Trinity College Dublin

Coláiste na Tríonóide, Baile Átha Cliath

The University of Dublin

SCHOOL OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 18/2023

December 2023

["Its just the vibe of the thing": Mapping the role of culture in comparative constitutional law]

[David Kenny, Trinity College Dublin]

Further information about the Trinity College Dublin School of Law Legal Studies Research Paper Series can be found at
www.tcd.ie/law/researchpapers/

"It's just the vibe of the thing": Mapping the role of culture in comparative constitutional law

David Kenny*

Introduction

In the iconic 1997 Australian comedy film *The Castle*,[1] the Kerrigan family try to resist the compulsory acquisition of their modest Melbourne home—their castle—for the expansion of the nearby airport. Family patriarch Darryl convinces local solicitor Dennis Denuto, who previously defended his son on criminal charges, to take a constitutional case on their behalf despite his lack of constitutional law expertise. Before the judge, Denuto begins with a spirited argument:

> It's the Constitution of Australia. This is a blatant violation of the Constitution of the Commonwealth of Australia. And when it comes to violations, they don't come any bigger.

As he slaps down his copy of the Constitution on the desk, the judge asks: what section of the constitution has been breached? Here, Denuto loses his lustre and becomes more uncertain. After a long pause, Denuto responds with a legendary line: 'There is no one section… It's just the vibe of the thing.' The rest of the hearing goes about as well as you would expect. He points to irrelevant sections on copyrights ('It's all part of it!') and cites (after some difficulties in recollection) the famed aboriginal land rights case, *Mabo*.[2] He concludes: 'In summing up… It's the Constitution, it's *Mabo*, it's justice, it's law, it's the vibe… and… no that's it, it's the vibe… I rest my case.' Mr Kerrigan thinks this was a sensational display of lawyering, but they lose the argument. Thankfully for the Kerrigans, a

* Professor in Law and Fellow, Trinity College Dublin (david.kenny@tcd.ie). I am very grateful to Cheryl Saunders for many conversations that helped me hone these thoughts, and to the workshop participants at the 2023 Constitutional Law Roundtable in Academia Sinica, Taiwan, for very helpful comments and suggestions.

[1] *The Castle* (Roadshow Entertainment, 1997)

[2] *Mabo v Queensland (No 2)* [1992] HCA 23.

kindly retired QC comes along to help make the vibe more specific, and they win an unlikely victory in the High Court, saving their castle.[3]

Dennis Denuto may not have been a great practitioner of Australian constitutional law, but it is my case that, as an informal theorist of constitutional law, he is exactly right: when it comes to the Constitution, it's the vibe of the thing that really matters. It is the unspoken culture of the constitution—a set of suppositions about what it means, what it does, what it allows, what it prohibits—that actually animates its institutions, drives its development, resolves cases. As scholars, however, we have to try to do better than Dennis Denuto; we have to try to say what the vibe of thing—the constitutional culture—actually is.

My position in this paper is that culture plays a vast but largely underexplored role in constitutional law, and that both domestic and comparative constitutional scholarship would benefit from an increased focus on this concept. However, the concept is problematic in that there is no agreed definition; no clear methodology for finding it out; no clear agreement on what to do with it when we find it. When people say 'culture' in a discussion of constitutional law, they may mean very different things. Comparison of cultures is rare, and difficult. The discipline of comparative constitutional law has largely avoided engaging with culture, perhaps because debates about culture led to long (and perhaps not very fruitful) arguments in comparative law scholarship more generally. Culture in law is often associated with a reductionist view that tends to explain legal phenomena by reference to specific legal traditions or families like common law, civil law, etc. without allowing for the very significant variation within and between systems that make such generalisations problematic. The concept of culture I am arguing for is, I think, quite different, referring not to an essentialising notion of legal families or traditions but to a distinctive, subconscious layer of thought that animates constitutional law in a much more local, plural and complex way.

[3] The film is not based on a true story, and the Australian constitutional law on this point is, I am told, not particularly sympathetic. See <https://www.theguardian.com/film/2022/mar/19/its-the-vibe-25-years-on-how-the-castle-became-an-australian-classic>.

I have written about culture directly on several previous occasions, including in respect of referendums,[4] expectations of executive dominance,[5] constitutional design,[6] and more generally.[7] This paper is an early attempt to do several things elaborating and building on this work: to argue that culture is important to constitutional law; to note the difficulties in studying it; to explore its use in constitutional scholarship to date and examine key commonalities; to suggest objects of cultural study in constitutional law; and to consider some methodologies that might help us with this. It is a mapping project in that I aim to map some of the uses of the term in the field, and also to tentatively suggest paths forward in credibly studying constitutional culture.

In Part I, I consider the difficulties of defining culture in other fields, including anthropology; look at potentially useful ways to consider culture in law; and argue for its central importance to legal study. In Part II, I look at various different approaches that have been taken to considering culture, and its importance, in constitutional law, focusing on those that I think consider culture in a deep and interesting way. Some of these are comparative, but many are mono-jurisdictional. In Part III, I look at how comparative constitutional law can embrace this concept and advance our work by relying on it. I draw out some common threads of the accounts discussed in Part II to see a convergence in how culture might be considered; look at possible constitutional 'subcultures' that would be of interest for comparative study; and consider ways to tackle some of the significant methodological challenges that beset this enterprise. I conclude with some brief thoughts about the deep challenges of a cultural turn for the enterprise of comparative constitutional law, and why I think we should face them.

I. What is culture?

The trouble with defining culture

[4] David Kenny 'The Risks of Referendums: "Referendum culture" in Ireland as a solution?' in Cahill et al. (eds.), *Constitutional Change and Popular Sovereignty in Ireland* (Routledge, 2021) 198.
[5] David Kenny and Conor Casey, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016–2019' [2021] (April) *Public Law* 355.
[6] David Kenny and Lauryn Musgrove McCann, 'Directive Principles, Political Constitutionalism, and Constitutional Culture: the case of Ireland's failed Directive Principles of Social Policy' (2022) 18 *European Constitutional Law Review* 207.
[7] David Kenny, 'Examining Constitutional Culture: Assisted Suicide in Ireland and Canada' (2022) 17(1) Journal of Comparative Law 85.

Those writing about culture in law have called the idea 'troublingly vague' and 'hotly contested'.[8] Herklotz aptly says it is a 'somewhat fuzzy concept'.[9] Mezey, even more starkly, says the 'notion of culture is everywhere invoked and virtually nowhere explained.'[10] But the trouble of defining culture has long beset other disciplines that are far more directly devoted to studying culture and its influence, such as geography and sociology. Even (and especially[11]) anthropology—which is, at its core, the study of culture—has major and long-running disputes about the meaning of the term. Kroeber and Kluckhohn famous examined the use of the term culture in the discipline in 1952 and extracted more than 160 different attempts to define it.[12] They tried in their conclusions to formulate something approximating a consensus definition reflecting the state of the art:

> Culture consists of patterns, explicit and implicit, of and for behaviour acquired and transmitted by symbols, constituting the distinctive achievement of human groups, including their embodiments in artifacts; the essential core of culture of traditional (i.e. historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other as conditioning elements of further action.[13]

But they said 'as yet we have no full theory of culture'.[14] We still don't, and there have been many crises of confidence about the concept since. There are differences in purpose, focus, and emphasis within the many definitions used in the field, but also perhaps ideological or agenda-driven differences.[15] But for all these problems, it is also something the field could

[8] Austin Sarat and Thomas Kearns, 'The Cultural Lives of Law' in Sarat and Kearns (eds) *Law in the Domains of Culture* (Michigan, 1998) 1, 1.
[9] Tanja Herklotz, 'Legal Cultures' in *Max Plank Encyclopaedia of Comparative Constitutional Law* (Oxford, 2023) [1].
[10] Naomi Mezey, 'Law as culture' (2001) 13 *Yale Journal of Law & Humanities* 35, 35.
[11] Perhaps looking to anthropology for clarity on what culture is no more easy than turning to the academic discipline of law to ask 'what is law?' We have interesting answers to that question, but plural and complex ones.
[12] A. L Kroeber & C. Kluckhohn, *Culture: a critical review of concepts and definitions*, *(*Peabody Museum of Archaeology & Ethnology, 1952, page 43 et seq, see <https://iiif.lib.harvard.edu/manifests/view/drs:427692955$195i>.
[13] *Ibid* 181.
[14] Ibid.
[15] Helen Spencer-Oatey, 'What is culture?' (2012) GlobalPAD Core Concepts.

not move past; as James Clifford put it, 'Culture is a deeply compromised idea I cannot yet do without.'[16]

The core elements of culture in anthropology are that it is a group phenomenon that has some continuity over time and is passed between group members, but is experienced individually. Van Maanen describes 'the stuff of culture' as the 'language, concepts, categories, practices, rules, beliefs, and so forth, used by members of the … group.'[17] As such, group identity becomes essential: if the group cannot be identified, culture cannot be specified. Therefore, there must be some common history or shared experience that distinguishes the group in order for the idea of a culture to be coherent.[18] Culture will then, itself, distinguish members of the group; Hofstede et al. describe culture as 'the collective programming of the mind which distinguishes the members of one group or category of people from another.'[19] This is an aspect of culture's reflexive nature, to which we shall return.

Culture is also agreed to be is vastly interrelated in its many and various aspects. Its parts intersect and interact with each other in multifarious ways. The image of a pattern, web or network is apt; Geertz says that if 'man is an animal suspended in webs of significance he himself has spun', he believes 'culture to be those webs'.[20] Stein is the right when he speaks of the 'vastness' of the phenomenon.[21] There is also a great deal that *cannot* be said about it.[22] Culture is often implicit rather than explicit, subconscious rather than conscious, latent rather than patent. It is often bound up with and contained in language, and the conceptual categories that language sets up.[23]

---

[16] James Clifford, *The Predicament Of Culture: Twentieth-Century Ethnography, Literature, and Art* (Harvard, 1988) 10.
[17] John Van Maanen, *Tales of the Field: On Writing Ethnography* (2nd ed, University of Chicago Press, 2011) 13.
[18] Edgar H. Stein, 'What is culture?' in Godwyn and Hoffer Gittell (eds.) *Sociology of Organizations: Structures and Relationships* (Sage, 2012) 313.
[19] Geert Hofstede et al., *Cultures and Organizations: Software of the Mind* (McGraw Hill, 1994) 6.
[20] Clifford Geertz *The Interpretation of Cultures* (Basic Books, 1973) 5.
[21] Stein (n 18) 312-3.
[22] Spencer-Oatey (n 15). Stein (n 18) 312 notes that 'the perceptions, cognitions, and feelings' of people all play into culture in a way that is hard to unpack.
[23] Stein (n 18) 312.

Culture in this telling is not merely ornamental or symbolic; it has real effects, produces and characterises actions, shapes understanding, and thus is means by which a group's purposes are achieved. It is through culture that the meaning and import of social practices is made concrete, that social practices can be understood, that social practices can be successfully *practiced*. Without understanding it, much of what a group does is not readable or comprehensible to us. Without having it, the group would not—could not—do as it does.

Culture in law

Law's relationship to culture is not well developed.[24] There are few large studies on the topic.[25] Law has typically regard culture as something apart and separate from it, and this tendency (and desire) to appear distant from culture has made cultural explorations in law either controversial or challenging.[26] Mezey argues that legal accounts of culture tend to be reluctant and minimising: 'Most visions of law include culture, if they include it at all, as the unavoidable social context of an otherwise legal question—the element of irrationality or the basis of policy conflicts.'[27] This latter tendency is for law to regard culture as being major moral and ethical values or debates—I have elsewhere called this 'culture with a capital C'—that may *impact* the law from outside, but are not properly part of it.[28] There has also been a tendency in comparative law to focus on culture at the highest level, that of legal traditions and systems: the common and civil law traditions, say, are not just different sets of rules and practices but different ways of *thinking about law*.[29] Both of these tendencies minimise and cabin the role of culture. It may impact upon law at the highest level of legal systems, and may act upon law as a sort of external factor, but it is not an important part of law itself, or law in practice, or legal understandings. This is unsustainable as a position: culture runs much deeper than this.

---

[24] For an excellent examination of how culture has been used in law, see Herklotz (n 9). Other candidates terms for the phenomenon we are discussion—tradition, custom, convention, interpretive community—are no less complex, difficult to define, and underdeveloped, and/or fail to capture something that culture encompasses. But I am not wedded to the term, and would happily use another term if it were shown to be more helpful.

[25] See Sarat and Kearns (n 8) who bring together a sampling of approaches, moving towards a cultural study of law.

[26] See Robert Post, 'Introduction' in Post (ed.), *Law and the Order of Culture* (Berkeley, 1988) vii.

[27] Mezey (n 10) 35.

[28] Kenny (n 7).

[29] See H. Patrick Glenn, *Legal Traditions of the World* (5th ed, OUP, 2014) for accounts of different legal traditions.

Deeper accounts—that get towards the real and pervasive impact on culture—are rarer. When found, they are usually in law and society scholarship, and do not feed into either comparative law or legal theory such that it would suffuse broader understandings of the law outside this subdiscipline.[30] Mezey, in her excellent cultural studies of law scholarship, offers two useful definitions: culture is 'a set of shared signifying practices that are always in the making and always up for grabs';[31] and 'the almost unconscious meaning-systems that people inhabit and enact without choice. It can also be thought of as the more self-conscious deployment of certain symbols whose meaning becomes temporarily salient.'[32]

Legrand's comparative law account of legal culture is, I think, similar to Mezey's definitions and gets to the heart of the broader importance of culture in law.[33] Legrand describes culture as those things which are 'not universal, but that transcend the individual'.[34] It is intersubjective, existing in community and between people. He describes a phenomenon he calls either 'interiorised legal culture' or sometimes 'mentalité' that shapes our legal understandings in a deep and fundamental way:

> an array of predispositions, predilections, propensities, or inclinations [that] is the outcome of a process of transformation of often unconscious aspirations or expectations according to the concrete indices of what is probable, possible, or impossible for an identifiable community into relatively durable tendencies that are internalised intergenerationally through socialisation and that crystallise into patterns of action.[35]

[30] See interesting work from, amongst others, Lawrence Friedman; 'Is there a Modern Legal Culture?' (1994) 7(2) Ratio Juris 117; 'Legal Culture and Social Development' (1969) 4(1) Law and Society Review 29.
[31] Mezey (n 10) 37.
[32] *Ibid* 42. See also Robin West. 'Literature, Culture, and Law at Duke University' (2008) *Georgetown Law Faculty Working Papers*.
[33] See Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45(1) *International and Comparative Law Quarterly* 52.
[34] Pierre Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) Journal of Comparative Law 365, 380.
[35] *Ibid* 376.

In another work, Legrand speaks of 'the values, beliefs, dispositions, justifications and the practical consciousness that allows [lawyers] to consolidate a cultural code, to crystallize their identities, and to become professionally socialized'.[36] Culture for Legrand is 'a framework of intangibles' that have normative force within the legal community even though they are 'not coherently and completely instantiated', and are often not formal and conscious but informal and subconscious.[37] Legrand also stresses the inevitable change and contestation that is a necessary part of culture; it is not some monolithic, static, or linear phenomenon.[38] It is not uniform, and varies in large and small ways across a community and over time.[39] Crucial for Legrand is the vast scope of culture, and no aspect of law can avoid it: 'No formulation of the posited law can safely escape a cultural interpretation and all formulations of the posited law can therefore be helpfully envisaged as cultural expressions'.[40] Culture is what decodes and organises the field, as it 'renders action intelligible to those involved and delineates the boundaries of relevance and irrelevance'.[41] Culture in law can be seen as acting both 'by empowering legal agents and by limiting their possibilities' which means that our individual understandings of law are 'never fully individual' and are always the product of community.[42]

Legrand's vision is close, I think, to Stanley Fish's.[43] Fish uses 'culture' in this sense sometimes, but more commonly he uses the concept of interpretive community to do the same work. (Legrand sometimes uses Fish's terminology as well.) Such a community is 'an ever-changing collection of rules of thumb, doctrines, proverbs, precedents, folk-tales, prejudices, aspirations, goals, fears, and above all, beliefs'.[44] It is our induction into that community that help us decode the world around us, that gives words their meaning, that

[36] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) *Maastricht Journal of European and Comparative Law* 111
[37] Legrand (n 34) 374, 375.
[38] *Ibid* 377.
[39] *Ibid* 381-2.
[40] *Ibid* 376.
[41] *Ibid* 377.
[42] *Ibid*.
[43] Legrand cites him (*ibid* 383), alongside Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1988) 156: 'all aspects of social life are pervaded by decidedly non-neutral assumptions whose acceptance by a member of the culture define what is "possible" for that person'.
[44] See Stanley Fish, Almost Pragmatism' in Fish, *There's No Such Things as Free Speech and it's a Good Thing Too* (OUP, 1994) 203.

gives you a sense of the purposes of your enterprise and directs you in doing it. There are legal interpretive communities, of course, that one becomes part of 'with the experience of law school, of practice, of a life in the courts, etc'.[45] The culture is subconsciously acquired from living in community, and cannot be articulated fully. It changes over time, in a stochastic and unpredictable way, with no authoritative source. It enables, as well as limits, the way in which you use the law.[46]

Legal culture is not isolated from other cultures that might be important to a society or group. Law, given its crucial social role and its influence in shaping the social world, is also part of the broader set of understandings that form the other cultures around us—'Law is… constitutive of culture'[47]—while in turn law is shaped by those cultural forces as it responds to them, *answers* to them, resists them. There is thus a form of feedback between different cultures, adding to their complexity.

Culture as indispensable to understanding law

It follows that culture is central to understanding law. As I put it elsewhere, cultural beliefs 'are the foundations, frame, and filter of your knowledge and understandings.'[48] I take Martin Krygier to have made a somewhat similar argument when he famously argued that jurisprudence could not understand law by reference to acontextual concepts alone, and had to account for the vast role of tradition: a set of set of slowly-changing precepts transmitted from past generations and granted some authority in the present.[49] Culture in this sense fleshes out the legal texts, concepts, structures, and institutions that we refer to and rely on, and is what gives abstract concepts real utility. But once culture is acquired, it guides us without much or any conscious recourse to it. With culture having formed our legal and professional selves, the products of culture then issue from us 'as naturally as breathing'.[50]

---

[45] *Ibid* 214.

[46] Ibid 204: 'the state of the culture, of what it will hear as reasonable (not the force of reason itself) bars' particular legal interpretations.

[47] Sarat and Kearns (n 8) 7. *Cf* West (n 32).

[48] Kenny (n 7).

[49] See Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237.

[50] Stanley Fish, *Doing What Comes Naturally* (Duke, 1989) ix. Even novel thinking about the fringes of culture will be influenced and formed by our subconscious sense of the culture.

Law as a phenomenon is only readable to us because of myriad legal-cultural suppositions that we are not necessarily aware of; cannot fully articulate; and that are always in a state of growth and change.[51] If you doubt this, I would invite you to think back to the vague intimation of the law you had before you studied it. (Even this partial perspective was only available to you because of cultural suppositions as from the general political culture around the law.) When you started to join the *legal* community, you saw things very differently as you were inculcated into the law's culture. Most students experience this as a kind of 'eureka' moment, where cultural intelligibility kicks in and they start to understand the feeling and dynamics of the system in way that stretches far beyond the formal knowledge they have acquired. They have acquired not just knowledge but cultural sensibilities that they can use to understand the legal system in a much fuller way. If you think over all the ways you have changed your mind on the law, in big ways and small, since you first studied it, I would suggest that these are not simply a function of *learning* more, but of joining new subcultures and communities, or seeing those communities change over time. Looked at this way, the study of culture—even though it is difficult—is essential in any study of law. Without an account of it, we ignore the origin of legal meaning, the driver of legal development and change, and the deep, unseen content of the law. We would be missing the all-important vibe of the thing.

II. The use of culture in constitutional law

Culture is acutely relevant in comparative constitutional law. In comparative law, this view of culture would make it by far the most problematic and significant 'omitted variable'[52] in the study of law across systems. Culture is likely to bend and change concepts travelling across borders to make them fit with local expectations and beliefs.[53] Trying to understand

[51] Krygier's vision of tradition is not only that it can change but that it *must* change: 'it is impossible for traditions to survive unchanged.' Krygier (n 49) 251-252. I think this is exactly right, as is his account of change being both deliberate and designed in some cases and entirely undirected and spontaneous in others. However, seeming statis can occur because all of the changes in the factors that make up and influence culture do not happen to result in obvious or visible changes to the products of culture.

[52] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale Law Journal 1225.

[53] See Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 Modern Law Review 11; David Kenny, 'Proportionality and the Inevitability of the Local: a comparative localist analysis of Canada and Ireland' (2018) 66(3) *American Journal of Comparative Law* 537.

the nuances of a legal system without a grasp on its legal culture will be difficult or impossible, and the likelihood that we misunderstand fundamentally the legal system and its dynamics are significantly increased. Constitutional law, similarly, has very significant cultural components because it encompasses the general legal culture of a place, its particular culture of politics, and a distinctive set of cultural factors that exist around the constitution in public, political, and legal life.[54] Constitutional law is a product of these overlapping cultural forces. This is where our subconscious sense of constitutional law comes from. It is how we can develop the Constitution in novel ways and say we are true to its spirit. It is how might have a strong sense that something is unconstitutional before we know exactly how we would show this.[55] Constitutional culture is central to all of our constitutional thought.

In spite of this, there has not been significant focus on culture in comparative constitutional law scholarship, or in many bodies of domestic constitutional scholarship of which I am aware.[56] This is surprising in the comparative sphere, given that comparative law was long divided between two school or traditions—culturalists versus universalists.[57] Universalists posited that laws and legal systems are derivative of universal and universally applicable core tenets of principles, even if these principles are not fully known or realised. Culturalists denied any such principles existed and instead viewed law as a function of local factors such

[54] See Kenny (n 7): 'The direct and consequential relationship of constitutional law to politics, and its potential to shape the political landscape of a country, will likely make it take on unique characteristics that might not be seen in the legal culture or community's suppositions about, say, private law'.

[55] A judge of my acquaintance once told me of three very senior and learned judges walking into a case conference and all saying something like: 'We know this is how this should go. Now we have to decide what constitutional reasons make that so.' This can be seen as disturbing, but I would say that this subconscious reasoning, with (good, persuasive) reasons coming after, is not a problem, but an inevitable function of culture when we are at the fringes of the law as currently established.

[56] Recent developments in respect of tikanga Māori being recognised as a freestanding legal framework in Aotearoa New Zealand—which was presaged by legal scholarship discussed below—are the exception to this; see *Ellis v R* [2022] NZSC 114. Another possible exception in terms of domestic constitutional law might be the constitutional law of the United Kingdom. The constitution, being uncodified, involves a huge number of 'constitutional conventions' and understandings about what is and is not permissible and necessary in the constitutional system. This, on one level, means that the study of the UK constitution is the study of constitutional culture. This is limited, however, by the tendency to formalise constitutional conventions in scholarship as something close to rules, which tends to occlude the cultural influences I am discussing here, and a tendency in comparative law to contrast 'unwritten' constitutions to written ones and suggest that latter do not rely on conventions in the same way, which I think it incorrect.

[57] See Glenn (n 29) 163. Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, 2010) 24-26; Carlos Rosenkrantz, 'Against Borrowing and Other Nonauthorative Uses of Foreign Law' (2003) *International Journal of Constitutional Law* 1.

as history, circumstance, tradition etc. Far from universal, law is close to autochthonous, an almost entirely native phenomenon. Comparative constitutional law—in a major break from comparative law more broadly—did not engage with this debate. Hirschl considers that we did well to avoid this 'age-old' conflict and move our discipline in 'a more productive direction'.[58] I see his point; engaging in this debate might have mired the field in its early stages of development. Perhaps, however, we went too far in the matter; we largely threw culture away.

There are of course exceptions to this general non-engagement with culture, and my purpose in this section is to catalogue the most important of them. A full survey of how the word 'culture' has featured in constitutional scholarship would be too great an undertaking to complete here.[59] Instead, I wish to highlight the most important uses I have found in English, the ones that speak most closely to the Legrand/Fish/Mezey conception I have discussed above, and that point the way to a product culture-based scholarship in constitutional law. Some are comparative; others are not. There are surely many other good examples that I have overlooked or not yet discovered.

Saunders' culture in constitutional reform and design

Saunders, discussing democracy building and preventing democratic decay, makes the case for culture as a major part of constitutional discourse. [60] She notes that 'all communities

[58] Ran Hirschl, *Comparative Matters* (Oxford, 2014) 4.

[59] Some other interesting examples, including fascinating German language materials by Häberle, are canvassed very well in Herklotz (n 9).

[60] See Cheryl Saunders, 'Constitutional Cultures' (2022) draft chapter on file with the author. See also Lael K. Weiss, 'Does Australia Need a Popular Constitutional Culture?' in *New Directions for Law in Australia* (ANU, 2017) 377, arguing for the importance of a popular/public discourse and deliberation on the constitution as an essential ingredient of constitutional democracy. There is a narrow use of the term constitutional culture that should be differentiated here. Constitutional culture is sometimes used to speak of a set of political norms and commitments to legality, the rule of law, the separation of powers etc, felt by political actors, that is needed to make those values real and to defend them against gradual (or indeed sudden and dramatic) erosion. It is not enough to have formal or facial commitments to the rule of law; there must be deep commitment to it in the political culture to protecting and defending these values. See eg Richard Fallon '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97(1) Columbia Law Review 1; Jason Mazzone, 'The Creation of a Constitutional Culture' (2005) 40(4) Tulsa Law Review 671. This is of particular importance to constitutional design and transition, and is an important object of study both in in practice and at a conceptual level. But culture in constitutional law is substantially broader than this because many other facets of culture will influence and act upon the constitutional system in myriad ways. Saunders takes a broader view while looking at this facet of constitutional culture, but other scholarship with this focus often does not.

have values, premises and practices that are cultural in nature',[61] and it is no different for the communities that surround constitutional law. Saunders' vision of culture (drawing on Legrand and others) has several important elements. This culture is not homogenous and will be internally contested. It changes over time, usually gradually, sometimes rapidly. Globalisation may play a major role, but there may also be a limit to how much cultures will converge. Cultures are not easy to transplant. It is generally implicit rather than explicit. And 'Constitutions and culture have a reflexive relationship, in which constitutions shape culture and culture shapes constitutions, in both form and operation.'

When it comes to democracy building, different cultures will have different effects on efforts to build institutions:

> In any community, some versions of culture may be more conducive to constitutional democracy than others, offering opportunities. Some versions may be patently antithetical to democracy, presenting threats which democratisation must meet.

Saunders also notes the possibility of cultural manipulation, which is highly pertinent in democracy building and democratic decay: 'the usual lack of a definitive source means that culture may be mischaracterized or even manipulated for instrumental, typically political, ends'. She also insightfully suggests that 'any significant move from the constitutional status quo will require cultural change' for it to be effective. [62]

Saunders suggests that awareness of culture can have both diagnostic and instrumental uses: showing us problems that emerge in constitutional orders, and showing us what elements of new or emerging constitutional orders are most important: 'Which features of a constitution require particular attention, from the standpoint of culture, depend on context.' In her chapter, she sketches how culture has had a role in attempts at democracy

[61] Saunders (n 60). Internal quotation marks omitted.
[62] She also invokes the concept of a 'constitutional imaginary' as a culture-linked constitutional ideal and belief that supports constitutional democracy. See further Cheryl Saunders, 'Constitutional Imaginary', Blog Post, 1st December 2020, <https://www.robertotoniatti.eu/contributi/constitutional-imaginary>.

building in seven case studies included in the volume, and makes suggestions about how to address culture in constitutional design and implementation. I find all of this compelling, and I think it is similar in outlook to my approach in looking at Ireland's lack of success with constitutional directive principles as a failure of culture, and considering what this means for use of this tool in constitutional design.[63]

Palmer's account of constitutional culture in Aotearoa New Zealand

Palmer's fascinating analysis of Aotearoa New Zealand is a strong example of cultural examination of a constitution.[64] A constitution, Palmer suggests, is 'a set of factors that determines who exercises public power and how they exercise it'.[65] Looking closely at the uncodified constitution of Aotearoa New Zealand and its operation, Palmer argues 'its content is determined, to a significant extent, by the beliefs and behaviour of those who are involved in its operation (and by the beliefs and behaviour of those others whose opinions affect those involved in its operation)'.[66] Showing this is the basis of what Palmer calls 'constitutional realism'—trying to candidly show the real human interactions that make up the constitution's lived reality.[67] His point is not limited to uncodified constitutions or the 'formal Westminster device of constitutional conventions', but is much deeper and more complex phenomenon.[68] Palmer cites Legrand's definition of culture, as well as definitions from anthropology, and notes the reality that cultures are plural and overlap so that broader political culture is a huge part of constitutional culture, and that constitutional culture will vary across groups.[69] He then attempts to unpack Aotearoa New Zealand's constitutional culture as being pragmatic, slightly authoritarian yet markedly egalitarian, with several core constitutional norms emerging from that. He does this using his in-depth and embedded knowledge of the politics, legal system, legal academy, and legal community in Aotearoa New Zealand. He analogises the Māori concept of tikanga—which presaged

[63] Saunders (n 60

[64] Palmer, now a judge of the High Court, has continued this examination judicially in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843, and extra-judicially in his book with Dean Knight: *The Constitution of New Zealand: a contextual analysis* (Hart, 2022).

[65] Matthew Palmer, 'New Zealand Constitutional Culture' (2007) 22 New Zealand Universities Law Review 565, 565.

[66] *Ibid*.

[67] *Ibid* 566.

[68] *Ibid* 567.

[69] *Ibid* 568-570.

recent bringing of tikanga Māori alongside the common law framework of Aotearoa New Zealand[70]—and suggests is may have had more influence on constitutional law than has been appreciated.[71]

I find Palmer's account compelling on several levels. His vision of culture is similar to the one discussed above, and I find his account of Aotearoa New Zealand persuasive. I have used a similar approach in trying to explain Ireland's practice around parliamentary rules and executive dominance of the legislature.[72] The only issue I would have with his project is the possible latent belief that Aoteraoa New Zealand's constitutional changeability is so great that it shows it does not want 'we do not really have, or yet want, "a constitution" like any other country does. Our constitution is not a thing, it is a way of doing things. We have constitutional tikanga.'[73] I think his insight about the depth of culture suggests that even places that have and want a constitution that *is* a thing in fact also find the constitution to be a way of doing things, and to have a tikanga of their own. There is no hard distinction here, merely one of degree. It is always, on some level, about the vibe of the thing.

Roux's professional culture[74]

Theunis Roux begins his fascinating paper on legal professional culture in constitutional interpretation by imagining comparative constitutional scholars as sommeliers doing a blind tasting: we could, without being given obviously revealing details, quickly tell apart a US Supreme Court judgment, an Australian High Court judgment, and a South African Constitutional Court judgment, and locate each in its 'constitutional terroir'. Despite many similar ingredients and components, we would be able to tell which Court combined them. They would, in my terminology, have very different vibes. These courts are all 'working

[70] See above (n 56).
[71] Palmer (n 65) 597.
[72] See Kenny and Casey (n 5).
[73] Palmer (n 65) 597.
[74] For a very detailed and persuasive account of the effects of legal professional culture on the constitutional law of Australia and Germany, see Liz Hicks, *Legalist Reasoning And Its Limits: Legal Professional Culture And Constitutional Development In Australia And Germany*, PhD Thesis, University of Melbourne/Humboldt University, 2023. I note in the interests of disclosure that I had the pleasure of examining this thesis shortly after the original version of this paper was written. Dennis Davis has also used the idea of culture amongst judges in particular as a way of unpacking constitutional law borrowing and comparative influence in the courts; D.M. Davis, 'Constitutional Borrowing: the influence of legal culture and local history in the reconstruction of comparative influence' (2003) 1(2) I.CON 181.

within a distinct tradition of legal reasoning that generates certain expectations about what an authoritative judgment in constitutional law should look like'. Even very distinctive judicial voices are distinctive in the ways in which 'they manipulate, creatively reconstruct, or push the boundaries of the reasoning tradition in which they are working'.[75] He uses 'legal professional culture' to describe the factor that gives these national constitutional works their distinctive flavour, defining it as

> the cluster of nationally distinct values, reasoning techniques, and assumptions about good judgment-writing that condition the way judges work with formal legal norms. These values, techniques and assumptions are clearly not determinative of case outcomes since judges on the same court—at least in jurisdictions that allow dissenting opinions—will and do disagree about the correct outcome of cases. Nevertheless, they structure decision-making and supply standards for assessing the legal legitimacy of decisions.[76]

He illustrates his point with a very compelling analysis of the Same-sex Marriage case from the Australian High Court. He concludes by arguing that professional culture should be seen as a friend rather than a foe of comparative constitutional studies, showing us the ways that courts address common institutional challenges in a nationally-distinct way.[77] I find Roux's analysis persuasive, and his cautions against using of culture for overly simplistic or causative analysis apt.

Reva Siegel's culture as driving constitutional change and meaning

Reva Siegel, in a significant article, argues that social movements and the conflicts they spark can lead to informal constitutional change and the creation of enforceable constitutional entitlements. This is a process, she says, that is 'enabled and constrained by constitutional culture'.[78] Her case study is the development of equal protection

[75] Theunis Roux, 'The Role of Legal-Professional Culture in Constitutional Interpretation' (14th September 2001) 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923923.
[76] Ibid 4.
[77] Ibid 12.
[78] Reva Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era' (2006) 94(5) California Law Review 1323, 1323.

jurisprudence on sex under the 14th Amendment to the US Constitution, which she persuasively argues arose out of the failed push for the Equal Rights Amendment (ERA). Siegel describes constitutional culture as being 'the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning'. This 'shapes both popular and professional claims about the Constitution and enables the forms of communication and deliberative engagement amongst citizens and officials' that sustain the Constitution.[79] This phenomenon 'mediates the relationship between law and politics'.[80]

She also notes that change in the culture happens gradually, and must persuade people in the community over time: 'innovative claims within a tradition, even if intelligible within a tradition, will remain marginal claims if they do not persuade.'[81] She explores the effect of campaigning for the ERA on social groups and officials, and mounts a careful and detailed argument for this process resulting in an informal change to US constitutional law—a 'de facto' ERA, where sex became a suspect classification in equal protection jurisprudence. This process was both enabled and delimited by the constitutional culture that motivates and informs discussions on constitutional meaning.

Siegel contrasts her use of culture to 'social values relevant to matters of constitutional law', another meaning of the term constitutional culture.[82] She notes that her project is not a full articulation of culture, which would be vast, multi-level, complex, and take into account myriad role moralities, norms, and modes of argument. Her project is more 'modest', in looking at culture as constraint on argument about constitutional meaning .[83]

Cover's constitutional narratives and Frankenberg's comparative layered narratives

Cover's Harvard Law Review Foreward 'Nomos and Narrative' is a landmark work of law and humanities scholarship, but it is also a major attempt to explore ideas around culture in

[79] *Ibid* 1325.
[80] *Ibid* 1327.
[81] *Ibid* 1359.
[82] *Ibid* 1325.
[83] *Ibid* 1351. See also several interesting, critical responses from Ackerman, Kramer, and Minnow in the same volume.

constitutional law. Cover's basic thesis is that we live in a normative world, and it is *narratives* that populate and structure this. It famously opens:

> We inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.[84]

Cover's point goes to the heart of legal meaning. The making of meaning in law, which he calls *jurisgenesis*, 'takes place always through an essentially cultural medium.'[85] Cultural here refers has a more literary and narratival meaning, but narrative has a similar force to culture in my telling:[86] 'The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior.'[87] He also uses the term 'tradition' to encompass much of the broader phenomenon I have described here rather than using the term culture itself.[88] All this builds to a discussion of the creation of constitutional meaning as a contest of different narratives, and the 'jurispathic' role of judges in *killing off* legal meanings, which is explored through an analysis of various aspects of US constitutional law.[89] Cover concludes with a plea for new constitutional meanings, an expansive and capacious constitutional culture, a case that 'we ought to invite new worlds.'[90]

[84] Robert Cover, 'Nomos and Narrative' (1983-1984) 97(4) Harvard Law Review 4, 4.
[85] *Ibid* 11.
[86] See below, and Kenny and Musgrove McCann (n 6).
[87] Cover (n 84) 10.
[88] *Ibid* 9. He also relies on the idea of interpretive communities, though not necessarily Fish's version; *ibid* 26.
[89] In particular, the case of *Bob Jones University v US* 103 S.Ct. 2017 (1983); see *ibid* 26 et seq, 40 et seq.
[90] *Ibid* 68.

Frankenberg, in a similar vein, considers narratives—and layers of narratives—as essential to the project of comparative constitutional law. One of the great challenges of the field is that 'it is not at all clear how laws and constitutions relate to culture, society, and politics—and how culture, society, and politics relate to laws and constitutions—in one's own and in other countries'.[91] The field would be stronger, Frankenberg argues, if it dedicated itself to seeing 'constitutions as shaping culture and culture as shaping constitutions.'[92] He suggests that in the realm of culture we can see constitutions as having layers of narrative, from high, lofty and symbolic to more prosaic and practical charters of governance and conflict resolution.[93] Only by telling and combining all these stories about constitutions, and understanding how these stories shape and are shaped by culture, can we overcome what he calls a 'pathetically narrow focus on legal norms and cases, legal processes and institutions.'[94]

Post's constitutional law and culture and Andrew Siegel's deeper account

Post sought to challenge the idea 'that constitutional law is and ought to be autonomous from the beliefs and values of nonjudicial actors'.[95] Culture is the name Post uses for such beliefs and values, and 'that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture… culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.'[96] Post analyses several US Supreme Court cases to show the ways in which the Court can try to separate constitutional law and constitutional culture, and how it can let them intermingle, as it so chooses. He discusses various different dynamics in this: the Court may try to lessen the influence of culture to protect constitutional rights, but constitutional culture itself is a function of the constitution and seeks to defend constitutional values in its own way. Moreover, the Court in its constitutional law is 'an institutional force capable of

[91] Günter Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology—toward a layered narrative' (2006) 4(3) ICON 439, 443.
[92] *Ibid* 446.
[93] *Ibid* 449.
[94] *Ibid* 451.
[95] Robert Post, (2003-04) 117(4) Harvard Law Review 4, 8.
[96] *Ibid*.

regulating culture', and the Court and the public can engage in a conversation about constitutional values.[97]

Post's vision of constitutional culture here is limited, in that it includes only beliefs about the constitution's meaning held by non-judicial actors. In this—though Post is denying the autonomy of constitutional law from the influence of public cultural values—Post is taking a restricted view of the operation of culture on constitutional law by not engaging with the idea of a *judicial* constitutional culture shaping what he is calling constitutional *law*. Andrew Siegel, in a 2016 article, develops something similar to Post's view of American constitutional law that goes further.[98] He suggests that many matters often explained by supposedly permanent and static constitutional concepts—like constitutional 'structure'—are in fact a product of context and historical contingency, and that much more of constitutional law is governed by 'messier, or more controversial' constitutional practices and arrangements than is often accounted for.[99] He offers constitutional culture—'an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes'[100]—as the best way to explain these realities. This seems to me to be a much fuller unpacking of culture's potential impacts than Post's account.

Amendment/referendum culture

Several scholars have used the notion of culture in trying to sketch out some of the factors at play in constitutional amendment. Ginsburg and Melton used the term 'amendment culture' to differentiate ideas of amendment *difficulty* and amendment *rate*.[101] Resistance and blocks to amendment are not merely institutional, but result from attitudes and dispositions towards amendment. They define amendment culture as 'the set of shared

[97] *Ibid* 10-11
[98] Andre Siegal, ' Constitutional Theory, Constitutional Culture' (2016) 18(4) Journal of Constitutional Law 1067; he says culture must be 'drawn broadly enough to also encompass the habits of thought and institutional arrangements that shape the behavior of those inside the judicial system.' *Ibid* 1111.
[99] *Ibid* 1106.
[100] *Ibid* 1107.
[101] Tom Ginsburg and James Melton 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 13(3) ICON 686.

attitudes about the desirability of amendment, independent of the substantive issue under consideration and the degree of pressure for change.'[102] Such a culture is not immune from change, and 'might vary over time even within a particular country, as political and social conditions change.'[103] They briefly mention many different examples of attitudes towards change that are part of such a culture, such as ideals of constitutional 'sacredness' in the United States, and the change starting in the 1980s in Brazil from previously having very few amendments to having very many amendments. But these are piece of analysis are brief, and the article focuses much more on amendment rate generally rather than on particular cultures. Ginsburg and Melton, in order to attempt a more 'rigorous' account of culture, develop a data-based proxy for amendment culture (of which I admit I am sceptical).[104] But their core argument—'that something we are calling amendment culture exists and is important', even more important than formal constraints and institutional blocks[105]—is significant.

Yokodaido takes up Ginsburg and Melton's concept to make a very useful contribution to the literature on amendment by explaining Japan's famously unamended Constitution of 1947 by reference to amendment culture.[106] He engages in a deep and searching consideration of the amendment debates in Japan, and the formation of popular, political, academic, and judicial constitutional attitudes and views on constitutional change. From this, he offers explanations for why a constitutional culture developed that produces remarkable—perhaps pathological—constitutional stability in Japan.[107]

In a previous work, I have posited the idea of a 'referendum culture'—a subset of constitutional and political culture—in Ireland that regulates and controls behaviours around referendums and constitutional change in politics, media, civil society, and the public. Drawing on Fish and others, I define this culture as 'a set of largely unspoken practices, conventions and assumptions that have developed, over time, from experience,

[102] *Ibid* 699.
[103] *Ibid* 700.
[104] *Ibid* 688, 708 et seq.
[105] *Ibid* 712.
[106] Satoshi Yokodaido, 'Constitutional stability in Japan not due to popular approval' (2019) 20 German Law Journal 263.
[107] *Ibid* 282-283.

and shape the ways in which referendums are conducted.'[108] I argue that this culture informs, animates, and supplements Ireland's fairly scant formal rules on referendum regulation and is 'as or more important than any formal rules and structures in the control of referendums'.[109] I suggest that this culture—which consists in, amongst other things, suspicion of vague referendum questions, conventions that resist disinformation, deep civil society engagement, and the separating of primary and secondary preferences in voting—has been essential to Ireland's relative success in using referendums as its means of constitutional change.[110]

III. Advancing the study of constitutional culture

Common threads

The accounts discussed above are all, I think, trying to get at the same phenomenon: a deep and influential role for cultural forces in constitutional law.[111] Saunders, Palmer, Roux, and Andrew Siegel, in particular, are engaged in similar projects, which also resemble my cultural projects in previous papers. What can we say about these attempts to examine culture? What do they have in common?

First, they are all tentative to some degree, generally proposing a scholarly approach that would need elaboration and broad adoption in order to develop. Though these scholars are generally not just highlighting culture but trying to *use* it to say something, they are not (yet) proposing broad programmes of work or fully-fleshed out concepts. Even those of us who are believers in the importance of culture are still at a somewhat early stage of figure out what to do about it.

Secondly, all these examples are limited in some significant way. Most of the examples—particularly those of US scholars—are mono-jurisdictional. Palmer's account is very clearly applicable to all constitutional cultures, but his approach to the question is to look in very great detail at the culture with which he is familiar. Very few attempts at comparison are

[108] Kenny (n 4) 205.
[109] *Ibid*.
[110] *Ibid* 208-219.
[111] Having canvassed much of the literature in this space, Herklotz offers three core elements of legal culture: beliefs and attitudes towards; practice and rituals; and institutional arrangements and symbols. Herklotz (n 9).

made, and when they are, the comparisons are limited. Ginsburg and Melton's mooting of amendment culture is highly comparative but is limited in subject-matter and is also very general. Saunders' consideration of culture is highly comparative, though the jurisdictions were all canvassed in detail by others the book she is writing in, and there is some subject matter limitation. Roux's briefly canvasses several jurisdictions, but only to make what I see as a negative point that they all reject a unitary model of interpretation. Attempting to explore constitutional culture previously, I limited myself to two similar jurisdictions dealing with very similar cases.[112] This affirms, I think, the idea that immersion in a system is crucial to understand culture, and comparison is a challenging enterprise.

Thirdly, the approaches are methodologically diverse, and not focused on articulating a methodology. We have few agreed tools to identify, measure, or consider culture. We rely a great deal on impressionistic assessment. Because most approaches are mono-jurisdictional, there is a great deal of reliance on deep knowledge of these system acquired over years of immersion. They are, perhaps, informal ethnographies. (Constitutional ethnography as a practice is discussed further below.) Saunders' comparative approach is built on multiple informal ethnographies assembled by others. My own work is either in this ethnographic camp, or in a similar dual-jurisdiction methodology discussed below. Ginsburg and Melton use a large scale data approach, but their approach is limited—as my own comparative method largely is—to being able to *display some cultural effect* rather than to precisely detail that effect or be able to say a great deal about it. Identifying places where culture is important is certainly important and a good starting point, but more will be needed.

Fourthly, most or all of these accounts have agree on several core features of culture:

- It exists in community and in groups;
- There is an extent to which its influence is subconscious and latent rather than obvious;
- It is not homogeneous and consistent across actors and time, but is variable and changing;

[112] See Kenny (n 7) and Kenny (n 53).

- It is both variable and reflexive in the sense of influencing various institutions, actors, behaviours which in turn change the culture;
- It is both enabling and constraining constitutional thought and action—culture forms the understandings that enable and direct constitutional action, and in so doing, limit action to within the bounds acceptability that these understandings create;
- It is an unavoidable part of constitutions and constitutionalism.

Finally, almost all of these accounts recognise that these features of culture that make it challenging to study.[113] Culture is not fixed and is constantly changing, but also is a product of context and history and so often demands a detailed historical lens. The historical origins of culture often blinds us to its contingency, as we are so thoroughly immersed in the culture that it seems natural to us. Since it is both conscious and subconscious in different parts and different ways, it is sometime amenable to direct argument and contestation, but sometimes is too deeply embedded for this to be possible. Since cultural relationships are reflexive and bidirectional, things affected and shaped by culture in turn affect and shape the culture itself. None of this makes it easy to pin down, and these scholars are aware of the problem that they face.

Constitutional culture mediates between structures and practices, between doctrine and actions, between text and interpretation, between theory and action. It will, therefore, be very complicated. But for it to be useful in our field we must find ways to grapple with its complexities. So where does that leave us? Where next for the study of constitutional culture? I want to tentatively suggest several subcategories of culture that we might consider focusing on, and some methodological directions.

Some objects of cultural study: constitutional subcultures

All good accounts of culture take account of its group nature, and its interconnectedness and reflexivity. Culture belongs to groups, and constitutional culture is a part of and an emanation of broader group cultures that surround it; it is not insulated from those forces. That is *a fortiori* true of different groups' cultural attitudes to the constitution, or different

[113] See a perceptive summary of many of these problems in Herklotz (n 9) [61]-[65].

constitutional subcultures. The constitutional culture of the judiciary and the constitutional culture of the political branches, say, are deeply interconnected, draw from the same sources, and influence each other in myriad ways. We cannot conceptually separate them. However, as these scholars show, there are differences in different groups' constitutional cultures, and these are interesting and important to note. Moreover, for the sake of understanding constitutional culture in action and more broadly, it may be useful to consider these as different variations on cultural themes and to treat them as more separate than they conceptually are. But it is crucial that in any such division, we remember the fundamental interrelation of culture, and the need to consider the plural relationships between types. We should not mistake these rule-of-thumb categories that help our work for strict *conceptual* categories that are insulated from others. Here, I briefly suggest some categories or subcultures of legal and constitutional culture that I think have the sort of significant bearing on the reality of constitutionalism and would be useful places to direct our attention.

- Culture of constitutionalism: similar to Saunders' object of study, a culture of respect for constitutional norms (general and specific), a set of conventions about how constitution works, a respect for values of constitutionalism that is necessary to create, preserve, or run a constitutional state.
- Culture of politics*:* the conventions and suppositions that animate politics are extraordinarily important to the operations of constitution, which could directly relate to the constitution or could concern 'ordinary' politics that will naturally come up against all sorts of constitutional directions, barriers, facilitators etc.
- Public political culture: the general public's and civil society's view of politics and political issues will be extremely important to constitutional matters, setting the bounds of the political; drawing the lines of acceptable and unacceptable political processes and outcomes; determining a society's democratic sensibilities; and influencing the kind of constitutional issues that will arise.[114]

[114] See further Weiss (n 60). Mueller uses culture as an alterative to, or perhaps an origin of, constitutional identity. See Jan-Verner Mueller, *Constitutional Patriotism* (Princeton University Press, 2007).

- Bureaucratic culture: the culture that animates the administrative state is extremely important for all manner of constitutional questions, including its attitude to legality, the rule of law, etc; its views on the constitution and its role under it; its view of interbranch relationships and its own accountability.
- Legal professional culture:[115] the culture of the community of legal practitioners and experts—its view on the constitution, the judiciary, the legal system, the political system etc—will have many effects on the operation of constitutional law.
- Judicial culture: a crucial subset of the legal and political culture within the judicial branch will set the limits of judging, the level of openness to new ideas and influences, and a great deal more that will shape the constitutional law that the judiciary makes.
- Legal academic culture: the legal academy of a country (or the comparative law field[116]) may, in some places, have a great influence on constitutional law, by influencing legal professional actors, judicial actors, or political actors.
- Amendment/referendum culture: as discussed above, the culture specifically related to constitutional change and amendment (there may be many other subject-specific cultures also).
- Thick/moral Culture: the primary moral values and normative commitments of a society obvious shape laws and constitutions, and protecting these values—and meeting the ends they direct us towards—is the *raison d'être* of a constitutional order, though the influence of such values should not be exaggerated.[117]

Some methods of cultural study

[115] The meaning of the term here is slightly different to Roux's, in large part because of a desire on my part to distinguish a culture amongst lawyers, judges, and the academy with these categories.
[116] Comparative constitutional law has its own culture, with attendant biases and suppositions. The field has the potential and (I think possibly problematic) aspiration to influence constitutional law around the world. The culture that underlies the field should thus be unpacked and carefully studied to see what its effects might be.See eg Duncan Kennedy, 'Political Ideology and Comparative Law' in Bussani and Mattei (eds.) *Cambridge Companion to Comparative Law* (Cambridge, 2012); Mark Tushnet, 'The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project' (2019) 8 Global Constitutionalism 29; Havercroft et al., 'Editorial: Decolonising Global Constitutionalism' (2020) 9 Global Constitutionalism 1.
[117] I have suggested elsewhere that these influences are often exaggerated to the expense of broader understandings of constitutional culture; Kenny (n 7).

If these subcultures give us a focus for studying constitutional culture, what about a method? How should we go about exploring culture? A starting point is that we should talk more about culture in our scholarship, and try out cultural explanations and frames when discussing various aspects of constitutional law. My suspicion is that many more constitutional scholars are engaging with culture in various ways than is obvious. In conversation, and in informal conference presentations, I find colleagues regularly elaborating on aspects of judicial or political culture to bolster their arguments or to try to explain, to those less immersed in a system, some peculiar feature of its constitutional law. However, it is less common for these insights to find their way into our published scholarship. This, I think, should change. But for this to happen, we need a level of methodological comfort with culture. If I am right that more people consider culture in constitutional law than actively integrate it into their scholarship, this is likely because of the methodological/definitional challenges that culture throws up.

In terms of definition, I do not know that very precise definition is either necessary or desirable. Legrand suggests a more functionalist approach; rather than engaging with the endlessness of debates about definition in anthropology, he chooses to ask 'how does culture work?'[118] I think the features identified as common threads in the scholarship discussed above give us a good place to begin. It would seem that constitutional culture is best expressed generally and worked out inductively in specific contexts from persuasive cultural analysis of practice.[119] This counsels against attempt to generalise culture beyond a few identifying features, and rather trying to piece it together by observing its effects. By its fruits we shall know it.

Comparative work seems useful for exploration of culture. I have argued previously that the contrast of legal systems often shows us cultural elements we do not see.[120] Scheppele

[118] Legrand (n 34) 374.
[119] Relatedly, there may be other concepts that are more specific than culture but that are unique to a certain concept, context, jurisdiction, etc. There is no need for cultural terminology to replace this other vocabulary, but links to culture might be drawn when appropriate and useful to draw these areas into broader debate. For example, I think the *acquis communautaire* of the EU has interesting cultural elements (particularly in respect of how it was 'acquired') and might profitably be considered as culture. But I do not think anything would be gained by trying to replace the prevailing language of acquis.
[120] Kenny (n 7).

notes similar experiences.[121] However, comparison is difficult, and cultural comparison more so. Seeing culture at work requires a degree of immersion in a system that is not easy to acquire. Cultures must also have a meaningful similarity to avoid a huge number of differences making any comparison fathomless. Different comparisons would also potentially show up different aspects of culture that may be hard to reconcile without an even deeper immersion. All this makes the enterprise very challenging.[122]

From this, we might say that immersion, allowing for induction, is the most promising way to unpack constitutional culture. I wish to outline two approaches that might help with this task: constitutional ethnography and comparative localism. I then briefly suggest a more speculative approach based on narrative and the humanities.

Constitutional ethnography

Anthropology and similar disciplines have many different ways to study culture, from surveys, to data-based approaches, to analytical-descriptive approaches that focus on higher-level instantiations or components.[123] Ethnography is the most well-known, and I think the most useful. The term refers both to a research methodology and to a type of account of culture.[124] It is a form of deep or thick description,[125] coming from a prolonged period of observation, immersion, or deep interviews, deciphering behaviour and language of the group to attempt to bring forth latent understandings not readily visible to cultural outsiders and perhaps not consciously seen even by insiders.[126] This a means by which the induction of the content of culture may be possible.

I think many legal accounts—even those which do not specifically try to unearth culture—have a quasi-ethnographic bent, being the product of deep and prolonged exposures to community. I take this to what Courtin and Fortin mean when they say that many lawyers

[121] See Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38(3) Law & Society Review 389, 398.
[122] Kenny (n 7) 109-110.
[123] See Stein (n 18).
[124] See Susan Bibler Coutin and Véronique Fortin, 'Legal Ethnographies and Ethnographic Law' in Sarat and Ewick (eds) *Handbook of Law and Society* 71, 72, and their history of ethnography 76-78.
[125] See Geertz (n 20) 5-6; Van Maanen (n 17).
[126] Coutin and Fortin (n 124) 72-73, citing Cresswell.

are 'para-ethnographers'.[127] But as a self-conscious practice, constitutional ethnography has not developed. A significant exception to this is Kim Lane Scheppele's 2004 article on the topic. Her argument, in short, is that constitutional circumstances are *particular*, not general. There is only so much that we can learn from the knowledge that certain kinds of constitutional systems last so long, that certain judicial appointments mechanisms produce good or bad results; 'knowing how constitutional regimes fare on a handful of variables abstracted from context may say little.'[128] Quantification can sometimes misunderstand what is important.[129] If you want to say more, constitutional ethnography is needed:

> Constitutional ethnography does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the mechanisms through which governance is accomplished and the strategies through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context. While any one specific constitutional setting has distinctive and ungeneralizable features, each constitutional context also has logics that link various specific features found in the particular case into patterns whose traces may also be visible elsewhere with different specific manifestations.[130]

A working definition of constitutional ethnography is 'the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape.'[131] This approach 'embraces nation, culture, and context as more than background assumption'.[132] While this focuses on the particular, it has broader ambitions. Ethnographies help to build understandings from the bottom up that will eventually

[127] *Ibid* 82.
[128] Scheppele (n 121) 390.
[129] *Ibid* 400, documenting a disagreement between her and a quantitative researcher on whether counting the number of dissenting judgment on the Hungarian constitutional court would reveal anything meaningful.
[130] *Ibid* 390-391.
[131] *Ibid* 395.
[132] *Ibid* 393.

produce 'a set of repertoires that can be found in real cases and that provide insight into how constitutional regimes operate' which will let us then 'see more deeply into particular cases' and even expect—though *not* predict—the future.[133] In short, detail-oriented comparative work can offer themes and lenses that will help us understand constitutional law more deeply, and help us see how 'national, local, and distinctive ideas modify the universalist ambitions of abstract constitutional theory' and local realities 'inescapably alter what can be seen as general meanings'.[134]

Scheppele notes that the ethnographic writings on constitutions are not new; it is a tradition characterised by Bagehot and Montesquieu. The tradition, however, is much fallen off.[135] Methodologically, ethnography used to mean on-site fieldwork, but in anthropology it now includes broader methods, including consulting histories and archives, and all sorts of methods of observation.[136] Describing her own experiences in Hungary and Russia, Scheppele notes the highly context-dependent nature of this; methods that seemed to work well in one place may provide inadequate results in another.[137] Perhaps the only common requirement is immersion; unless you have a pre-existing understanding the structures of a system, you will face great challenges at a distance. A small number of examples, treated in greater detail may be preferable: '[a]t the level at which constitutional knowledge is typically invoked—when comprehending existing constitutional systems or attempting to design new ones—knowing more about fewer cases tends to be more valuable than knowing less about more cases.'[138] This leads directly into my other methodological suggestion: comparative localism, and 'small-n' comparative studies.

Comparative localism and 'small n' comparative study

I think that this detailed, ethnographic approach would be fruitfully combined with comparison, specifically using a method I have previously called 'comparative localism'.[139] This methodology suggests focusing in great detail on a small number of jurisdictions to

[133] *Ibid* 391. Prediction would suggest a causal understanding of cultural forces which is not possible.
[134] *Ibid* 394.
[135] *Ibid* 392-393.
[136] *Ibid* 396.
[137] *Ibid* 397-8.
[138] *Ibid* 401.
[139] See Kenny (n 53); Kenny (n 7) 96.

explore particular constitutional phenomena within them to consider the depth and nature of differences that emerge in full context, or as close to this as we can get. Legrand notes that 'the comparative mind is always at a distance'.[140] But this distance can be kept to manageable levels if the comparison is kept to a small number of jurisdictions that can then be discussed in detail, rather than large sample or general, more abstract discussions. Detailed comparison of local practice can act as what Legrand calls a 'diagnostic', that shows us the role of local culture and cognitive structures in law.[141] Such detailed accounts, I think, are akin to ethnography, especially when given with the express intention of explicating culture, making this approach a form of comparative constitutional ethnography. We can induce more about a culture if we carefully compare it to places where similar cultural forces play out differently.

I have elsewhere proposed and practiced comparative localism by examining two constitutional jurisdictions I know extremely well—Ireland and Canada. In my first attempt, I argued that seemingly identical proportionality tests in the two jurisdictions—Ireland's being directly copied from Canada—were in fact very different in practice. Despite no linguistic variation in the tests, Ireland's test would be better described as a negative recasting of Canada's, and had very different effects. I argued that the facial similarity was a sort of rhetoric that masked differences in values and culture that played out in the test's application.[142] My second attempt looked at two nearly identical cases in the Supreme Court of each jurisdictions on the topic of a right to assisted suicide. Using detailed, situated comparison, I argued that the different results in the case were not a product of constitutional text or even broad moral/ethical priorities (which were in fact very similar), but a specific set of constitutional-cultural differences that led the two courts to deal with the constitutional issue in very different ways. Similarly to Schepele's suggestion that ethnography primarily reveals local difference and undermines universal or general claims, my use of comparative localism was to reveal cultural forces that show difference,

[140] Legrand (n 34) 387.
[141] Legrand (n 33) 60.
[142]

divergence, diversity, and complexity rather than helping to illustrate or bolster universals or abstract concepts.[143]

I think this sort of approach can illustrate and diagnose the role of culture effectively. But there are significant limitation of such a method. First, there are only so many cultures one can be familiar with in this level of detail. It takes time and immersion to reach this level of understanding—so too with any exercise in ethnography. However, there may be solutions to this by making use of other scholars' ethnographies, or collaborating with other scholars on to develop comparative ethnographies , that would allow comparison without full *personal* immersion in a system. This might provide interesting and useful insights, and give us lots of scope for future work. Secondly, it is very much easier to do this comparative cultural diagnostic in similar systems. The many similarities between Ireland and Canada are what enabled me to highlight important cultural differences; the cultural induction is possible because so many of the other, broader ways we could explain difference in practice—very different legal systems, adjudicative traditions, constitutional texts—are not available with these two examples. It may be challenging to conduct studies of this sort in very different systems and offer persuasive cultural accounts, as those broader explanation for difference will present themselves and cloud our ability to see more subtle cultural forces at work. This methodology, then, might have the effect of limiting our comparative horizons.

Thirdly, and relatedly, there is a risk that this methodology binds scholars to the systems where they were educated, or similar systems, or to systems within their linguistic or geographical reach. If the approach were widely adopted, this could have the effect of unintentionally exacerbating existing geographical divisions in the discipline by effectively limiting scholars' work to a small number of places or systems where they can immerse themselves effectively based on their place of origin or education. This in turn could have real impacts on careers, and the discipline overall. I think this is a major concern, and I have no easy solution to it. In an ideal world, there would be no career disadvantages based on

[143] I have suggested elsewhere it would result in a difference oriented or 'differential' comparative constitutional law. See Kenny (n 7).

what systems one studies, but this is not utopia. But I do think that 'large n' studies will struggle to say anything meaningful about culture, so we should consider whether and how these problems with smaller and more detail-oriented methodologies might be addressed.

Humanities-based approach

Another approach would be to lean into a very different methodology: a law and humanities study of culture. This has been undertaken by scholars involved in cultural studies of law. It is also something I have tentatively mooted before, suggesting that another way to describe constitutional culture was narratively: a story about the 'meaning, purpose, and importance' of constitutional law or concepts.[144] Understanding law's stories, and the way they shape meaning, may be a fruitful route to explore culture, and understanding constitutional narrative may give us access to some richer accounts of constitutional culture than we could get from small scale induction from detailed analysis.[145] Perhaps this could complement and build on the techniques discussed above. But constitutional law (and indeed law in general) lacks a narratology: a theory of narrative, its importance, and its origins.[146] Other than Cover and Frankenberg, discussed above, not many people have approached constitutional law in this way.[147] To try to forge tools for narratival analysis of constitutional culture would be to start more or less from scratch. Given that I also work in the field of law and literature, I find this prospect interesting and exciting, but other comparative constitutional lawyers may not. Looking at language—around which culture is so tightly bound—and a deep idea of translation might be another approach.[148] A fuller consideration must await another occasion.

Conclusion

[144] Kenny and Musgrove McCann (n 6) 235.
[145] Peter Brooks, 'The Rhetoric of Constitutional Narrative' (1990) 2 Yale Journal of Law and Humanities 129.
[146] Peter Brooks, 'Narrative Transactions – Does the Law Need a Narratology?' (2006) 18(2) Yale Journal of Law and the Humanities 1.
[147] See also Austin Sarat and Thomas Kearns, *Law in the Domains of Culture* (Michigan, 1998); Austin Sarat and Patricia Ewick (eds) *Handbook of Law and Society* (Wiley, 2015).
[148] See three interesting and quite different perspectives on language and translation in a deep and somewhat cultural frame: James Boyd White, Justice as Translation (Chicago, 1990); Jeanne Gaakeer, *Judging from Experience* (Edinburgh, 2019); Maartje de Visser, 'Constitutional Comparisons and Language', in Vicki Jackson and Madhav Khosla (Eds), *Comparative Constitutional Law: Redefining the Field* (forthcoming).

My case in this paper has been that constitutional culture is a hugely important facet of constitutional law, and that we should strive to know it, and its influence, more fully. Herklotz, in her excellent encyclopaedia entry, suggests that constitutional culture can be an independent variable, a dependent variable, and as a means by which to categorise constitutional practice.[149] Such a significant force is clearly worthy of our attention. However, culture is very hard to know. Our knowledge of it is always tentative, contingent, uncertain. It is hard to understand a subconscious, fluid, ever-changing, complex phenomenon. The strongest articulation of this problem would be that the culture is unknown, unknowable, vague, and changeable, and therefore unusable in constitutional scholarship. There is something in this critique. There is a long line of scholarship even in anthropology that queries if culture is the best focus of their studies. There are also potent concerns about the 'homogenizing and reifying tendencies' of earlier studies of culture.[150] There is a risk of culture being used to stereotype. There is a risk that is takes on a magic property of always filling whatever gaps we find when trying to understand something.[151] Culture risks being truistic and/or empty, or being a 'theoretical unmentionable':[152] something central to an explanation we are giving that we do not develop and can never unpack further.[153] We may end up no better than Dennis Denuto, arguing (although probably with more elaborate rhetoric) that 'It's just the vibe of the thing'.

These are concerns that we have to take seriously. But something being hard (or even impossible) to know or know fully does not mean that it has no impact on the object of our discipline. If culture does have an impact, which I think it clearly does, the difficulty in finding its precise nature cannot absolve us of the need to know it as best we can. If culture causes us difficulties for us as scholars because of its complex nature, I would suggest these are difficulties we already experience but do not grapple with, rather than difficulties

[149] Herklotz (n 9) [26].
[150] Sarat and Kearns (n 8) 4. Herklotz (n 9) [63] notes the 'essentialist, orientalist, or stereotypical understandings about foreign legal cultures' that marred earlier scholarship.
[151] Siegel highlights this risk in her account, noting it could be said that she claims culture enables just enough change, but also limits it to avoid threats to the status quo. Siegel (n 78) 1327.
[152] On this concept, see Pierre Schlag, 'Fiss v Zapp: The Case of the Relatively Autonomous Self' (1987-1988) 76 Georgetown Law Journal 37.
[153] For a similar general point about the explanatory work we ask culture to do, see Adam Gopnik, 'Culture Vultures', The New Yorker, May 24,1999: 'Every age has a term to explain things that resist explanation. The Elizabethans had Fate; the Victorians had History; we have Culture.'

created by engaging with culture. If we did nothing else, a robust understanding of culture's role in constitutional law would help us know what we have *not* accounted for (and perhaps cannot account for) in our field, and make our understandings *less incomplete*. That is no small thing. But more broadly, we will only know how useful cultural insights will be in our scholarship if we try to explore culture more fully. It seems likely to me that culture can highlight reasons for difference and divergence in similar legal systems or legal circumstances, adding new layers of understanding in our domestic and comparative constitutional contexts.

In short, the fact that the concept of culture is difficult, or vague, does not mean that we can cast it off; as Saunders puts it, with culture, '[a]voidance is not an option'.[154] Like Krygier's tradition, culture is 'inescapable'.[155] As it stands, not accounting for culture, we are seeing through a glass darkly. We may never see face to face, but we will see more clearly, I think, for the trying.

[154] Saunders (n 60).
[155] Krygier (n 49) 254.