1. What is constitutional idolatry?¹

At the 2016 Democratic National Convention in Philadelphia, Khizr Kahn—an American Muslim and father of an American soldier killed in Iraq—rhetorically asked Donald Trump regarding his proposed Muslim ban whether he had ‘even read the United States Constitution?’² Kahn then produced a small paperback edition of the document from his jacket pocket, saying, ‘I will gladly lend you my copy’.³ The crowd erupted. It was a powerful moment, and certainly one of the highlights of the four-day event, occurring in one of the most contentious US presidential elections in recent memory. After this, the US Constitution itself had a ‘moment’. Sales of the written document spiked to record levels, with the American Civil Liberties Union (ACLU), the Government Printing Office, and niche publishers offering discounted rates on their versions of the document. On Amazon the pocket version of the US Constitution blazed up to #2 on the best-sellers list (only behind the latest *Harry Potter* book),⁴ and for a spell demonstrators at Trump’s rallies could be seen waving the document at him in protest, taunting him and his supporters with the sacred text.⁵ The message was clear: Trump was not only a threat, but an unconstitutional threat that endangered America’s most sacred values and principles.

Thus, when Donald Trump lost the national popular vote by close to three million ballots, and yet the Constitution via the Electoral College secured him the presidency anyway, momentum from the increased constitutional attention—not to mention the increased readership—could have brought forward a fortuitous constitutional moment. At a time of historic national polarisation and cultural division, some type of constitutional rejuvenation

¹ Portions of this chapter are taken from: BC Jones, ‘Preliminary Warnings on “Constitutional” Idolatry’ (2016) *Public Law* 74; and BC Jones, ‘Constitutions and Bills of Rights: Invigorating or Placating Democracy’ (2018) 38(3) *Legal Studies* 339.

² K Khan, ‘2016 DNC Speech’ *YouTube*, <https://youtu.be/Xzkkk-oJ6bo?t=200> (at 3:20).

³ *Ibid.* He further notes, ‘In this document, look for the words ... “liberty” and “equal protection of law”’ (at 3:53).

⁴ M Rhodan, ‘Sales of Pocket Constitutions Spike After Khizr Khan’s DNC Speech’ *Time* (1 August 2016), <http://time.com/4433453/khizr-khan-pocket-constitution/>.

⁵ D Kurtzleben, ‘Protesters Wield Pocket Constitutions At Trump Rally’ *NPR* (4 August 2016), <https://www.npr.org/2016/08/04/488738033/protesters-wield-pocket-constitutions-at-trump-rally>.

(e.g., a proposed amendment or even just a national debate) could have provided a way forward. But it did not happen; perhaps because of increased disillusionment among the citizenry, nothing even came close. As it has for much of its existence (27 amendments over 230 years), America's written Constitution remained untouchable. Of course, constitutional idolatry—here defined as *drastically or persistently over-selling the importance and effects of written constitutions*—has long been the American public's forte.

In 1937, Max Lerner, editor of *The Nation*, wrote that '[e]very tribe needs its totem and its fetish, and the Constitution is ours'.⁶ The 2016 Democratic Convention was merely one illustration of the American Constitution being used as ultimate saviour, pre-eminent rallying point, and all-encompassing truncheon. Regarding the latter, the US Constitution has so successfully become a symbol of national pride and is cherished so widely among citizens that it is now frequently used as a potent weapon. Even slightly questioning its provisions is sometimes akin to political heresy.⁷ There is little doubt that use of the Constitution elevates the status of legal or political arguments, and at times has an enormous impact when used. The unfortunate irony, however, is that the document, which supposedly transformed the modern organisation and governance of democratic states to be situated around 'We the People', is now conveniently wielded as a heavyweight political truncheon, designed to cut off all debate and advocate only one particular 'constitutional' way forward ... a path that does not really exist.

Using the Constitution as a truncheon, however, carries certain hazards. If employed too frequently among the citizenry, 'there is a risk that the term "unconstitutional" comes to include everything we subjectively do not like', thus degrading its impact.⁸ Seidman takes this argument further, noting that it is 'deeply authoritarian to try to end an argument by insisting on the sanctity of a particular text'.⁹ There seems to be little doubt that such degradation has occurred in the US context. For all the talk of unconstitutionality regarding Trump's proposals during the 2016 election, on 26 June 2018 the United States Supreme Court (SCOTUS) upheld the President's Muslim ban by a 5–4

⁶ M Lerner, 'Constitution and Court as Symbols' (1937) 46(8) *Yale Law Journal* 1294.

⁷ B Palmer, 'Founding Fathers Fetish' *Slate* (4 October 2012), http://www.slate.com/articles/news_and_politics/explainer/2012/10/mitt_romney_constitution_worship_when_did_politicians_stop_questioning_the_constitution_.html.

⁸ J McLean, 'The unwritten political constitution and its enemies' (2016) 14(1) *International Journal of Constitutional Law* 119, 136.

⁹ LM Seidman, *On Constitutional Disobedience* (2012), p 28 ('We would be much better off if we could agree to ban the claim from our political lexicon').

ruling, thus proving that it was within the bounds of the US Constitution.¹⁰ The fact that the ban was upheld was not surprising. After all, Justice Gorsuch had recently replaced Justice Scalia, who had died while Obama was in office. Gorsuch's appointment preserved a 5–4 conservative advantage on the court. Ultimately, the result was a civics lesson for many of those who had attempted to paint Trump's campaign plans as 'unconstitutional'. The reality is that, in America, it is usually not the people or the people's representatives that get to determine what the Constitution means, or what is or is not constitutional. This, even under a Constitution that begins with 'We the People', is the job of the US Supreme Court.

Khizr Kahn's speech also portrayed America's written Constitution as saviour, being able to rescue citizens from those that threaten the status quo. As Frankenberg notes, this type of expansive constitutional rhetoric 'has not done constitutional projects much good'.¹¹ The primary danger with the 'constitution as saviour' portrayal is that it presents the situation as the people themselves not having to do much of anything: as long as the Constitution is in place, citizens should feel safe and protected. This common trope provides a false and misleading narrative about how constitutional protections operate, as constitutions rely on a wide variety of actors—and especially citizens—to uphold political and cultural norms and ensure that those in power are being held to account. One governmental branch consisting of a small group of individuals, or one written document—however much it is praised—is not enough to ensure a properly functioning state.

Another reason why Kahn's speech offers an alluring example of constitutional idolatry is that it presents constitutions as the pre-eminent rallying point for citizens. Given that these documents are supposed to contain the state's collective identity, including underlying foundational principles and citizen rights, some may consider this higher status essential, even tautological. Thus, it should be a relatively easy symbol for citizens of all political affiliations to rally round. But in reality constitutions are human creations—often the outputs of power struggles—and are not necessarily the endearing collective symbol that political and constitutional theorists believe them to be. This may especially be the case when constitutions are weaponised by political parties and others to try to get people to conform to certain behaviours or practices, or when legalised constitutions interpreted by the judiciary are perceived as favouring one constitutional position over another.

¹⁰ *Trump v Hawaii*, 585 U.S. ____ (2018).

¹¹ G Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (2018), p 15.

This book discusses some difficult and perhaps even uncomfortable topics in relation to written constitutions and how they operate.¹² At the heart of the matter is this: do written constitutions matter as much as we think they do? Can they possibly shape our lives to the extent that prominent historians or American Presidents say they do?¹³ And, perhaps more importantly, do written constitutions fulfil the lofty promises provided by many of their advocates, or are they more akin to being the false gods of the legal and political realms? The unfortunate reality for written constitutions is that these parchment barriers are not the keys to state success that many believe, and nor will they prevent states from falling prey to constitutional abuse or misuse.¹⁴ If they are part of the solution, they are only a small part. This book explores some of the limits of written constitutions, which have often been misrepresented by politicians, journalists, academics, and others. Although it is acknowledged that any critical scholarship about the limits or potential downsides of constitutions has ‘almost always been swimming against the tide’,¹⁵ it is hoped that this book provides at least a wider discussion regarding the place these texts currently have within our societies.

Grappling with the virtues of written versus unwritten texts, and framed around whether the UK should codify its constitution into one single written document, this book analyses whether contemporary written constitutions

¹² Of course, there is some discussion regarding terminology as to whether to use ‘written’ or ‘codified’ in relation to these constitutions, and going forward, I largely stick with ‘written/unwritten’. As Palmer notes, the ‘great advantage of the term “written” is that it inherently confronts you with the abstract nature of a constitution’ (MSR Palmer, ‘What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders’ (2006) 17 *Public Law Review* 133, 136).

¹³ See, e.g., B Bailyn, *The Ideological Origins of the American Revolution* (1992), p 321 (‘The subject [the Constitution] matters too much—matters in the sense of shaping the way we live, what we may do, and how the government may act. We must get the two-hundred-year-old story straight, in some way, in order to make sense of our own world. The Constitution, in all its aspects and ramifications, is profoundly relevant’). Calvin Coolidge, ‘Remarks at the White House on 12 December 1924’, <https://www.coolidgefoundation.org/quote/quotations-c/> (‘To live under the American Constitution is the greatest political privilege that was ever accorded to the human race’).

¹⁴ S Levitsky and D Ziblatt, *How Democracies Die: What History Reveals about Our Future* (2018), p 99 (‘Even well-designed constitutions cannot, by themselves, guarantee democracy. For one, constitutions are always incomplete. Like any set of rules, they have countless gaps and ambiguities. No operating manual, no matter how detailed, can anticipate all possible contingencies or prescribe how to behave under all possible circumstances ... Because of the gaps and ambiguities inherent in all legal systems, we cannot rely on constitutions alone to safeguard democracy against would-be authoritarians’).

¹⁵ S Levinson, *Constitutional Faith* (1988), p 14.

are essential to modern polities, or if the rise in written constitutionalism is providing eighteenth-century answers for twenty-first-century problems. As noted above, here I define constitutional idolatry as: *drastically or persistently over-selling the importance and effects of written constitutions*. Throughout, I introduce three main arguments critical of written constitutions and which complement the definition of constitutional idolatry: (1) constitutional idolatry devalues politics and the political process; (2) constitutional idolatry is overly paternalistic; and (3) constitutional idolatry stifles constitutional maintenance. These themes permeate the book. In order to understand them more deeply, we must examine the contextual justification in which this book is written, and therefore take into consideration the rise of world constitutionalism.

1.1 TO CODIFY OR NOT? THIS BOOK'S CONTEXTUAL JUSTIFICATION

1.1.1 The Rise of World Constitutionalism

If anything was ever in vogue in democratic and constitutional theory, constitutions would surely be it; at no point in history have the countries of the world had so many constitutions in place.¹⁶ Ever since the drafting of the US Constitution in 1787, democracies—and even non-democracies, for that matter—have increasingly felt the need to pen a written constitution, even if only in symbolic form.¹⁷ Many countries now even have public holidays or special commemoration days to celebrate the anniversaries of their constitutions.¹⁸ Much of this constitutional desire has come within the last half-century, or post-war era,¹⁹ as many held onto the belief that such documents are antecedent to government,²⁰ and others argued that constitutions are essential to the rule of law and the protection of basic human rights.²¹ Some have gone so far

¹⁶ Comparative Constitutions Project, 'Data Visualizations', <https://comparativeconstitutionsproject.org/>.

¹⁷ See The Constitution of the People's Republic of China (1982).

¹⁸ Comparative Constitutions Project, World Constitution Holidays, <http://comparativeconstitutionsproject.org/world-constitutional-holidays/>.

¹⁹ DJ Galligan & M Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions' in DJ Galligan & M Versteeg, *Social and Political Foundations of Constitutions* (2013), p 3.

²⁰ As Thomas Paine famously wrote (cited in M Loughlin, *The Idea of Public Law* (2004), p 46).

²¹ See, e.g., R Dworkin, *Taking Rights Seriously* (1977), p 133; TRS Allan, 'The Rule of Law', in D Dyzenhaus & M Thorburn, *Philosophical Foundations of Constitutional Law* (2016), p 216 (although Allan does not necessarily subscribe to this view; he merely acknowledges it is a common 'assumption').

as to say that the idea of a contemporary founding or ‘fundamental [political] transformation’ not incorporating a written constitution would be unthinkable; and in the current climate, they are probably right.²² Although most states have implemented a large-C codified Constitution, there remain some states in which—for whatever reason—a written constitution has not come about (e.g., the United Kingdom, New Zealand, and Israel). This book focuses primarily on the United Kingdom, and the continuing debate over whether it should codify its constitution into a single written document.

As essential as they may be in contemporary times, written constitutions often resemble elegant but convoluted cog machines (like the one on the cover of this book): citizens may recognise important features, but one will hardly understand state processes through consulting them. Frankenberg goes further, saying that constitutions ‘hardly render an accurate description of social reality’ and cannot be read as state instruction manuals. He notes that at best they ‘indicate how societies ... envision coping with or camouflaging the business of establishing and exercising authority and bringing about social cohesion’.²³ Nevertheless, they are widely considered the first port of call for comparative legal scholars and are said to contain the fundamental law essential to the establishment and operation of states. Constitutional theorists have laid out a number of potential functions that constitutions serve, including: setting forth constitutional values, entrenching constitutional rights, conferring and limiting powers of government, delineating the structure and operations of the state,²⁴ educating and inspiring the citizenry, and even generating endless democratic debate.²⁵ These functions have been extensively written about and indeed are endlessly debated. Ultimately, whatever underlying reasons states may provide for drafting a constitution, there remains little doubt that most states have now done it.

Although debate over constitutional success or failure has been a long-running strand of academic investigation, only recently has constitutional performance become a more sophisticated sub-topic of constitutional theory. Recent texts have analysed why national constitutions endure,²⁶ what

²² H Lerner, *Making Constitutions in Deeply Divided Societies* (2013), p 16.

²³ Frankenberg, n 11 above, pp 14–15.

²⁴ See, e.g., A Barak, ‘On Constitutional Implications and Constitutional Structure’ in D Dyzenhaus & M Thorburn, *Philosophical Foundations of Constitutional Law* (2016), pp 62–64; BC Jones, ‘Preliminary Warnings on Constitutional Idolatry’ (2016) *Public Law* 74, 75.

²⁵ S Levinson, ‘Do Constitutions Have a Point?’ in EF Paul, FD Miller & J Paul, *What Should Constitutions Do?* (2011), p 178.

²⁶ Z Elkins, T Ginsburg & B Melton, *The Endurance of National Constitutions* (2009).

constitutions should do,²⁷ and how constitutions should be assessed.²⁸ This important development has led not only to a more robust discussion regarding constitutional success, but also to a more widespread empirical analysis of constitutions more generally, including how long they last, which types of rights are included, and what specific factors we should take into consideration (e.g., levels of democracy, political stability, economic performance, or crisis propensity).²⁹ Much recent scholarship has strayed beyond traditional doctrinal and philosophical approaches to explore the social and political elements of constitutions.³⁰ After all, ‘one cannot understand constitutions simply from the perspective of settlement’ alone.³¹ These perspectives extend into the alluring field of constitutional possibility. Here scholars have gone beyond constitution as symbol,³² concluding that modern constitutional texts are performative, in the sense that ‘they perform an action, rather than only describe an event or make a statement’.³³ Loughlin has highlighted this, emphasising ‘the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape—and re-shape—political reality’.³⁴

Claims regarding constitutional possibilities can make such texts appear powerfully tempting. As Frankenberg notes, the documents are often ‘enshrouded by the aura of magic’.³⁵ Blackburn has claimed that such a document may ‘bring government and the governed closer together’,³⁶ and could ‘strengthen public confidence and trust in the political system’ by better educating citizens.³⁷ A recent book on preambles notes that such devices may ‘strengthen citizenship’.³⁸ A focus on including citizens in the drafting process has claimed

²⁷ Paul, Miller & Paul, n 25 above.

²⁸ T Ginsburg & AZ Huq, *Assessing Constitutional Performance* (2016).

²⁹ Elkins, Ginsburg & Melton, n 26 above, pp 12–35.

³⁰ Of course, some of these social and political elements have always been present in constitutional scholarship, and can be seen in work by Jeremy Bentham, Thomas Jefferson, and others.

³¹ Levinson, n 25 above, p 178.

³² See, e.g., Lerner, n 6 above; TC Grey, ‘The Constitution as Scripture’ (1984) 37(1) *Stanford Law Review* 1.

³³ J Pryor, *Constitutions: Writing Nations, Reading Difference* (2008), p 5.

³⁴ M Loughlin, ‘The Constitutional Imagination’ (2015) 78(1) *Modern Law Review* 1.

³⁵ Frankenberg, n 11 above, p 11.

³⁶ R Blackburn, ‘Britain’s unwritten constitution’, *British Library*, <http://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>.

³⁷ R Blackburn, ‘Enacting a Written Constitution for the United Kingdom’ (2015) 36(1) *Statute Law Review* 1, 5.

³⁸ W Voermans, M Stremmler & P Cliteur, *Constitutional Preambles: A Comparative Analysis* (2017), p 93.

a number of benefits, such as decreased state violence,³⁹ stronger citizen constitutional attachment,⁴⁰ even a longer constitutional lifespan.⁴¹ Further, the narrative component, which may incorporate a nation's history, can sometimes act as 'a source of inspiration' for citizens.⁴² Landemore notes that great constitutions include such inspirational features, adding that they are 'beautifully written and likely to generate emotions such as love and admiration among its own people and beyond, among current and future generations'.⁴³ Ultimately, the notion that there may be something 'sacred or irrational' in the very 'nature of constitutions'⁴⁴ is a long-held belief that much constitutional scholarship has perpetuated.⁴⁵

A popular performative mechanism located within constitutions is preambles, which as an expressive component can 'narrate the nation's past and envision its future'.⁴⁶ A recent work on constitutional preambles has identified purposes beyond the narrative component, such as: identifying function, evocative function, 'bridge in time' function and an educational function.⁴⁷ King has noted that such devices can provide 'normative guidance and the institutional declaration of key variables',⁴⁸ while Levinson states that they express 'the ostensible "essence" of the people or nation', and on occasion can be 'inspiring'.⁴⁹ Even though the justiciability of preambles within states remains relatively low,⁵⁰ it is the expressive elements of these intriguing devices that

³⁹ J Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (2008) 49 *William and Mary Law Review* 1513.

⁴⁰ DC Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution-making* (2008).

⁴¹ Elkins, Ginsburg & Melton, n 26 above.

⁴² Galligan & Versteeg, n 19 above, p 9.

⁴³ H Landemore, 'What is a good constitution? Assessing the constitutional proposal in the Icelandic experiment', in Ginsburg & Huq, n 28 above, p 79.

⁴⁴ Galligan and Versteeg, n 19 above, p 42.

⁴⁵ M Versteeg, "'Perfection in Imperfection": Joseph de Maistre and the Limitations of Constitutional Design' in D Galligan, *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (2014), pp 323–325.

⁴⁶ M Versteeg, 'Unpopular Constitutionalism' (2014) 89 *Indiana Law Journal* 1133, 1140.

⁴⁷ Voermans, Stremmler & Cliteur, n 38 above, pp 92–94.

⁴⁸ J King, 'Constitutions as Mission Statements' in Galligan & Versteeg, n 18 above, p 82.

⁴⁹ Levinson, n 25 above, pp 177–178.

⁵⁰ However, some preambles are indeed justiciable. See Voermans, Stremmler & Cliteur, n 38 above, pp 19–21, 89–91.

scholars—and indeed many countries—have found so empowering, and therefore so useful. As one book recently put it:

Preambles try to frame political thought and to that end they sing, educate, seduce with poetic language, raise their voice, play at emotions like operas, novels and plays; they refer to deep emotions and beliefs by harping on common tradition and ancestry, connectedness and group identity (in its turn hinting at the deep rooted emotion of family and kinship), religion (even profane ones like the belief in the law), expressing and appealing narratives.⁵¹

By incorporating narrative, history, values and aspirations, preambles are the primary places by which constitutions can ‘offer alternative perceptions of reality’.⁵² Thus, if constitutions can—or have the potential to—inspire people, strengthen public confidence, capture the essence of a citizenry, and even be looked at as sacred, then their importance goes well beyond legal significance. Indeed, under certain conditions their political and cultural significance may rival or even supersede their legal significance.

Some have even argued that constitutions can go beyond their performative status, and be ‘transformative’ on societies. The most prominent example here surrounds the 1996 South African Constitution, which has received a lot of praise, and began with such strong hopes to mend the country after apartheid. Klare defines transformative constitutionalism as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.⁵³

This idea goes beyond the bounds of legal and political reform, as cultural reform would also be necessary. As Barber emphasises, ‘[c]onstitutional failure is thus the failure of a culture. And constitutional reform must therefore be nothing short of cultural reform’.⁵⁴ Of course, this is more easily said than done. The idea of transforming a culture via constitutional text goes beyond merely the performative aspects of such documents, touching on the mystical and magical elements mentioned earlier that constitutions are sometimes said to possess. It also connects to the idea of constitutions being a ‘sacred cove-

⁵¹ Ibid, p 151.

⁵² Loughlin, n 34 above, p 3.

⁵³ KE Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14(1) *South African Journal on Human Rights* 146, 149.

⁵⁴ S Barber, *Constitutional Failure* (2014), p xvii.

nant' that the people will abide by. The notion that constitutions are a sacred, almost religious document (i.e., a 'covenant') contains some linguistic foundations. Pryor writes that such a phenomenon may be inevitable because '[a] religious idiom therefore persists, despite the sometimes deliberately secular tone of modern constitutional texts'.⁵⁵ Therefore, even though we may perceive some written constitutions as highly secular, the idea that they form a type of larger covenant may be inescapable.

Additionally, and perhaps most importantly, contemporary 'We the People' democratic constitutions—at least in theory—provide sovereignty or ultimate power to the citizens through popular sovereignty.⁵⁶ It is this focus on sovereignty, as opposed to democracy, that is 'the language of constitutions'.⁵⁷ Although the constitutional reality under such claims varies,⁵⁸ the 'We the People' refrain often gives the impression that—even within representative democracies with strong judicial review—it is the people who are central to establishing government; it is the people who provide governmental legitimacy; and it is the people who ultimately hold state power. Indeed, the rise of 'We the People' phrasing in written constitutions throughout the years has been an international force, and such language now adorns a plethora of constitutions throughout the world. Bold claims regarding this 'We the People' factor have also been made, especially in relation to the foundational elements and the composition of the state's narrative. Lerner recognises the foundational function as the second major role of constitutions, observing that they 'provide the citizenry with a sense of ownership and authorship, a sense that "We the people" includes me'.⁵⁹ These words echo those from Ackerman's definitive work on the subject, where he noted that, 'the narrative we tell ourselves about our Constitution's roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity'.⁶⁰ He further emphasises that, '[t]o discover the Constitution is to discover an important part of oneself'.⁶¹

As these authors acknowledge, separating the legal and political functions of constitutions from their cultural and personal connotations is also extremely

⁵⁵ Pryor, n 33 above, p 5.

⁵⁶ B Ackerman, 'The Rise of World Constitutionalism' (1997) *Virginia Law Review* 771.

⁵⁷ DJ Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2013) 33(4) *Oxford Journal of Legal Studies* 703, 704. The author rightly points out that 'democracy' is rarely mentioned.

⁵⁸ *Ibid*, pp 729–730.

⁵⁹ Lerner, n 22 above, p 18.

⁶⁰ B Ackerman, *We the People, Volume I: Foundations* (1991), p 36.

⁶¹ *Ibid*, p 37.

difficult, if not impossible. Sometimes commentators talk as if the legal, political and personal meanings are one and the same, or inherently intertwined through a national text. I believe this overlap is dangerous, and can be especially so in regard to interpreting such texts. Yet the phenomenon of combining (or perhaps confusing) these multiple meanings is also not surprising, considering:

Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community or as a union.⁶²

But in recognising the importance of constitutions we should also recognise their limits. When discussing the legal, political, societal or personal effects of constitutions, we should be careful not to concoct false narratives of what they can accomplish or exaggerate how indispensable they are for societies, as doing so turns them into the false gods of our legal, political and societal communities.

Some fascinating scholarship from a number of critical constitutionalists has cautioned against the downsides of constitutions, such as the possibility that they may be democracy-hindering (as opposed to democracy-reinforcing) mechanisms,⁶³ they could set too high expectations on courts,⁶⁴ or they could mislead citizens into thinking that they are the definitive power-bearers in society.⁶⁵ Other work has concentrated on the operation of sham constitutions,⁶⁶ the decline of the once venerated American Constitution⁶⁷ and Bill of Rights,⁶⁸ and instances of ‘unpopular sovereignty’ in particular constitutions.⁶⁹ The constitution-making process itself has been increasingly exposed in recent

⁶² J Weiler, ‘On the power of the Word: Europe’s constitutional iconography’ (2005) 3 *International Journal of Constitutional Law* 173, 184.

⁶³ Versteeg, n 46 above, p 1133.

⁶⁴ TGDaly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (2017), p 294.

⁶⁵ Galligan, n 57 above, p 711.

⁶⁶ D Law & M Versteeg, ‘Sham Constitutions’ (2013) 101(4) *California Law Review* 863.

⁶⁷ D Law & M Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) 87 *New York University Law Review* 762.

⁶⁸ J Allan & G Huscroft, ‘Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts’ (2006) 43 *San Diego Law Review* 1.

⁶⁹ See, e.g., CY Huang, ‘Unpopular Sovereignty: Constitutional Identity Through the Lens of the Sunflower and Umbrella Movements’ in BC Jones (ed), *Law and*

years. Hirschl identifies it as ‘politics by other means’;⁷⁰ Versteeg has noted that constitution-making often does poorly at incorporating the specific values some polities hold, therefore forming not popular, but ‘unpopular’, constitutionalism;⁷¹ and Landau recognises that constitution-making moments are often traumatic events, and ‘should not be idealized’.⁷² And in a cautionary note for countries thinking of penning new constitutions—perhaps especially for those thinking of drafting ‘A New Magna Carta’—scholars have found that the average national constitution only lasts 19 years before being replaced.⁷³ Nevertheless, while this small chorus of critical constitutionalism is growing stronger, it remains a trickle compared with the flood of constitutional scholarship championing the seemingly endless potential benefits of these written documents.

1.1.2 Out of Step: The UK Contextualised

Written constitutions have played a significant—if not a pre-eminent—role in the establishment of democracy and the continuation of democratic rights and principles ... or so the story goes. When it comes to the United Kingdom and a few other jurisdictions, this is certainly not the case.⁷⁴ The UK, with its unwritten constitution, historic monarchy and ‘untenable’ principle of parliamentary sovereignty,⁷⁵ is perceived by some as the perfect example of a nation stuck in the past, unable to transform itself into the contemporary conception of a truly democratic nation-state, complete with the primary symbol (i.e., a written constitution) that virtually all such states now possess. Thus, while some countries have progressed to Constitutionalism 3.0,⁷⁶ the UK may not ever have progressed to Constitutionalism 1.0. This is partly true. In the expansive field of world constitutionalism, the UK is an outlier: its unwritten constitution guarantees this. The growth of constitutional writing throughout the world, however, has changed perceptions of constitutionalism within the

Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements (2017), pp 117–126.

⁷⁰ R Hirschl, ‘The Strategic Foundations of Constitutions’ in DJ Galligan & M Versteeg, *Social and Political Foundations of Constitutions* (2013), p 157.

⁷¹ Versteeg, n 46 above.

⁷² D Landau, ‘Constitution-Making Gone Wrong’ (2013) 64(5) *Alabama Law Review* 923.

⁷³ Elkins, Ginsburg & Melton, n 26 above, p 129.

⁷⁴ Although, it should be noted that the UK has been willing to pen numerous constitutions and charters for its former colonies.

⁷⁵ House of Commons Political and Constitutional Reform Committee, ‘A New Magna Carta?’ (10 July 2014), HC 463, p 21.

⁷⁶ A Somek, *The Cosmopolitan Constitution* (2014).

UK. Indeed, eighteenth- and nineteenth-century Britons, as Sedley recognises, would probably not have given the same puzzled look when asked about their constitution, considering the ‘belief that a constitution is a document and that we do not have one is a comparatively recent phenomenon’.⁷⁷

It is worth pointing out that written constitutions had been tried—even in Britain—before 1789. In the mid-seventeenth century, England had gone through a bloody civil war, and Oliver Cromwell put the UK’s first and only written constitution into existence, the ‘Instrument of Government’,⁷⁸ implemented in 1653.⁷⁹ In fact, between 1649 and 1660, several attempts were made to devise a written constitution, but none were called a ‘constitution’; the documents used ‘terms such as covenant, instrument, agreement, model, paramount or fundamental law’.⁸⁰ None of these worked. Monarchy was restored in 1660 under Charles II, who reigned until 1685. The Restoration Settlement, however, put the Crown and Parliament on an equilibrium,⁸¹ something that changed after the Glorious Revolution.

In its modern form, the term ‘constitution’ remains relatively young.⁸² Seventeenth- and sometimes eighteenth-century uses of the word do associate it with law and statutes, among other things, but it was often not used to refer to a single document.⁸³ Even before this, the concept has focused on the form in which a state is organised, usually in reference to the location of sovereign power.⁸⁴ Aristotle, often said to be the first constitutional comparativist, used the word *politeia*, which does not mean constitution, but ‘the way in which a polity is patterned’.⁸⁵ The modern conception of a constitution has largely been attributed to the American Constitution of 1787,⁸⁶ which included a Bill

⁷⁷ S Sedley, ‘No Ordinary Law’ (1998) 30(11) *London Review of Books* 20.

⁷⁸ M Loughlin, *The British Constitution: A Very Short Introduction* (2013), p 49.

⁷⁹ There is dispute over this. Gordon notes that the UK has had two written constitutions, the second being the ‘Humble Petition and Advice’, written in 1857 to replace the Instrument of Government (R Gordon, *Repairing British Politics* (2010), p 15, n 34). A text that backs Gordon’s claim up

is: C Hill, *The Century of Revolution 1603–1714: A History of England* (Vol 5) (1961), p 116.

⁸⁰ G Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56(4) *American Political Science Review* 853, 860; Skinner calls one such constitutional experiment under Cromwell ‘disastrous’, probably referring to the implementation of *The Humble Petition and Advice* (Q Skinner, *Liberty Before Liberalism* (1998), p 15).

⁸¹ GM Trevelyan, *The English Revolution 1688–89* (1935), p 11.

⁸² Sartori, n 80 above, p 859.

⁸³ DS Lutz, ‘From Covenant to Constitution in American Political Thought’ (1980) 10(4) *Publius* 101, 114.

⁸⁴ *Ibid.*, p 113.

⁸⁵ Sartori, n 80 above, p 860.

⁸⁶ Loughlin, n 34 above, p 2, 16.

of Rights and began with the words ‘We the People’, and also the 1789 French Declaration of Rights.⁸⁷ Both formed in the midst of violent revolutions, from this point forward the idea of a constitution radically changed how people thought about the word, its meanings, and the power of subsequent documents.⁸⁸ Constitutions no longer merely encapsulated the ‘entire body of laws, institutions, and customs that comprised’ a state, but the idea of *the people* constituting a state.⁸⁹ It then followed that some form of written document, in visible form,⁹⁰ would be produced and displayed.

Without one codified document the British constitution remains a diverse combination of statutes, common law, customs, manuals, parliamentary rules, and other entities (some scholars refer to this as the small-c constitution). The flat nature of law in the UK contributes to a unique and dynamic legal system. As Norton writes, ‘[t]here is no clear or formal dividing line between what constitutes a core component of the constitution and what does not’.⁹¹ It also means that the UK constitution is comparatively easy to change, a fact that has been noted by several authors.⁹² A codified constitution would change this significantly, incorporating into the legal landscape a more hierarchical structure, and a more difficult amendment procedure. Furthermore, there is little question that such a document would threaten the notion of parliamentary sovereignty,⁹³ and Britain’s distinctively structured and widely recognised political constitution.⁹⁴ In contemporary discussion within Britain over a written constitution, many commentators appear to desire not a more defined *politeia* but something more akin to modern-day large-C Constitutions, which, as Pryor notes, are often ‘reified as much for their rhetoric, “original” appearance and supposed uniqueness as for their constitutive effects’.⁹⁵

The lack of a codified or written document for the UK has left analysis of its constitution out of some major works on constitutional theory, as comparativists tend to focus on those jurisdictions with large-C documents. This makes

⁸⁷ Sartori, n 80 above, p 860.

⁸⁸ Loughlin, n 20 above, pp 46, 120.

⁸⁹ Ibid, pp 120–121. My emphasis.

⁹⁰ Ibid, p 120, quoting Thomas Paine, *Rights of Man, Common Sense and Other Political Writings*, Mark Philp (ed) (1995), p 122.

⁹¹ P Norton, ‘Introduction: A Century of Change’ in P Norton (ed), *A Century of Constitutional Reform* (2011), p 2.

⁹² A Lijphart, *Patterns of Democracy* (2nd edn) (2012), p 206; A Lorenz, ‘How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives’ (2005) 17 *Journal of Theoretical Politics* 339, 358–359.

⁹³ V Bogdanor & S Vogenauer, ‘Enacting a British Constitution: Some Problems’ (2008) *Public Law* 38, 53–57.

⁹⁴ JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1.

⁹⁵ Pryor, n 33 above, p 165.

perfect sense on particular issues. A book about constitutional preambles, for instance, is not going to include the UK.⁹⁶ Other times, however, there appears to be a reluctance to include the UK because of its unwritten constitution. For example, a prominent work on the endurance of national constitutions eliminates it entirely, calling it a 'sui generis' case.⁹⁷ A major work on constitutional amendment also largely ignores UK constitutional change,⁹⁸ disregarding the fact that the idea of 'constitutional statutes' is one of the major issues not just within the UK, but in constitutional scholarship more generally. Other works have given short shrift treatment to the UK, and seem to struggle with the history and evolution of the unwritten constitution.⁹⁹ More widely, the lack of a written constitution may exclude these states with non-traditional constitutions from receiving attention in the literature. For example, in a recent search of the *International Journal of Constitutional Law*, the total number of journal articles tagging any one of the three unwritten constitutional democracies (UK, New Zealand and Israel) came to 576, which does not even surpass the number of articles devoted to one jurisdiction: the United States (720).¹⁰⁰ Comparatively, at the individual level, the UK has received less attention than some other European states, such as France (358) and Germany (444).¹⁰¹ This analysis may not tell us much, but it does suggest that on the whole written constitutions are generating more analysis and discussion in the legal literature than unwritten constitutions. Although the UK and a few others are certainly outliers and do not fit neatly into a data set, discounting these constitutional democracies or not including them in relevant constitutional analysis is troubling.

As regards the prospects of some type of written constitutional document developing in the UK, a perfect storm may be brewing.¹⁰² The year 2015 was the 800th anniversary of the Magna Carta, and the run-up to this produced calls for Britain to produce a written constitution. A Commons Committee inquiry on the prospect of the UK penning a written constitution was brazenly

⁹⁶ Voermans, Stremmer & Cliteur, n 38 above.

⁹⁷ Elkins, Ginsburg & Melton, n 26 above, pp 49–50.

⁹⁸ R Albert, X Contiades & A Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (2017).

⁹⁹ For example, in a major text on the social and political foundations of constitutions, which an unwritten constitution would likely have quite a lot of significance, the UK only receives sparse mention (D Galligan & M Versteeg, *Social and Political Foundations of Constitutions* (2013)).

¹⁰⁰ Search performed on 13 May 2019, and included the following figures: UK (325), Israel (136) and New Zealand (115).

¹⁰¹ Search performed on 13 May 2019.

¹⁰² A Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015).

entitled: ‘A New Magna Carta?’.¹⁰³ Although the final inquiry report did not recommend for or against codification, the inquiry’s title was not as neutral, even with the question mark. On the heels of the Magna Carta anniversary, the 2016 Brexit referendum vote and its wayward and uncertain aftermath have brought forward renewed calls for a written UK constitution.¹⁰⁴ Some boil this down to issues regarding how constitutional change happens in Britain and the lack of constitutional entrenchment, while others point to the dysfunction and uncertainty after the vote and the parliamentary paralysis on the negotiated agreement. In 2019 election manifestos, a number of parties mentioned drafting or debating a written UK Constitution (or devolved constitutions), in addition to holding constitutional Conventions or Commissions.¹⁰⁵ Thus, for many parties, significant constitutional change is on the agenda.

No doubt much of the disillusionment regarding the UK constitution has been home grown. After once being the envy of Europe and beyond, ‘the British constitution today can evoke bewilderment and sometimes even derision’.¹⁰⁶ In an era where politics and politicians are unrelentingly disparaged, it comes as no surprise that Lord Hailsham’s characterisation of the UK constitutional system as an ‘elective dictatorship’ continues to resonate with the public.¹⁰⁷ Contemporary authors have not been afraid to lambaste the current system as ‘in turmoil’,¹⁰⁸ ‘unprotected’,¹⁰⁹ and especially in reference to Brexit, as ‘in crisis’.¹¹⁰ Some writers also seem surprised that an unwritten flexible constitution produces constitutional change, as if the UK were in continuous constitutional tumult. After ‘unwritten’, the main adjective used to describe the UK constitution is ‘changing’.¹¹¹ This can lead to a misperception that underlying UK constitutional principles have changed, as opposed to the mechanics of the constitution. While the constitutional mechanics of the UK

¹⁰³ House of Commons Political and Constitutional Reform Committee, ‘A New Magna Carta?’ (10 July 2014), HC 463.

¹⁰⁴ One of the most prominent accounts is: V Bogdanor, *Beyond Brexit: Towards a British Constitution* (2019).

¹⁰⁵ S Mitchell, E Nicholson, H Shaylor & A Walker, ‘Constitutional plans and pledges in the 2019 election manifestos’ (5 December 2019) *The Constitution Unit*, <https://constitution-unit.com/2019/12/05/constitutional-plans-and-pledges-in-the-2019-election-manifestos/>.

¹⁰⁶ Loughlin, n 78 above, p 1.

¹⁰⁷ Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (1978), pp 9–11.

¹⁰⁸ Blick, n 102 above, p 117.

¹⁰⁹ V Bogdanor, *Brexit and Our Unprotected Constitution* (2018).

¹¹⁰ DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (2017).

¹¹¹ For example, J Jowell & C O’Cinneide, *The Changing Constitution* (9th edn) (2019).

have seen significant transformations over the centuries (decreased powers of the Crown, an increase in methods of Parliamentary accountability, enhanced protection of rights via the courts, etc.), the constitutional fundamentals have remained pretty much the same. The UK's constitutional settlement is further explored in Chapter 4.

1.1.3 Not Quite Immune from Idolatry

As the basis of the current constitutional settlement and for its obvious world-wide influence on subsequent constitutional documents—such as the US Bill of Rights—one could be forgiven for thinking that the Bill of Rights 1689 would be the UK document most worthy of veneration. After all, the statute still possesses much practical relevance today. But in reality a UK document that serves very little practical relevance is the one that receives perhaps just as much praise and veneration as the US Constitution: Magna Carta. Originally written in 1215, this agreement between King John and his rebel barons was annulled by the Pope within weeks and went through numerous iterations.¹¹² Some have argued that it was essentially irrelevant or lay dormant for centuries after its passage. But even if it did fall into relative insignificance, it has enjoyed a lasting (if intermittent) renaissance since the seventeenth century, when Sir Edward Coke resurrected the document to use as a bulwark against the powers of the Stuart kings.¹¹³

However significant the document has become as a calling card for the rule of law, the continued idolisation of this document borders on the downright strange. Loughlin notes that, 'Magna Carta was not some great work of the "nation" or the "people"',¹¹⁴ and Wicks has pointed out that there is no sweeping preamble or overarching political theory present in the document for people to relate to.¹¹⁵ Some have even misinterpreted Magna Carta to require trial by jury and consent for taxation, which certainly goes 'beyond the original purposes of the Charter'.¹¹⁶ The provisions that have endured focus on the need for government to function through judicial processes and through the counsel of those throughout the kingdom.¹¹⁷ Chapters 39 and 40 describe elements of due process and swift justice, and have come to symbolise the first attempt to

¹¹² G Garnett, 'Magna Carta through eight centuries' (2015) *Oxford Dictionary of National Biography*, p 1.

¹¹³ *Ibid*, pp 8–10.

¹¹⁴ M Loughlin, n 78 above, p 44.

¹¹⁵ E Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (2006), p 5.

¹¹⁶ *Ibid*, p 6.

¹¹⁷ *Ibid*, p 5.

restrict sovereign authority, therefore championing the rule of law. Practically, however, the document serves very little—if any—function in contemporary times, beyond its use as a rhetorical tool. Nevertheless, even though its origins largely pertain to thirteenth-century Baronial interests, ‘the Magna Carta left a legacy for individuals of future ages to ensure that their governments acted according to the law and legal processes’.¹¹⁸

The year 2015 marked the 800th anniversary of Magna Carta, and veneration of the document was on full display. I mentioned above that a Commons Committee named their inquiry into drafting a codified constitution: ‘A New Magna Carta?’. Outside this, Constitution UK (Professor Conor Gearty’s organisation at the time) teamed up with the organisation Unlock Democracy, for numerous events entitled ‘Unlock Magna Carta’.¹¹⁹ Gearty’s organisation eventually produced a ‘People’s Constitution’ for the UK.¹²⁰ The Magna Carta Trust also set up an international poll conducted in 23 separate countries to determine the extent to which the charter was known throughout the world. The poll compared recognition of Magna Carta to other well-known documents, such as the US Declaration of Independence and the Universal Declaration of Human Rights.¹²¹ Exactly what the exercise demonstrated is uncertain, but the Ipsos MORI poll definitely came back with some interesting findings. In some jurisdictions Magna Carta was virtually unheard of (France—6%), while in others, the document was known by almost two-thirds of the population (Italy—62%, United States—65%).¹²² Not bad for an 800-year-old charter with little practical significance.

The idolisation of Magna Carta, both in contemporary times and in the past, connects to how constitution idolatry is defined and experienced in this book. Given that the Great Charter was not integral to the enduring 1688 constitutional settlement and has little practical value today beyond its rhetorical influence, continued reverence for the document displays that, even in the UK, constitutional idolatry could easily arise and take shape. As Bingham aptly remarks, ‘sometimes the myth is more important than the actuality’,¹²³ and it seems that this is definitely the case with Magna Carta.

¹¹⁸ Ibid, p 6.

¹¹⁹ This event took place in London on 25 March 2015.

¹²⁰ ‘The People’s Constitution’ (15 June 2015) *Constitution UK*, <https://blogs.lse.ac.uk/constitutionuk/2015/06/15/the-peoples-constitution/>.

¹²¹ Magna Carta Trust, ‘International Poll’, <https://magnacarta800th.com/projects/international-poll/>.

¹²² Ibid.

¹²³ T Bingham, *The Rule of Law* (2010), p 12.

1.2 DEFINING CONSTITUTIONAL IDOLATRY: SOME CONCEPTUAL FORMS

States possess an abundance of prominent legal and political symbols: anthems, flags, buildings, leaders, institutions, crests, customs, treaties, statutes, and declarations. But nowadays, arguably the most emblematic state symbol is that of the written constitution.¹²⁴ And yet, the idea of constitution as symbol has often strayed beyond the bounds of merely being symbolic, and into the realm of what may be considered veneration, worship or idolatry. While I prefer the latter description, all of these terms incorporate the distinct phenomenon of praising constitutional texts.

A number of constitutional scholars have touched on aspects of idolatry and its potential effects, although we still have not seen sustained attention devoted to the subject in the legal literature.¹²⁵ This is somewhat odd, given the vast amount of constitutional literature published every year. But to borrow (and modify) a phrase from Bernard Bailyn: constitutional idolatry, in all its aspects and ramifications, is profoundly relevant.¹²⁶ As noted above, here I define constitutional idolatry as: *drastically or persistently over-selling the importance and effects of written constitutions*. While this is what I hope to highlight throughout the book, there are also various forms that constitutional idolatry can come in, and I have attempted to acknowledge a few of those below. Of course, this list is not exhaustive and some of the forms overlap, but this is only a starting point into future expositions on the topic.

1.2.1 Constitution as Scripture

Those who have addressed constitutional idolatry tend to group it into religious or quasi-religious contexts. Unsurprisingly, some prominent accounts have come from American legal and political scholars, such as Max Lerner, Thomas Grey, Sanford Levinson, Steven D Smith, Jack Balkin, Michael Klarman, and Sotirios Barber. Grey describes the typical American attitude as such:

Just as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as sovereign, at least in secular matters, and the Constitution as the most authoritative legal expression of

¹²⁴ R Cotterrell, 'The Symbolism of Constitutions' in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (1995).

¹²⁵ Although in other disciplines, such as history, we have seen this within a single jurisdiction context: M Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (2006).

¹²⁶ Bailyn, n 13 above, p 321.

that popular will ... it has been, virtually from the moment of ratification, a sacred symbol, the most potent emblem (along with the flag) of the nation itself.¹²⁷

This approach on the American side has its origins in the late-eighteenth-century founding, which connects with the American Revolution and the establishment of the United States. But even during the founding, differences of opinion were present over how deeply attached the American public should be to their founding settlement. While Thomas Jefferson advocated generational constitutional change roughly every 20 years, warning about the ossification of certain religions, James Madison advocated veneration of the constitution as key to its success.¹²⁸ Madison won out. For many Americans the Constitution goes beyond merely state symbol, and is considered a form of religious scripture.¹²⁹ The document has been described as ‘perfect’,¹³⁰ a ‘miracle’,¹³¹ and ‘the greatest political privilege that was ever accorded to the human race’.¹³² While America may not have a national church, ‘the worship of the Constitution would serve the unifying function of a national civil religion’.¹³³ Thus, for all intents and purposes a national secular faith was born in 1789 focused primarily—if not exclusively—on the Constitution. The potential benefits of this national faith will be explored in Chapter 2.

Two contemporary authors who have addressed and furthered the study of constitutional idolatry are Sanford Levinson and Jack Balkin. Levinson’s famous account comes from his classic book, *Constitutional Faith*. Here, he uses religiosity to discuss aspects of constitutional authority, highlighting the pre-eminent role that scripture has within Protestantism, and the mix of scripture and oral tradition that was more accepted within Catholicism. Levinson did this to demonstrate that, ‘[a]cross all of the great Western religions ... there occur significant disputes about the relationship between “written” and “unwritten” foundations of doctrine’.¹³⁴ This important book demonstrates how a written constitution can serve as the primary source not of harmony and co-operation, but of ‘fragmentation and *disintegration*’. While Levinson

¹²⁷ Grey, n 32 above, p 3.

¹²⁸ Levinson, n 15 above, p 10.

¹²⁹ Grey, n 32 above.

¹³⁰ HP Monaghan, ‘Our Perfect Constitution’ (1981) 56(2–3) *New York University Law Review* 353.

¹³¹ Levinson, n 15 above, p 13. Of course, Levinson does not believe that the Constitution is a miracle. He merely points out that the exhibition for the bicentennial celebration in Philadelphia was called, ‘Miracle in Philadelphia’.

¹³² Coolidge, n 13 above.

¹³³ Grey, n 32 above, p 18.

¹³⁴ Levinson, n 15 above, p 21.

decides to add his name as a signatory to the original US Constitution at this stage, he repudiates doing so in a later text.¹³⁵

Of course, articulating the idea of ‘Constitution as scripture’ would not be complete without mentioning the judiciary. Both Levinson and Grey expound on the idea of scripture in part because this is how some US judges appear to use the document. Prominent examples are the originalist and textualist theories, which have become highly significant in constitutional interpretation throughout America’s judiciary and legal scholarship.¹³⁶ The philosophy is based around the idea that language and intent should be strictly construed, and ‘understood in the contexts of the society that adopted it’ (i.e., constitutional meaning is fixed to when it was adopted).¹³⁷ During her confirmation hearings, Justice Kagan famously stated, ‘we are all originalists’.¹³⁸ Although this approach can certainly be regarded as a form of constitutional fetishism, reasonable arguments exist for texts to be interpreted with these techniques in mind, as opposed to allowing judges to determine the meaning of words based on contemporary understandings. However, the second amendment’s ‘right to keep and bear arms’ provides a good example of how fetishism distorts this language.¹³⁹ While there is some debate as to whether this applies merely to a ‘well regulated militia’ (or should be applicable at all in the twenty-first century), in *District of Columbia v Heller*¹⁴⁰ the Supreme Court made clear that this phrase allows the citizenry to keep and bear arms, no matter if states, counties or cities had previously banned such weapons based on evolving standards of public safety regarding firearm regulation.

Thus, the idea of constitution as scripture touches on many facets of idolatry in the legal, political and cultural realms.

1.2.2 Constitution as Heavyweight Truncheon

Above, we saw how the word ‘constitutional’ can be used as an all-encompassing legal and political truncheon, designed to end the argument and close off all future debate. This form of idolatry relies heavily on the power of

¹³⁵ The later text in which he resists doing so is: S Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (2006).

¹³⁶ See, e.g., DL Drakeman, ‘What’s the Point of Originalism’ (2014) 37 *Harvard Journal of Law & Public Policy* 1123.

¹³⁷ P Brest, ‘The Misconceived Quest for Original Understanding’ (1980) 60 *Boston University Law Review* 204, 208.

¹³⁸ ‘Kagan: “We are all originalists”’, *Blog of the Legal Times* (29 June 2010), <https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html>.

¹³⁹ US Constitution, amend II.

¹⁴⁰ 554 U.S. 570 (2008).

language. After all, humanity has ‘always used symbols in the struggle for power, but only latterly have we grown aware generally of their importance’.¹⁴¹ Undoubtedly, the word ‘constitution’ carries a tremendous amount of force; from a legal and political perspective it is often difficult to speak in more consequential terms. Writing in 1960, Sartori noted the following: ‘In our minds, constitution is a “good word.” It has favorable emotive properties, like freedom, justice or democracy’. He goes on to explain that the most common response upon hearing the word is: ‘The constitution must be praised, for it protects my liberties’, even if this notion is entirely baseless.¹⁴² Indeed, given the worldwide expansion of written constitutionalism, the word’s significance and positive reverberations have only been heightened throughout the years.

Although I used an example from the Democratic National Convention above, in America the recent phenomenon of using the Constitution as a heavyweight truncheon has largely been developed on the political right.¹⁴³ Indeed, the US Constitution’s success as a symbol of national pride and worship has turned it into a potent political weapon. One of the most visceral examples of constitutional fetishism can be found in the now defunct United States Tea Party. This political faction prided themselves on being the bearers of ‘constitutional’ values, branding opposition to their political ideals as constitutional violations. They even went so far as to encourage members to carry the document with them at all times, and held numerous collective readings of the document.¹⁴⁴ But the idea of constitution as a heavyweight truncheon is not limited to the political realm. As Chapter 7 discusses, the judiciary often use written constitutions to expand the scope of their powers, preventing or dissuading other constitutional actors from interpreting the document.

Employing the use of the constitution in legal or political argument is perfectly valid to a certain extent, but when it is used as a heavyweight truncheon to cut off all debate of a particular topic, mask likes or dislikes, or prevent other constitutional actors from interpreting the document, then the constitution itself has been idealised beyond much constructive usefulness.

¹⁴¹ Lerner, n 6 above, p 1292.

¹⁴² Sartori, n 80 above, p 855.

¹⁴³ J Finn, ‘How the alt-right corrupts the Constitution’ *The Conversation* (15 April 2019), <https://theconversation.com/how-the-alt-right-corrupts-the-constitution-113650>.

¹⁴⁴ Economist, ‘The perils of constitution-worship’ (23 September 2010), <http://www.economist.com/node/17103701>.

1.2.3 Constitution as Saviour

Above, we saw Kahn discuss the American Constitution as if it alone would save the citizenry from Donald Trump and his policies. It would be extremely difficult to say it has done that, especially given the failure of the recent impeachment proceedings. Although those employing a constitution in this manner are likely attempting to appeal to general unifying principles, and usually do so in good faith, this rhetoric is also a double-edged sword: if the constitution does not protect or save societies from the supposed threats, this could lead to a downgrade in respect or admiration for the document.

While Sanford Levinson focused predominantly on the dangers of constitution as scripture and the idea of a written text fomenting fragmentation, Jack Balkin's *Constitutional Redemption* focuses on some of the wider aspects of constitutional faith and the potential dangers of idolatry. He describes idolatry as the 'the belief in a false god, in a graven image, in a false representation that purports to be the image of God but is not'.¹⁴⁵ In reference to the legal world, he suggests that this could be applied to the rule of law, to mathematical precision of legal argument, and to forms of patriotism and nationalism. Idolatry, as Balkin emphasises, is 'faith in what one ought not to have faith in'.¹⁴⁶ This corresponds with others that have written about idolatry in the legal context. Smith notes that, far from being akin to elaborate pagan rituals, idolatry is 'simply a practice in which humans take an object of human construction and, by an act of imagination, endow that object with superhuman wisdom, virtue, or power'.¹⁴⁷ Thus, Balkin's analysis highlights a practical element of idolatry: perhaps the widespread faith citizens have put in written constitutions is misplaced.

Complementing Balkin's ideas about idolatry and graven images, this book suggests that even though in particular contexts constitutions have been influential in the delivery of rights and freedoms, these venerated documents are often the false gods of the legal and political realm. As the rise of written world constitutionalism has grown, an overreliance on constitutions for the establishment and maintenance of the constitutional order seems to be proliferating, as grand claims regarding various constitutional possibilities continues to emerge. For example, what some scholars have termed 'transformative constitutionalism' sets these written documents up as legal, political, and cultural saviours, thus providing a focus point for societal development, but in turn

¹⁴⁵ J Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (2011), p 83.

¹⁴⁶ *Ibid.*, p 101.

¹⁴⁷ SD Smith, 'Idolatry in Constitutional Interpretation' 79(3) *Virginia Law Review* 583, 610).

makes it all too easy to identify them as false gods if they fail to deliver on their ambitious promises. Transformative constitutionalism uses aspirational rhetoric in an attempt to further certain constitutional commitments and fundamentally change the politics, culture and legal institutions of a particular country. It is often ‘designed to mobilize popular support and orchestrate institutional action for the materialization of the transformative agenda’.¹⁴⁸ Thus, the constitution is not just a legal or political document setting out general principles or a state framework in which actors must abide, but the primary engine for public development. This type of constitutionalism, if it is to be successful, is contingent on a high engagement with and knowledge of the constitution. For, if this is not demonstrated, then it is not the constitution that is driving whatever change is taking place, but other social, economic or political factors.

1.2.4 Constitution as Pre-eminent Societal Rallying Point

Much of the constitutional literature has pointed to written constitutions as pre-eminent rallying points within the citizenry. Kahn’s speech also represents this form of idolatry, as the US Constitution was used as a prop for political party unity. This touches on some of the literature noted above in relation to the performative aspects of constitutions. Indeed, some have portrayed constitutions as ‘inspirational’ documents¹⁴⁹ that may be able to promote some type of enhanced citizenship or national unity.¹⁵⁰ If constitutions are indeed inspirational documents that bring citizens closer together, then perhaps some of these other elements, such as citizen understanding of government and increased voter engagement, may be additional benefits of codifying a written document for the UK. Whether constitutions can perform such tasks as educating or invigorating the citizenry is further investigated in Chapters 3 and 5.

The ‘We the People’ elements of contemporary written constitutions have much to offer this form of idolatry, as constitutions are widely conceived of as the ultimate articulation of the power of the people. After all, most constitutions begin with a firm nod to constituent power, often as the source of the constitution itself. Chapter 4 examines the reality of how this plays out in contemporary constitutions. Other writers have stressed the more personal and psychological elements of constitutions. This is certainly present in some of Ackerman’s work, cited above, which says that to ‘discover the Constitution is to discover an important part of oneself’,¹⁵¹ as if a lack of self-awareness

¹⁴⁸ Frankenberg, n 11 above, p 103.

¹⁴⁹ Landemore, n 43 above.

¹⁵⁰ Voermans, Stremmer & Cliteur, n 38 above, p 93.

¹⁵¹ Ackerman, n 60 above, p 37.

is present if citizens remain unfamiliar with the Constitution. Additionally, constitutional language more generally has been described as deeply personal. A leading text on preambles explains, ‘As siren songs, preambles try to connect the imagined ideals and beliefs to the constitutional world with the individual’s world. They serve as a nexus between the abstract systemic world and the individual’s psyche’.¹⁵² Thus, constitutional language serves a dualist function, articulating general collective values and aspirations, but in a manner that touches on the extremely personal individual character of citizens.

1.2.5 Idolatry Outside of the Above Forms

Of course, not all examples of constitutional idolatry will fall into one of the forms above. A case could be made that our contemporary societies are currently engaged in worldwide constitutional idolatry. Despite their average of 19 years,¹⁵³ both liberal and non-liberal democracies continue to rely on constitutions as documents that will determine whether their states succeed or fail. Indeed, it is often thought that a ‘good’ constitution provides a path for state success, while a poorly drafted constitution may lead to failure. Chapter 6 examines whether this claim holds up.

Above, I defined constitutional idolatry as drastically or persistently over-selling the importance or effects of written constitutions. This deliberately keeps open the possibility that constitutional idolatry can be a one-off, short-term event, or a widespread sustained event. In the American context, constitutional worship has been a time-honoured tradition. But given the rise of written world constitutionalism, there is a danger that the American experience is now just a microcosm of a wider type of idolatry for written constitutional documents at the international level. Some may see them as bulwarks against the spread of nationalism and illiberalism, while others may see them as a natural extension of our increasingly complex societies. The fact that contemporary states have the option whether or not to codify such a document, and have continually chosen to do so, may demonstrate a very real need or desire for such documents. This may be true not only at the national level, but also internationally. For example, the recent ‘World Congress on Constitutional Law’ 2018, held in Seoul, featured a workshop entitled: ‘The Debate on Establishment of the World Constitution’. No doubt this may be premature, given what happened to the proposal for a European Constitution over a decade ago, but the fact that it is being discussed at the very least

¹⁵² Voerman, Stremmer & Cliteur, n 38 above, p 151.

¹⁵³ Elkins, Ginsburg & Melton, n 26 above, p 129.

demonstrates that the idea of a written world Constitution may be pushed more forcefully down the line.

While it is often the widespread sustained veneration that is of most interest and is the most disconcerting, short-term versions of idolatry also have significant implications. This is especially true in the UK context. Without a written constitution in place, we do not encounter continuing idolisation of such a document, even if sporadic idolatry has occurred with Magna Carta. Thus, there is potential that the British public could be vulnerable to manipulation if they were presented with short-term incidents of idolatry, especially as regards what the potential benefits of a written constitution may bring about (e.g., an end to the political tumult of Brexit). There is some evidence that during the passage of the Human Rights Act 1998, political and legal actors were over-selling the potential effects it would have on society. This will be covered further in Chapter 3.

Presently, UK constitutional values are not worshipped by the citizenry, not overtly used as political weapons, and rarely used as legal tactics against ministers or others.¹⁵⁴ Political parties have platforms and may value certain issues above others, but the accusation of unconstitutional proposals, bills or laws is not lightly and casually brought about. Should the UK adopt a written constitution, such circumstances could easily change. Individuals or groups may start claiming to be guardians or protectors of such a document, and ‘constitutional’ could be used as an all-encompassing truncheon for ‘right or wrong’.

1.3 SOME GENERAL THEMES

1.3.1 Constitutional Idolatry Devalues Politics and the Political Process

The rise in written constitutionalism has come with costs, one being the devaluation of politics and the political process. As Jutta Limbach pointed out close to two decades ago, this strategy was deliberate, given that ‘the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator’.¹⁵⁵ In some ways this harkens back to Aristotle’s discussion of rule by law rather than rule by men. Constitutional idolatry takes this to another level, as it perpetuates a mind-set that the political realm is subservient to the constitutional realm, rather than acknowledging

¹⁵⁴ Although regarding the latter, the recent *Cherry/Miller II* litigation intimates that this could be increasing (*R (Miller) v The Prime Minister* [2019] UKSC 41).

¹⁵⁵ J Limbach, ‘The Concept of the Supremacy of the Constitution’ (2001) 64(1) *Modern Law Review* 1.

that the political realm is a complement to—or even at times a master of—the constitutional realm. After all, it is through politics and the political process that constitutional norms and values take shape, and where written documents are formally amended, replaced, or renewed. Thus, lowering the standing of legislators and statutes appears to be a misconceived quest for constitutional superiority.

Within the UK context, some may push firmly back against this lower ranking of statute and the lower ranking of legislators. One of the reasons that the UK constitution works is because the primary focus remains on politics. This has been demonstrated through its commitment to parliamentary sovereignty, as opposed to constitutional or judicial supremacy. The idea that politics is the most important part of the British constitution has influenced a long line of constitutional thinkers, from AV Dicey and Walter Bagehot to John Griffith and Martin Loughlin. This commitment to a more political constitution, in which legal primacy resides with a majoritarian decision-making institution,¹⁵⁶ has been fundamental to the UK's contemporary constitutional settlement. As Chapter 4 discusses, a written constitution advocating constitutional supremacy would seriously threaten this integral component.

1.3.2 Constitutional Idolatry is Overly Paternalistic

Former American Supreme Court Justice Hugo Black and contemporary American Tea Party members had something in common: they both advocated carrying copies of the American Constitution at all times. Both also had similar reasons for doing so: they believed that most political disputes could be solved by simply pointing to the text of the Constitution.¹⁵⁷ The fact that Black encouraged this in the mid-twentieth century, while Tea Party members were advocating this in the early twenty-first century, demonstrates that the idea has been an enduring one among American citizens and those in the legal profession. And yet, the belief that any written constitution can provide all the answers to constitutional disputes is an attractive fairy tale. Chapter 3 discusses the idea that written constitutions can be a valuable educative tool for the citizenry. Constitutional idolatry also puts more weight on what the framers of a constitution, rather than the people currently living under the document, think of how things should operate. If the 'We the People' element of constitutions is more than simply hollow rhetoric, then citizens should have opportunities to shape such documents. Chapter 8 discusses this in more detail.

¹⁵⁶ M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2017), p 44.

¹⁵⁷ As regards Hugo Black, this came from Levinson, n 15 above, pp 31–32.

Additionally, in many constitutional democracies around the world, judiciaries have been increasingly adamant that they, as opposed to other constitutional branches or actors, are the ultimate interpreters or true constitutional guardians of their given democratic order. Chapter 7 further explores such claims, arguing that this type of constitutional jostling is inherently paternalistic, and damages the idea of constitutional guardianship being a collective endeavour within the entire state. Thus, in many jurisdictions, what began as a wider project based around constitutional protection has increasingly turned into a job for a small cadre of lawyers and judges. Those engaged in such constitutional sparring should acknowledge what American jurist Oliver Wendell Holmes once said: ‘that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts’.¹⁵⁸

1.3.3 Constitutional Idolatry Stifles Constitutional Maintenance

Especially in this day and age, when technology, society and culture are moving at such a rapid pace, constitutions must be adaptable enough to take account for such change. And yet, the presence of constitutional idolatry impedes such development, by discouraging citizens from amending the formal constitution. Discouraging formal amendment incentivises informal constitutional change via the courts, which essentially takes the constitution out of the people’s hands. Indeed, unrelenting constitutional idolatry can lead to constitutional disillusionment, as citizens and others see little or no prospects for constitutional change. This disillusionment impacts the possibilities of other types of political change through statutory or other means, as citizens are increasingly put off of the constitutional project.

The idea and prospects for constitutional moments have been a strong focus point within the constitutional scholarship.¹⁵⁹ But this idea was also unique to the American constitutional tradition. By contrast, the idea of constitutional maintenance has been key to sustaining the UK constitution. That is not to say that constitutional moments do not happen in the UK. They do. But constitutional maintenance, which is not as dramatic and does not need to incorporate widespread notions of popular sovereignty, is also important. Chapter 8 explores the idea that maintenance, which relies on consistent constitutional change, is incompatible with notions of constitutional idolatry.

¹⁵⁸ *Missouri, Kansas and Texas Railway Company v May*, 194 U.S. 267, 270 (1904).

¹⁵⁹ The most prominent original account is Ackerman’s *We the People*, n 60 above.

1.4 RECALCULATING OUR EXPECTATIONS OF CONSTITUTIONAL POSSIBILITY

This book stresses the need for a recalculation of constitutional possibility, contending that various forms of constitutional idolatry have seriously contributed to distorting what these parchment barriers can accomplish. Raised expectations for founding written documents have also contributed to the lowering in importance of the more human political realm, especially as regards legislators and statutes. This is unfortunate, as now more than ever politics and the political realm require trust and confidence, rather than contempt. Acknowledging the wide limitations of written constitutions and reasserting faith in the political realm is essential to negating the effects of constitutional idolatry. As the UK considers whether to pen a founding written document, these issues have become increasingly important. While discussion and debate usually revolve around ‘flexibility v rigidity’ or ‘transparency v opacity’, a wider conversation must consider elements such as: the educative functions of constitutions; their ability to deliver on their ‘We the People’ rhetoric; whether they can invigorate societies; whether ‘good’ documents are essential to state survival; how constitutional guardian rhetoric impacts societies; and the implications of writtenness on constitutional maintenance.