

Dublin University

LAW JOURNAL

2015 ♦ VOLUME 38(2)

Published by Clarus Press

**In association with the School of Law,
Trinity College Dublin, the University of Dublin**

Conventional Constitutional Law

Oran Doyle*

Abstract—Judges share conventional understandings about what the Constitution requires, both of themselves and of other constitutional actors. These informal conventions lead to formal decisions, which are then centrally enforced by the state in the same manner as all other judicial decisions. This recognition of conventional constitutional law has three critical implications for our understanding, critique and reform of constitutional law. First, it is unlikely that judges will refer explicitly to their own conventions in their decision-making; however, scholars cannot provide an accurate explanation of constitutional law if they do not account for the possible role of conventional constitutional law. Second, although there is nothing inherently objectionable in conventional law, it is problematic that the interaction of conventional and written constitutional law allows the conventions of a judicial and legal elite attain the force of law for other people. Third, in some circumstances, it may be more effective to change constitutional law by changing how we select judges than by formally amending the text of the Constitution.

Introduction

The other articles in this volume address non-judicial constitutional conventions. These are patterns of consistent behaviour among non-judicial constitutional actors, deviation from which results in informal sanction rather than judicially authorised state sanction. It is likely that similar constitutional conventions exist among judges. For instance, in the Irish Supreme Court, there are unwritten rules about which judge sits in which seat. If a new judge tried to sit in the seat of the chief justice, there would be informal and social pressure for conformity but – presumably – no centrally enforced state sanction. In this article, I argue that judges also share conventional understandings about what the Constitution requires, both of themselves and of other constitutional actors. These informal conventions lead to formal decisions, which are then centrally enforced by the state in the same manner as all other judicial decisions. The set of conventional understandings is conventional constitutional law.

* Associate Professor, Trinity College Dublin. I am grateful to those who participated in the symposium on Conventional Constitutionalism in Trinity College Dublin on 15 November 2014 for their comments, and in particular to John Gardner for his presentation and discussion of the paper. I am also grateful to Garrett Barden, David Kenny, David Prendergast and Julien Sterck who then read the revised draft and provided further useful comments.

Conventional constitutional law is distinguished from other species of constitutional law in the following way. Constitutional text and judicial decisions are species of posited constitutional law. They are not unrelated entities: judicial decisions tend at least to be presented as interpretations of the constitutional text, or as a development of previous judicial decisions. David A Strauss captures this phenomenon, writing in the US context, by arguing that constitutional law has become a common law system.¹ Constitutional law develops through an evolutionary process that relies on earlier decisions, and that is marked by an unmistakable concern with matters of policy and political morality.² There is thus an accretion of interpretations on top of interpretations, cases on top of cases. Under this account, constitutional law consists of the text, the previous decisions and whatever can plausibly flow from the text and those decisions. The central claim of this article is that even such an expansive account of constitutional law is incomplete: as well as text, decision and common law, there also exists conventional constitutional law, in the sense outlined above.

Part I provides an account of conventional constitutional law, related to a general analysis of conventions and customary law. Part II canvasses different understandings of conventionality in order to sharpen that account of conventional constitutional law. Part III explores a number of examples from Irish constitutional law to demonstrate that conventional constitutional law exists in our constitutional order. Part IV then explores in greater depth different dimensions of conventional constitutional law that emerge from those examples. In Part V, I argue that the recognition of conventional constitutional law has three critical implications for our understanding, critique and reform of constitutional law. First, it is unlikely that judges will refer explicitly to their own conventions in their decision-making; however, scholars cannot provide an accurate explanation of constitutional law if they do not account for the possible role of conventional constitutional law. Second, although there is nothing inherently objectionable in conventional law, it is problematic that the interaction of conventional and written constitutional law allows the conventions of a judicial and legal elite attain the force of law for other people. Third, in some circumstances, it may be more effective to change constitutional law by changing how we select judges than by formally amending the text of the Constitution.

-
1. David A Strauss, *The Living Constitution* (Oxford University Press 2010). The phrase 'constitutional common law' seems to have been coined by Monaghan to identify a body of case law elaborated by the US federal courts to give effect to constitutional norms but which was subject to legislative over-ruling. See Henry P Monaghan, 'The Supreme Court, 1974 Term – Foreword: Constitutional Common Law' (1975) 89 *Harvard Law Review* 1. It is questionable whether common law in that sense exists in the Irish constitutional order. In any event, for present purposes I use the term in the sense elaborated by Strauss.
 2. Strauss (n 1) 62. This is similar to what Gerard Hogan, writing in the Irish context, has termed an *acquis constitutionnel*. Gerard Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 *Irish Jurist* 373.

I. Conventional and Customary Law

Legal systems are systems of laws. In this image, laws are posited, interpreted and enforced by those to whom authority to do so has been ascribed by other laws. However, it is not possible for any system of interlocking laws to bring itself spontaneously into existence: some human agency is required. The most plausible explanation is that pre-existing (and by definition non-positated) laws become linked together in a *legal system*. This has led many theorists to reflect on the character of such non-positated laws. HLA Hart identifies social rules as consisting of a general convergence of behaviour, where deviations from that behaviour are regarded as lapses or faults open to criticism.³ Where the general demand for conformity is insistent and the social pressure involves physical sanction, Hart would classify the rules as a form of law.⁴ Hart's account of social rules finds echoes in Neil MacCormick's presentation of queuing as an instance of normative order: normative because you ought to take your turn in a queue; order because it is not random.⁵ MacCormick contrasts normative order *simpliciter* with institutionalised normative order. In the latter context, institutions exist to promulgate, interpret and enforce the norms. At passport offices, rather than rely on informal conventions of queuing, there is a rule stipulating that you must take a ticket and will be served in accordance with your ticket order.⁶ Garrett Barden and Tim Murphy describe conventional law or custom as 'those judgments and choices that in recurrent kinds of circumstances are generally accepted and approved in a particular community'.⁷ This 'living law' is historically prior to posited law but not displaced by posited law: it generates the posited law on an ongoing dialectical basis.

We can develop MacCormick's queuing example to illustrate how that dialectic between posited laws and conventions might occur. The officials at the passport office might develop a rule among themselves that a person who comes with incomplete documentation (perhaps by forgetting her passport photo) should be given a time-limited opportunity to complete the documentation and return to the counter without having to take a new ticket and join the bottom of the queue.⁸ It is possible that the officials could arrive at this position through an interpretation of the posited rule. But it is equally possible that the new rule could arise conventionally. A non-officious official deliberately

3. HLA Hart, *Concept of Law* (2nd edn, Oxford University Press 1992) 55–7.

4. *ibid* 86.

5. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 14–20.

6. *ibid* 21.

7. Garrett Barden and Tim Murphy, *Law and Justice in Community* (Oxford University Press 2010) 3–4.

8. This is the practice at the driving licence office in Dublin. The mere fact that this is a rule of the officials does not make it an institutionalised rule; the rule is not made through the institutionally prescribed method for making rules.

breaks (and understands herself to be breaking) the posited rule. Over time, other officials come to behave in the same way until it can be said that there is now a general practice to this effect. This divergence between posited rule and convention might continue indefinitely or a new posited rule might be made that reflects the conventional practice. Either way, there is a dialectic between convention and posited rule.

This example also illustrates a difference between how we interact with posited rules and conventional behaviour. Posited rules (even if straightforward) involve verbal formulae that require interpretation before we can guide our behaviour with reference to them. Conventional behaviour, in contrast, can be participated in without any conscious moment of interpretation - we just follow the crowd. Of course, we can reflect on our conventional behaviour and offer interpretations of it. Borderline cases may positively require interpretation - for instance, does the conventional practice in the passport office apply to someone who has not even brought the application form? Nevertheless, ordinarily the participants whose behaviour constitutes the conventional practice need not interpretatively reflect on their practice simply in order to continue their participation in it.

In common law legal systems, conventional practices have traditionally been labelled customary law, albeit that the conceptualisation of customary law has shifted alongside the emergence and refinement of legal positivism as a broader theory of law. William Blackstone explained that the unwritten law consisted of general customs (the common law properly so called) and particular customs. They received their authority from long and immemorial usage and their universal reception throughout the kingdom or in the relevant part thereof.⁹ Jeremy Bentham, in his challenge to Blackstone, adopted a distinction between custom *in pays*, that of a local or general populace, and custom *in foro*, that of judges in court. For Bentham, consistent with his generally sanction-based account of law, neither custom could be legal unless there was punishment: this could occur through judicial adoption of a custom *in pays* or through the adoption by a superior court of a custom *in foro*.¹⁰ John Gardner adopts Bentham's distinction between custom *in pays* and custom *in foro* but treats customary law in precisely the opposite way.¹¹ For Gardner, a custom that is adopted by a court is no longer customary law; it is merely a source of law. Genuinely customary law arises only where there is an identity between those who regard the practice as normative and those whose custom it is.

Blackstone's view that the general customs of the common law reflected the general customs of the people was never plausible and, as historians of

9. William Blackstone, *Commentaries on the Laws of England* (1766) Introduction, 63: <avalon.law.yale.edu>.

10. Jeremy Bentham, *A Comment on the Commentaries and a Fragment of Government* (eds JH Burns and HLA Hart, Clarendon Press 1977) 182-4.

11. John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 66-74.

the common law have observed, deflected attention from the real power of a legal elite:

[T]he custom from which [the common law] stemmed was not that of the English people as a whole but of the lawyers... This is not to say that it was just judge-made: it was the product of the whole legal culture focused first on Westminster Hall and later on the Inns of Court, where lawyers lived, discussed, taught and learned together... It is easy for a legal historian to say this, rather harder for a medieval lawyer to do so: for him to have asserted that something was the law simply because the lawyers said it was would not have been obviously attractive.¹²

This anticipates the democratic objection to conventional constitutional law, to which I shall return in Part V.

Conventional constitutional law, as I have been using the term, is equivalent to Gardner's customary law *in foro*. However, that latter term does not have great currency and is understood in quite different ways within the common law tradition. Since its introduction into this context is as likely to confuse than enlighten, I prefer the term 'conventional constitutional law'. Nevertheless, given Blackstone's view that the common law consisted partly of custom, it is worth briefly reconsidering how conventional constitutional law relates to constitutional common law. Strauss states that 'precedents, traditions and understandings form an indispensable part' of what he terms the 'living Constitution'.¹³ For the most part, his book provides an account of constitutional common law as the elaboration of precedent rather than custom, focusing on free-speech protections, racial desegregation and the freedom to obtain an abortion. However, he mentions three instances from the US that might be characterised in terms of custom.¹⁴ This suggests that we could redraw our typology to include conventional constitutional law within constitutional common law. Nevertheless, in order to argue for the existence and highlight the distinctiveness of conventional constitutional law, I shall continue to treat it as a discrete category.¹⁵

II. Refining Convention

The accounts of convention and custom in the previous section all involved or presupposed concurrent behaviour on the part of individuals that is in some

12. David Ibbetson, 'Custom in Medieval Law' in Perreau-Saussine and Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press 2007) 165.

13. Strauss (n 1) 35.

14. First, the Supreme Court holding property qualifications for voting unconstitutional 100 years after they had been abolished everywhere. Second, the ratification of the administrative state in 1932. Third, Madison's suggestion that the uniform sanction of successive legislative bodies might best provide the true and safe construction of a constitution. *ibid* 119–24.

15. For the differences between precedent and custom, see Joseph Raz, 'Legal Principles and the Limits of the Law' (1972) 81 *Yale Law Journal* 823, 852–3 and Gardner (n 11).

way accepted or followed by those individuals.¹⁶ There can be good moral reasons for people to conform to the concurrent behaviour within their group,¹⁷ leading some to argue for a moralised account of conventional behaviour. Under this account, a convention exists only where there is good moral reason for people to conform to concurrent behaviour within their group.¹⁸ This moralised account cannot, however, fully explain the phenomenon of conventional behaviour. If people are not *as a matter of fact* motivated to conform to the concurrent behaviour, the pattern of concurrent behaviour would disintegrate over time, unless people had some independent motivation for concurrence. In that case, however, there would be nothing distinctively conventional about the concurrence of behaviour. The moralised account can feature in an explanation of situations where people are motivated to conform because they believe (even incorrectly) that the concurrent behaviour does provide a good reason for conformity.¹⁹ But it cannot explain situations where people are motivated by a concurrent practice to behave in a particular way, *despite* knowing that they have no good reason to do so. For instance, a moral coward might participate in the bullying of a social outcast, not because she believes she has reason to bully the outcast, but rather because of her own fear of ostracism. Indeed, it is quite possible to imagine a community of bullies, all of whom believe that they ought not to join in the bullying but nevertheless do so for fear of their own ostracism. Adopting the moralised account of conventions, we could not characterise this as conventional behaviour and would have to find another word for it. The fact that there is no obvious word to use suggests that the moralised account provides a problematic explanation of conventionality.

Furthermore, the application of the moralised account also requires an unlikely insight into what beliefs in fact motivate people. For instance, perhaps the bullies are committed social Darwinists who believe that the apparently weak should be outcasts. Or perhaps some are moral cowards and others are social Darwinists. In that case the behaviour would be neither conventional nor that other type of behaviour for which we have no obvious word. Nothing is gained by making the characterisation of behaviour as conventional depend

16. This reflects Ronald Dworkin's view that a community's concurrent morality only qualifies as conventional where the fact of the common position itself is taken to provide a reason for the position. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 53–4. HLA Hart, in his posthumously published postscript to *Concept of Law*, adopts this as an accurate statement of what he understands social rules to be. HLA Hart, *Concept of Law* (2nd edn, Oxford University Press 1994) 256.

17. Conformity to a concurrent behaviour of driving on the left-hand side of the road is the traditional example.

18. For a more sophisticated version of this, see George Letsas, 'The DNA of Conventions' (2013) *Law and Philosophy* 1.

19. Letsas could characterise this as a believed convention. Gardner requires something like this for customary law to exist – the participants must believe that the custom is normative. Gardner (n 11) 67–8.

on fine empirical distinctions for which there is unlikely to be any accessible empirical evidence. Instead, we should separate the phenomenon of conventional behaviour from the question of whether it provides a good moral reason to behave in a particular way. Concurrent behaviour is conventional simply where the fact of the concurrent behaviour motivates people to conform to the concurrent behaviour.

This account implicitly rejects any suggestion that conventions must solve coordination problems²⁰ or that they must be arbitrary rules in the sense that there must always be another possible rule that, if people actually followed it, would provide a sufficient reason for people to follow it rather than the rule that they actually followed.²¹ Conventions may solve coordination problems and they may be arbitrary, but they need not be so. All that matters is that people are actually motivated by the fact of the concurrent behaviour to act in that way. That said, the fact that a concurrent practice solves a coordination problem or is arbitrary may be evidence from which we can infer that people are motivated by the concurrent practice to conform their behaviour to it.

The conventional behaviour in my development of MacCormick's queuing example is conventional in this way. The officials in the passport office are motivated by their own concurrent practice to make an allowance for people without complete documentation. Their behaviour qualifies as conventional irrespective of whether they believe that the concurrent practice provides them with a good moral reason to behave that way (perhaps out of a concern for fairness and consistency) or they believe it is wrong but go along with it for the sake of a quiet life. My claim about conventional behaviour on the part of judges is the same. The judges who sit in the conventionally assigned seats may do so either because they believe they have an obligation to follow a reasonable solution to the co-ordination problem of who sits where, or they may do so because they do not wish to be ostracised by their fellow judges. The central claim of this article is that judges also sometimes behave in this way in respect of issues that are regulated by the constitutional text. This is what I call conventional constitutional law.

This account of conventions requires the identification of one physical fact (a concurrence of behaviour) and one psychological fact (the motivation of those who concur in that behaviour). This provides us with an explanatory account of constitutional adjudication, an account of what judges actually do. In this regard, it is an exercise in naturalised jurisprudence, consistent with Brian Leiter's reconstruction of American legal realism.²² The question for naturalised jurisprudence, according to Leiter, is, 'What must law be if current

20. David Lewis, *Convention: A Philosophical Study* (Blackwell Publishers 2002) (originally Harvard University Press 1967) 42.

21. Andrei Marmor, *Social Convention* (Princeton University Press 2009) 2.

22. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2010).

social-scientific theory of adjudication ... is to be true and explanatory?²³ The answer in the current context, I suggest, is that constitutional law must include conventional constitutional law. In Part III, I empirically defend, through the use of three examples, the proposition that the incorporation of conventions into our account of adjudication provides greater explanatory and predictive power, at least in the context of Irish constitutional law. This validates the inclusion of conventions within our concept of law.

The focus on convention adds another dimension to the debate between Hart and the realists. A simplistic history of this debate is that Hart defeated the realists by showing that law was not as indeterminate as they claimed. Leiter argues that this depends on a misrepresentation of the realist position. They did not make conceptual claims that law was indeterminate but instead argued empirically that there was a large amount of indeterminacy in appellate cases.²⁴ Even read this way, however, there remains significant disagreement between Hart and the realists over the extent to which the law determines outcomes in cases. My account of conventional constitutional law reconfigures this disagreement. It offers an explanation of how judicial decisions can be predictable, even where they do not follow from the posited rules: the decisions reflect knowable judicial conventions. The advantage of this account is that it builds in an explanation of why judges experience constraint when they are reaching conclusions that do not follow from the posited rules. Although my account of conventions does not require that judges believe the concurrent practice provides a good moral reason for conformity, it allows for that possibility. Where this is the case, judges will experience constraint in precisely the same way in which they experience the constraint of posited rules. This is preferable to an explanation that judges decide on the basis of their ideology, with written judgments serving only the purpose of 'the *concealment* of their ideological aims behind rhetoric which involves purporting to take the normativity of law seriously'.²⁵ Leiter observes that would be a 'striking fact about the practice' that requires an explanation. The notion of conventional constitutional law does not imply such duplicity and therefore requires no such explanation.

III. Irish Constitutional Law: Three Instances of Conventional Judicial Decision-Making

III.A Discernment of Conventional Decision-Making

It is unlikely that judges, in their written judgments, would describe their behaviour as conventional. Followers of convention are prone to perceive

23. *ibid* 188.

24. *ibid* 59–80.

25. *ibid* 191. Leiter attributes this view to Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

it as natural, not conventional.²⁶ It is easy to miss how existing regularities of behaviour play a role in deeply internalised decision-making processes.²⁷ Furthermore, even if judges were to believe that some of their practices were conventional, it would be difficult to articulate this as a justification for their practice. As Ibbetson noted in respect of medieval common law judges, the claim that we must behave this way simply because this is the way we behave is not an attractive one. For these reasons, the identification of conventional behaviour can only be a matter of inference. But how can scholars, who do not themselves experience the constraint, know whether to draw that inference?

The inference that conventions are in play should only be drawn if there is no plausible alternative explanation for a judicial decision. Given the broad way in which I have delineated the scope of non-conventional constitutional law (text, judicial decisions and constitutional common law), this is a difficult threshold to meet. This account of constitutional common law is agnostic on methods of interpretation: if a judicial decision can plausibly be justified on any interpretative basis, it does not count as evidence of conventional constitutional law. Furthermore, conventions can only be a more plausible explanation if there is a concurrent practice. But even this is not enough. Under my account, a convention only exists if people are motivated by the fact of the concurrent practice to conform their behaviour to that practice. This is a psychological question, in respect of which there will not be direct evidence. Nevertheless, it is possible to draw inferences about people's state of mind from their actions, from what they have reason to do, as well as from what they report as the reasons for their actions. For instance, if we can see that people have strong independent reasons to concur in a regularity of behaviour, it is reasonable to infer that the regularity of behaviour is just concurrent and not conventional. Conversely, if we can see – in Lewis's terms – that a concurrent practice resolves a coordination problem, it is reasonable to infer that a convention exists. Similarly, arbitrariness in Marmor's sense is also evidence of conventionality: if the fact of the concurrent behaviour did not motivate the participants, it is unlikely that an arbitrary regularity of behaviour would have emerged and sustained itself over time. Finally, some actors offer explanations of their actions. Although they might misunderstand or deliberately misreport their motivating considerations, such explanations do count as evidence of what their motivating considerations might be. For the remainder of this part, I consider examples drawn from Irish constitutional law that appear to meet these requirements.²⁸ This, of course, can

26. Cromartie attributes the 'extreme opacity' of customs partly to the fact that 'a well-established custom is not merely a constraint external to a person's character, but has a tendency, with time, to constitute an aspect of his being'. Alan Cromartie, 'The Idea of Common Law as Custom' in Amanda Perreau-Saussine and James Bernard Murphy (n 12) 203.

27. NW Barber, *The Constitutional State* (Oxford University Press 2010) 72.

28. This is an abbreviated account of doctrinal developments, designed to highlight certain features.

go no further than establishing that conventional constitutional law is part of the *Irish* constitutional order.

III.B The Demise of the Unenumerated Rights Doctrine

From the 1960s to the 1990s, the Irish courts developed a doctrine of unenumerated constitutional rights,²⁹ leading to the judicial recognition of rights such as the right to bodily integrity, the right to travel and the right to privacy. Significant academic reservations came to be expressed about what many saw as undemocratic judicial activism.³⁰ The rate of judicial enumeration of rights significantly slowed down in the late 1980s and early 1990s. Nevertheless, as late as 1997 in *O'T v B*, a majority of the Supreme Court identified a new unenumerated right, namely that of an adopted person to know the identity of her mother.³¹ However, Keane J delivered a strongly dissenting judgment, markedly sceptical of the unenumerated rights doctrine. Two years later, there was a significant change in the personnel of the Supreme Court, including the promotion of Keane J to the position of Chief Justice. Since then, there has been no case that squarely addresses the issue of the unenumerated rights doctrine, either to confirm its vitality or to rule it constitutionally improper.³² The consensus among academics is that the doctrine is no longer a source of rights.³³

29. [1965] IR 294.

30. See, for instance, Gerard Hogan, 'Unenumerated Personal Rights: *Ryan's Case* Re-evaluated' (1990–92) 25–27 *Irish Jurist* 95, 114.

31. [1998] 2 IR 321.

32. In *TD v Minister for Education* [2001] 4 IR 259, both Keane CJ and Murphy J expressed the view that it would be improper to create socioeconomic rights under the unenumerated rights doctrine. However, this point was not at issue in the case and was not addressed by the other three judges on the Court. Moreover, it did not amount to an express disavowal of the use of the doctrine in other cases. There are occasional flickers of life, quickly snuffed out. For instance, in *Duffy v Clare County Council* [2013] IEHC 51, the applicant rather opportunistically asserted an unenumerated constitutional right to swim in unpolluted water. Peart J held that it was not arguable that the desirable pastime of swimming in a particular area could be elevated to a constitutional right but did not address the continued vitality of the doctrine. Although this case could be seen as evidence of the continued vitality of the doctrine, it better illustrates the extent to which the doctrine does not feature in serious constitutional litigation.

33. Writing in 2003, Hogan and Whyte, editing the fourth edition of *Kelly: The Irish Constitution* comment: '[I]t seems unlikely that there will be any significant expansion in the canon of implied rights for the foreseeable future. In the first place, leading members of the present Supreme Court appear committed to a policy of judicial restraint. Moreover the jurisprudence of the past 30 years or so may have exhausted the potential of the Constitution to yield up any further implied rights.' Gerard Hogan and Gerry Whyte (eds), *Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) [7.3.70]. The latter comment holds true only if one assumes that socioeconomic rights could not be covered by the doctrine, which is itself part of the

This leaves a large corpus of case law, never overruled or expressly doubted by a majority of the Supreme Court, approving of the unenumerated rights doctrine. This coexists alongside a fairly uniform practice of practitioners never invoking that doctrine (even where it would help to win their case) and judges not relying on the doctrine of their own motion.

Constitutional doctrines change over time as different judges with different moral views take office. But the sudden disappearance of a constitutional doctrine without any definitive decision to that effect is not part of the normal evolution of constitutional common law. There are several reasons to infer that the concurrent practice of ignoring the unenumerated rights doctrine is conventional. There is legitimate and profound disagreement over the appropriateness of the unenumerated rights doctrine; some worry about minorities, others about judicial activism. One would expect these differences to manifest themselves in different judicial approaches. The fact that they do not suggests that the concurrent practice is itself a motivating factor. Moreover, there must be something to overcome the natural opportunism of advocates who could make use of the existing corpus of case law. There are several ways in which the concurrent practice could motivate people to continue to behave in the same way. If there is a general practice of not invoking the unenumerated rights doctrine, any advocate who does so sends a signal about the weakness of her case. Furthermore, there could be professional embarrassment for practitioners and judges who seek to make or use arguments based on a constitutional doctrine that 'everyone knows' no longer counts as good law. It is also plausible that judges and practitioners might see the concurrent practice of non-reliance on the unenumerated rights doctrine as a convention possessed of justificatory force. One of the arguments in favour of judicial restraint is that it leads to a better quality of democratic decision-making, when elected politicians know that they cannot leave difficult issues to the courts.³⁴ This value has its strongest force if practised conventionally, since the gain for democratic decision-making comes about only if judges more or less uniformly refuse to create new constitutional rights.

question. The previous edition of *Kelly*, from 1994, contained no such assessment of the vitality of the doctrine. James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall Sweet & Maxwell 2000) and Michael Forde, *Constitutional Law* (2nd edn, Firstlaw 2004) provide only cursory treatment of the unenumerated rights doctrine and do not offer any assessment of its vitality.

34. Morgan has commented: 'inappropriate reliance on the judiciary is a bad thing also for the political system. It is a sign of an immature or decaying political system if it has to call into play the judiciary to clean out its own Augean stables. Long-term, it is bad for democracy if the citizenry, instead of relying on themselves, think that they can rely excessively on the judges.' David Gwynn Morgan, *A Judgment Too Far: Judicial Activism and the Constitution* (Cork University Press 2001) 110.

Frederick Schauer comments that desuetude is like the formation of custom in reverse.³⁵ Could the demise of the unenumerated rights doctrine instead be explained, however, by reference to a constitutional common law rule of desuetude, such that an unutilised constitutional doctrine loses its validity? This does not seem plausible, given the short lapse of time between the application of the doctrine in *O'T v B* and its apparent demise post-2000. In any event, such an explanation fails to address how a constitutional doctrine could fall into desuetude in the first place.

All of these factors give us good reason to infer the existence of a conventional practice on the part of judges not to apply the existing constitutional common law of the unenumerated rights doctrine. In structural terms, this is the same as the officials at the passport office who develop a conventional practice of not applying the posited rule about queuing. The power of judges to enumerate new rights is hugely significant – whether one viewed it as a valuable protection for vulnerable minorities or an egregious interference with majoritarian politics. It is a highly salient feature of adjudication that such a doctrine can disappear from constitutional common law through convention.

III.C The non-application of judicial tests

The Constitution generally treats constitutional rights as non-absolute, leading judges to devise tests that differentiate between legitimate and illegitimate from the illegitimate interferences. A significant feature of Irish constitutional law, however, is that the courts seldom apply the tests that they articulate.³⁶ In *Heaney v Ireland*, the High Court considered a challenge to the constitutionality of s 52 of the Offences Against the State Act 1939, which made certain encroachments on the right to silence.³⁷ In order to test the legitimacy of these restrictions, Costello J imported into Irish law the proportionality test as stated in the Canadian case of *Chalk v R*:

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.

They must:—

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights are proportional to the objective.

35. Frederick Schauer, 'Pitfalls in the Interpretation of Customary Law' in Perreault-Saussine and Murphy (eds) (n 12) 26.

36. The same phenomenon exists in respect of tests in other areas of constitutional law, such as the non-delegation doctrine under art 15.2 of the Constitution.

37. [1994] 3 IR 593.

This test has become commonplace in constitutional rights adjudication where rights are infringed for general reasons of the common good. However, the courts have never applied the test precisely as it is written. There are very few cases in which the courts have applied limb (b) or (c) of the test.³⁸ In most cases, what the judges actually do is apply some equivalent to limb (a), a rationality test.³⁹ For instance, in *Iarnród Éireann v Ireland*, Irish Rail challenged the constitutionality of ss 12 and 14 of the Civil Liability Act 1961.⁴⁰ Keane J recited the proportionality test, but then upheld the legislation without conducting any inquiry in the terms of that test. He simply held that it was a reasonable choice for the Oireachtas to penalise the tortfeasor rather than the victim, given that one or other party was bound to lose out.

This is typical of the Irish courts' approach. With one exception, the disjunction between the text of the proportionality test and its application has not been judicially articulated.⁴¹ It is of course not uncommon for judges to articulate a test that proves unsatisfactory when applied in future cases.⁴² What is noteworthy here, however, is that the courts manage to act so consistently at variance with the posited constitutional law without any apparent experience of cognitive dissonance. There is no sense that they see the bare rationality requirement as an interpretation of the proportionality test; they simply apply it instead of the proportionality test. This position is so internalised that it is never explained, nor its difference from the constitutional common law justified.

Again, it is a reasonable inference that this concurrent practice is conventional. As with the officials in the passport office, there is a concurrent practice of acting other than suggested by the constitutional common law. There are several reasons for inferring that judges are motivated by the fact of this concurrent practice to conform to it. The very existence of the posited proportionality test illustrates that there are many plausible ways of testing the restrictions of constitutional rights apart from a rationality approach. It is therefore unlikely that convergence on the rationality approach could emerge without the practice itself functioning as a motivating factor for at least some of the participants. It is also plausible that judges might see the concurrent practice as a reason for conformity. If a judge is committed to the consistent treatment of litigants, she

38. *McNally v Ireland* [2009] IEHC 573, *Daly v Revenue Commissioners* [1995] 3 IR 1 and *King v Minister for the Environment* [2007] 1 IR 296 are very much exceptions.

39. See Rachael Walsh, 'The Constitution, Property Rights and Proportionality: A Re-Appraisal' (2009) 31 DULJ 1.

40. [1996] 3 IR 321.

41. In *Nottinghamshire County Council v KB* [2011] IESC 48, O'Donnell J commented that proportionality could be applied strictly to strike down a statute or generously to sustain it; the 'mere statement that something is proportionate is almost as delphic as the statement that it is reasonable'.

42. This has been the Canadian experience in respect of the minimum impairment aspect of the *Oakes* test. See Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 SCLR (2d) 501.

must see it as wrong for litigants to receive different treatment depending on which judge the case is assigned to. This provides her with a reason to ensure that her behaviour conform with any concurrent practice among her fellow judges.

The significance of this cannot be overstated. No constitutional rights claim can ever succeed unless a court determines that the interference with the right is illegitimate. That determination is at the core of judicial power *vis-à-vis* the other branches of government. For this to be determined by convention rather than by posited rule or constitutional common law is again a highly salient feature of constitutional law that calls for explanation.

III.D Interaction of the Constitution and the ECHR

The European Convention on Human Rights Act 2003 indirectly incorporates the ECHR into Irish law at a sub-constitutional level.⁴³ Notwithstanding the priority of the Constitution, the jurisprudence of the ECtHR appears to prompt changes in Irish judges' general understanding of human rights, which in turn leads to changes in constitutional doctrine. This dynamic is starkly illustrated by one recent case. The courts had previously protected the right of an accused person to reasonable access to a solicitor but held that this was not breached where the police questioned a suspect before she had the opportunity to consult with her solicitor.⁴⁴ In *People (DPP) v Gormley*,⁴⁵ the Supreme Court reversed this position, placing considerable reliance on the case law of the Strasbourg Court, particularly its decision in *Salduz v Turkey* that the guarantee of a fair trial ordinarily required that an accused person have access to her solicitor before being questioned.⁴⁶ The unanimous Supreme Court judgment altered Irish constitutional law to bring it in line with the Convention.⁴⁷

Clarke J identified a number of reasons as to why the state authorities should not be surprised by the judgment. He referred first to *Salduz*, as well as the fact that the possibility of *Salduz* itself was foreseeable. He referred to the judgment of the Court of Criminal Appeal in *People (DPP) v Ryan*, in which that Court had adverted to the need for a uniform practice for the treatment of accused people in custody, including access to a solicitor, ensuring conformity with the ECHR.⁴⁸ Clarke J later observed that the development being made by the Court had been

43. See Fiona de Londras and Cliona Kelly, *The European Convention on Human Rights Act* (Round Hall 2010); and Oran Doyle and Des Ryan, 'Judicial Interpretation of the European Convention on Human Rights Act 2003: Reflections and Analysis' (2011) 33 *DULJ* 369.

44. *People (Director of Public Prosecutions) v Buck* [2002] 2 IR 268.

45. [2014] IESC 17.

46. (2009) 49 EHRR 19.

47. This was important for the applicant as the constitutional remedies were preferable to those available under the 2003 Act.

48. [2011] IECCA 6.

anticipated in the judgments of foreign courts traditionally found persuasive by the Irish Supreme Court. In his view, the finding that the constitutional right to a fair trial encompassed the right of access to legal advice before questioning could 'hardly come as a surprise'.⁴⁹ This conclusion elides what was happening under the ECHR and in other jurisdictions with the Irish constitutional position. The facts of the cases before the Court predated the ECtHR's judgment in *Solduz*. Moreover, the Irish courts had never been persuaded before on this issue by the position pertaining in the USA, Canada and New Zealand. Still, two points stand out for present purposes. First, that the Supreme Court changed the posited constitutional law largely because of the ECHR position. Second, that Clarke J saw fit to comment that the state should have known that this would happen. The Supreme Court did not understand itself simply to be making a change in the posited constitutional law but rather that it was reflecting a change that had, in some sense, already occurred.

This suggests a conventional judicial understanding of what a fair trial requires – informed by foreign jurisprudence, the ECHR and the Constitution, but not rigidly dependent on any of them. Clarke J did not suggest that the state should have anticipated the conclusion in *Gormley* by reason of its merits, but rather because it had already happened. Whereas the first two examples involved a continuing disjunction between constitutional common law and judicial decision-making, this case shows judicial conventions pushing the development of the constitutional common law. In terms of the analogy with the officials in the passport office, this reflects the situation where the officials promulgate an exception to the queuing rule to reflect what has become their conventional practice.

IV. Five Reflections on Conventional Judicial Decision-Making

First, conventional decision-making functions best in small, tight-knit groups.⁵⁰ The Irish legal world is a small one, suggesting that it may be particularly fertile ground for conventional decision-making. All constitutional cases are heard and determined in one building in central Dublin. Fewer than 50 people have authority at any one time to make constitutional determinations. This caste of judges is remarkably homogeneous.⁵¹ By and large, they are upper middle class in background. The majority were educated in fee-paying schools prior

49. [2014] IESC 17, para 9.7.

50. Both Hart and Barden and Murphy rely on this in their explanation of how posited state law emerges. Hart (n 3) 92; Barden and Murphy (n 7) 34. See also Barber (n 27) 72.

51. For analysis of the make-up of the Irish judiciary, see Paul Charles Bartholamew, *The Irish Judiciary* (IPA 1971); Raymond Byrne, Paul McCutcheon et al, *The Irish Legal System* (5th edn, Bloomsbury Professional 2009) 143; Jennifer Carroll, 'You Be the Judge, Part I' (2005) 10(5) Bar Review 153; and Jennifer Carroll, 'You Be the Judge, Part II' (2005) 10(6) Bar Review 182.

to attending University. Following this, they would most likely have trained as barristers, membership of and success in that profession generally being a prerequisite for a senior judicial appointment. Whatever their social backgrounds, therefore, by the time they are serious candidates for judicial appointment, they must be exceptionally wealthy individuals working in a small professional caste. The small size, geographical concentration and homogeneity of the Irish judiciary allows for the informal communication and grasp of conventional norms.

Second, the preceding reflection causes us to specify our sense of community. The relevant community for this paper consists of judges and senior legal practitioners. These are the people who shape constitutional law through the arguments they choose to deploy and accept or reject. There is an element of hierarchy in this relationship since practitioners of course take their cue from judges. They seamlessly adapt to conventional constitutional law through their choice of which arguments to advance, and which to ignore. These practitioners in turn, however, play an important role in disseminating conventional constitutional law, since it is they who advise all the other constitutional actors, as well as litigants and members of the public, as to what the courts are likely to do if required to decide a constitutional case.⁵² The other constitutional actors, therefore, do not play an independent role in the formation of these conventional actions – rather they adapt themselves to the judicial conventions, as mediated by the senior practitioners.

Third, David Kenny has also drawn attention to the homogeneity of the Irish judiciary, arguing that they form an interpretive community – in the manner suggested by Stanley Fish – with particular views on how the Constitution should be interpreted.⁵³ For Fish, the notion of interpretative communities explains how interpretation can be relatively stable in the absence of an autonomous text: it depends on shared interpretative strategies within the community.⁵⁴ Addressing legal interpretation generally, Fish observes that ‘competent practitioners operate within a strong understanding of what the practice they are engaged in is *for*, an understanding that generates without the addition of further reflection a sense of what is and is not appropriate, useful, or effective

52. This is consistent with Leiter’s reconstruction of the realist position as a claim of how it is useful to think about law for attorneys who must advise clients what to do. Leiter (n 22) 71.

53. See David Kenny, ‘Merit, Diversity and Interpretive Communities: The (Non-Party) Politics of Judicial Appointments’ <tcd.academia.edu/DavidKenny> accessed 29 August 2014.

54. Stanley Fish, *Doing What Comes Naturally* (Clarendon Press 1989) 141. He describes the interpretive community as ‘a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community’s enterprise, community property.’ *ibid.*

in particular situations.⁵⁵ Although the insights of Fish and Kenny are similar to what I rely on here, there is a fundamental difference. My focus is not on the interpretation of text but on conformity with concurrent practices. However, if it is the case that practitioners learn interpretative strategies in the manner suggested by Fish, it is likely that they would learn about what is expected in their community in the same way.

Fourth, since each of the instances of conventional decision-making considered in Part III stands in opposition to an existing legal position, none solves a coordination problem. The prevalence of judicial conventions, however, may result from the general culture of following precedents. This is not to equate conventions with precedents. Whereas both involve past actions that motivate behaviour, they function in very different ways. Precedents are deliberately intended to resolve a particular dispute in the knowledge that they may be used to resolve similar disputes in future. They consist of single decisions. In contrast, conventions require a general pattern of behaviour (not just one instance) and motivational significance may attach to that pattern of behaviour over time, without any collective intention that this should occur. Nevertheless, a culture of following precedents may engender a culture of conforming to concurrent behaviour more generally.

Fifth, as I noted at the start of Part III, those who observe conventions are prone to perceive them as natural, not conventional. Of course, participants within the practice have the capacity for critical self-reflection and may be able to disinter the conventional characteristics of their own behaviour. In contrast, those outside the relevant community do not themselves experience constraint and therefore may miss the way in which convention influences decision-making processes. They can only do their best to reconstruct the most plausible explanation of a particular practice. Of course, it is impossible to be a truly external observer. Those who write about these things have some insider knowledge – some experience (whether first or second hand) of judicial practice. Specifically, I approach these issues as someone who has been an insider in Irish constitutional law, partly as an academic commentator but more relevantly as a barrister preparing and sometimes arguing constitutional cases before the Irish superior courts. A practitioner learns (whether through bitter experience or the instruction of those more senior, ie more internal to the practice) which arguments will work and which will not. Court advocacy involves marshalling the posited rules and constitutional common law in support of conclusions that are beneficial to one's client while feeling right to judges. This experiential knowledge precludes me from adopting a wholly detached perspective on Irish judicial decision-making – I am fated to understand the practice partly through my own experience of it. This insider knowledge is both hindrance and help. On the one hand, it inevitably relativises my observations. On the other hand, if the

55. Stanley Fish, *There's No Such Thing as Free Speech* (Oxford University Press 1994) 225.

conceptual account of conventions is correct, insider knowledge may often be necessary at least to select examples that an external observer can infer are conventional.

V. Implications

Conventional constitutional law exists alongside and in dialectic with the constitutional text, judicial decisions and constitutional common law: sometimes there is a disjunction between the two; other times conventional constitutional law generates new constitutional common law. As the examples in Part III show, conventional constitutional law can govern some of the most important features of constitutional law. It is not amenable to legislative override and owes more to the culture of a legal and judicial elite than it does to any democratic authorisation through posited constitutional channels. This has three important implications: for how we conduct doctrinal analysis of law; for the democratic justifiability of the judicial role and, relatedly, how we select judges; and for how we reform constitutional law.

Doctrinal analysis of constitutional law typically involves common law method. It starts with the posited parts of constitutional law, both the text and previous decisions, traces the connections between them and identifies what outcomes are interpretatively sustainable or compelled. Legal practitioners present arguments on behalf of their clients in these terms. Judges write judgments that resolve disputes within the same framework. Much academic writing is parasitic on the judicial practice, offering an account of how doctrines have developed in the past or should develop in the future. All of this is radically incomplete if it does not engage with conventional constitutional law. Practitioners are associate members of the community that generates and is governed by these conventional practices. Their cash value depends much on their knowledge of conventional constitutional law, in order both to advise clients on whether to litigate and to formulate the arguments with the greatest chance of success. However, they need not articulate this knowledge, not even to themselves. Indeed, the obligation to secure the best outcome for their clients may positively militate against being transparent about how conventional constitutional law figures in their submissions to judges.

Scholars, in contrast, have no obligation other than to ascertain the truth about constitutional law, whatever that might be. The difficulty for scholars, as explored above, is that of external observers identifying conventional behaviour. Even if such knowledge can be obtained, how is it to meet the standard for academic knowledge, where every assertion must be cited and the domain of acceptable reference points is largely limited to written sources? There are good reasons for expecting academic knowledge to meet this standard. It is all too easy to postulate an X-factor that explains judicial decision-making, particularly if we also postulate that there cannot be direct evidence for it. Nevertheless, court judgments are not the only legitimate reference points for legal scholars. The approach adopted in Part III sets an exacting standard

for the identification of conventions in judicial decision-making, while allowing the existence of such conventions to be inferred where appropriate. This is the approach that legal scholars should take. Importantly, though, this is not just a task for rarefied law-journal articles directed to the epigones. Constitutional law ought to be explained to the public and taught to first-year law students in these terms.

It is less clear whether judges should refer to conventional constitutional law in their decision-making. On the one hand, a judgment should record the reality of how a judge has reached her conclusion. On the other hand, the comments of Ibbetson with respect to medieval judges also apply here: the proposition that something is law simply because the lawyers say so is not particularly attractive. However, there are circumstances in which it can be morally justified to follow a convention: perhaps it solves a coordination problem that needs to be solved; or perhaps it ensures consistency of treatment in the absence of any posited rule. It is difficult to see how this could be the case where the conventional constitutional law contradicts the posited constitutional law, since the posited rule should be adequate to solve the coordination problem or ensure consistency of treatment. We can only know if such justifications hold true, however, if they are openly articulated and defended on the face of judgments. The judgment of Clarke J in *Gormley* approached this standard: it articulated the evolving conventional understanding of what a fair trial required, leading to an advertised change in the posited constitutional rules. Judges should therefore try to isolate and identify the conventional aspects of their decision-making and present it on the face of their judgments. This would open up conventional decision-making to the demands of public reason and might reduce reliance on conventional decision-making where it is inappropriate.

It is unlikely that judges would be so open, however. Apart from anything else, those whose behaviour is governed by convention often do not perceive this to be the case. The result is that conventional constitutional law will likely continue to play a large, but unacknowledged, role in constitutional decision-making. This is democratically problematic. Although conventional law has *a priori* no greater or lesser claim to legitimacy than posited law, the conventional practices of judges endowed with significant power by posited law raises its own concerns, since those practices become posited rules for *others* to follow. In this context, conventional norms are not a community's own informal response to the issues that confront it but rather the superimposition of one community's values, through the coercive power of the state, onto another community. This is far greater than the power of common law judges applying customary law, since conventional constitutional law cannot be overturned by statute. For this reason, the way in which conventions resolve fundamental questions in Irish constitutional law is deeply troubling.

Finally, the prevalence of conventional constitutional law points to another avenue of constitutional change. Rather than amend the text through the prescribed process, or encourage judges to adopt new interpretations of the Constitution, one can seek to alter conventional constitutional law. Conventions,

however, are not amenable to deliberate change: the conventional status of a practice derives from how it is subsequently treated, not the intentions of those who first engage in it. Nevertheless, it should be possible to change conventional constitutional law through an abrupt and radical change to the way in which judges are selected and to the pool of people from which they are chosen. Gradual change would not suffice as new judges would likely just conform themselves to the existing judicial conventions. The difficulty with such an approach, however, is how to predict what sort of conventions the new legal elite would bring with them and develop. Nevertheless, in some circumstances change to the community of judges may be the only effective way to change some aspects of conventional constitutional law. Where the conventional constitutional law determines a general approach and stands in opposition to the posited constitutional law, there is nothing that a formal amendment can directly address. Consider how we would amend the Constitution to ensure a more interventionist approach to the constitutional review of legislation. Although judges might change their approach in response to a constitutional amendment, it is also possible that rationality review would continue as before, but couched in the language of the new constitutional text. In much the same way as the conventional constitutional law of rationality review survived the judicial promulgation of the proportionality test, it might survive the popular promulgation of an alternative approach. If this were the case, changing the class of judges would be the only remaining way to change the Constitution.