

RESEARCH ARTICLE

Out of ‘time out of mind’: The emotional experience of time and the English constitution between the seventeenth and nineteenth centuries

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Abstract

This article investigates the role of the emotional experiences of time in the constitutional debates of the seventeenth and nineteenth centuries. It posits temporality as a shared, collective and emotional experience, rather than an external and natural line where events develop unidirectionally. As such, temporality is proposed as a new analytical framework for exploring the shift from a past-oriented to a future-oriented constitutional theory from the seventeenth to nineteenth centuries. Adopting this perspective, this shift in constitutionalism is framed, in part, as a response to different emotional experiences of time. Focusing on the writings of Coke in the seventeenth century, and Bentham and Godwin in the nineteenth century, this article also identifies a point of continuity between the past-oriented claims for legitimacy of the English constitution in the seventeenth century and the future-oriented ones in the nineteenth century, and indicates new paths for future investigation. Questioning the role of historicity in the legitimization of the English constitution in the seventeenth century, and the role of progress in the nineteenth century as ‘past’ and ‘future’, this article proposes to analyse these temporal categories as a qualified ‘immemorial’ past as opposed to a qualified ‘timeless’ present ruled by the steady category of progress.

Keywords: continuity and discontinuity; emotional experience of time; legitimization processes; temporality and constitutionalism

Introduction

This article examines the shift between past-oriented and future-oriented constitutionalism through the lens of the emotional experience of time.¹ I argue that legal and political processes, in many ways, constitute responses to temporality. These responses to temporality operate in the less-than-conscious level, rather than constituting intentional creations and manipulations of time as if it were a political tool. Characterising the

¹Note to the reader: Parts of this section have been taken from my PhD thesis “‘It’s alive!’: the emotional experience of time and the legitimization of case law in the nineteenth century”, supported by the HSS Principal’s Research Studentship at Queen Mary University of London.

experience of time as an *emotional* experience, this article will highlight the less-than-conscious processes as active agents in processes of legitimation, such as the ones seen in moments of constitutional crises.

Different studies on law and temporality, and on law and emotion, have, in turn, brought to the fore the two elements that compose the lens of this article. Juxtaposing time and emotion in the analysis of processes of legitimation allows for a deeper understanding of not only the underlying less-than-conscious processes of the questioning and justification of legal and political systems, but also how these processes can be particularised and contextualised in relation to a specific experience of time.

In order to demonstrate the role of the emotional experience of time in processes of legitimation, I will frame the shift from a past-oriented constitutionalism in the seventeenth century to a future-oriented constitutionalism in the nineteenth as different responses to different emotional experiences of time. Through this lens, and considering the emotional experience of time as part of the constitutional debates of the seventeenth and nineteenth centuries, I identify one common trait between ‘classical’ and ‘modern’ constitutionalism²: whether the claims for legitimacy were based on the ancient character of the constitution or its capacity to uphold and maintain order for the future, I argue that *a-historicity* played an important role in these claims for stability of the constitutional order.

Temporality is an important, albeit frequently overlooked, source of legitimation. Time, in its social and shared dimension, and given its malleability and aspect of naturality, allows the manipulation of temporality for purposes of legitimation to go unnoticed.³ It is by inserting the shift between a past-oriented justification of the English constitution to one that is future-oriented in the context of a new experience of time in the nineteenth century, marked by the shift from a history of continuity to one of discontinuity, that this article proposes a new approach to the study of constitutionalism as, partly, a response to temporality.

Critiquing the overly rigid division between discovery and justification – that is, between the process through which one comes to a decision and the rationale one uses to explain this decision – Del Mar proposes a model of inquiry that ‘goes beyond, but also overlaps with’⁴ discovery and justification. It is within this framework that we are able to consider as constitutive of inquiry these ‘less-than-conscious’ processes, including imagination and emotion.⁵ Although Del Mar’s work is aimed at analysing processes of adjudication, it is helpful to consider that, in thinking and writing about law, theorists are also working within a social, interactive, collective, diachronic and experimental process, rather than the individual genius coming to purely rational conclusions as analyses concerned only with ‘justification’ usually conclude.

²N.B.: ‘classical’ constitutionalism, as opposed to ‘modern’ constitutionalism, does not correspond – for the purposes of this article – to the historical categories of ‘classical’ and ‘modern’ (ie, ‘classical’ as referring to Classical antiquity and ‘modern’ to the post-medieval period). Rather, this is the terminology used by C Weston, *English Constitutional Theory and the House of Lords 1556–1832 (Routledge Revivals)* (Routledge, 2010, London). This means that the ‘classical’ constitutional theory is the one associated with the theory of ‘mixed’ government, here called ‘past-oriented’ constitutionalism, whereas the ‘modern’ constitutionalism relates to ‘future-oriented’ constitutional theory and the appeals to an ‘unmixed’ or ‘pure’ democracy.

³NC Lazar, *Out of Joint: Power, Crisis, and the Rhetoric of Time* (Yale University Press, CT, 2019).

⁴M Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing, 2020, London) 38.

⁵Ibid 29–77.

Although the constitutional debate of the seventeenth century is evoked to illustrate a different response to a different emotional experience of time, the focus of this article is on nineteenth-century temporality and modern constitutionalism as a response to it. I will explore the writings of Coke in the seventeenth century to illustrate the 'classical' past-oriented constitutional theory, and those of Bentham and Godwin in the nineteenth century, as representative of the 'modern' future-oriented constitutional theory. In this shift, I identify one similarity between the past-oriented and future-oriented legitimization of the English constitution: along with the past–present–future categories of the role of temporality in the law, constitution and processes of legitimization, considering the role of *a-historicity* may also reveal a path for future investigation.

First, I argue that highlighting the collective and emotional dimensions of the experience of time as a lens of analysis allows for the understanding of legitimization crises as responses to our relationships with time; second, I claim that the seventeenth-century constitutional debate and Coke's defence of the English constitution based on its ancient character constitute responses to an experience of time as continuous; third, I claim that nineteenth-century future-oriented constitutionalism is a response to an experience of time as disruptive. Throughout these analyses, I identify a thread of continuity in this shift: a claim for *a-historicity*.

Temporality, emotion and legitimization

To frame the shift from a past-oriented to a future-oriented constitutional theory as responses to different emotional experiences of time, I will first consider the emotional experience of time and its role in processes of legitimization.

Temporality is not a neutral 'spatial' line in which to allocate events: on the contrary, temporality is a human, embodied and communal experience. Lazar argues that 'time itself' cannot be experienced; all human experience with temporality is mediated. While Lazar focuses on modes of mediation that refer to and quantify the passage of time, I highlight the *emotional* filter of experience. This means that the experience of time is not objective or neutral, but subjective, historically and culturally contingent.⁶ Lazar contends that if there is such a thing as 'time itself' or an 'objective' temporality, it is not with this external time that we engage in our individual or collective experiences. We experience time through, among other things, clocks, daylight or the crowing of a rooster. However, it is not only through technologies of counting the passage of time that we engage with temporality. I argue that temporality is also experienced through *emotion*, stirring, confirming or creating feelings of anxiety, security, melancholy or optimistic anticipation. *Emotion*, in this context, is the mediator that structures our experience of time as time itself.

Emotion is here understood as a process that is both conative and cognitive: an *embodied knowing* of the world. In other words, it is by judging something to be dangerous (whether that judgement is correct or not) that I am afraid of it; and it is only through my fear that I can recognise danger.⁷ In terms of temporality, it is through this conative and cognitive process that we experience time. In the context of the nineteenth century, if time seems to be accelerating and if it is being known as disruptive and

⁶Lazar (n 3).

⁷RA Furtak, *Knowing Emotions: Truthfulness and Recognition in Affective Experience* (Oxford University Press, 2018, New York) 55–58.

unstable, it is because acceleration, disruption and instability were felt; if time felt accelerated, disruptive and unstable, it is because it was known as such.

That time is relative to the individual experience has been studied and established in psychoanalytic scholarship.⁸ But time is also relative in the *collective and communicative* dimension of experience. It is relative because we experience it through emotion. It is because emotion is communicable and experience is shared that we can talk about a collective emotional experience of time. This collective emotional experience of time, in turn, informs and is informed by processes of legitimation.

By a 'collective emotional experience of time', I mean the points of convergence and identification that can be found in diverse cultural, literary and historical articulations of temporality in the West throughout the nineteenth century. Rather than suggesting that the emotional experience of time is uniform, even in its collective dimension, what I aim to highlight are the emotional components of these points of convergence.

That which various studies on modernity call 'acceleration',⁹ the 'shared feeling of living in a revolutionary age',¹⁰ the 'break with the past'¹¹ or the 'melancholy for the stability of the past'¹² refers to an experience of time that cannot be entirely (if at all) explained without recourse to something less-than-conscious, something I am here naming *emotion*. Whether articulated in text, image or normativity, what the category of 'collective emotional experience of time' aims to highlight is the commonality and communicability of traits of an experience that happens not purely in the realm of 'justification', but are not entirely identifiable within a logic of 'discovery' either: it is an experience that happens at the less-than-conscious and the conscious levels. The two are indissociable.

Studies relating temporality and constitutional theory, such as Parker's analysis of originalism and the re-insertion of constitutionalism in history post-World War II,¹³ and Forbath's study of the 'politics of history' in 'constitutional change',¹⁴ show that the accusation that lawyers produce a 'law-office history' (the deployment of history for purposes of legitimation of continuation, creating a past that 'serves' the present) is not always accurate.

Parker indicates that the historical concern of constitutional theory in the twentieth century made for a recognition that history is human-made, and for a shift in constitutional focus from 'truths, ends' to 'means, methods, procedures and processes'.¹⁵ This is a

⁸See, eg, S Freud, 'Constructions in Analysis' in J Strachey and A Freud (trans), *Moses and Monotheism: An Outline of Psycho-Analysis and Other Works*, vol 23 (The Hogarth Press and The Institute of Psycho-Analysis, 1964, London); K Noel-Smith, *Freud on Time and Timelessness* (Palgrave Macmillan, 2016, London) <https://doi.org/10.1057/978-1-137-59721-2>; J Lacan, 'On the Subject Who Is Finally in Question', *Écrits* (W. W. Norton & Company, 2006, New York); J Lacan, 'Logical Time and the Assertion of Anticipated Certainty', *Écrits* (W. W. Norton & Company, 2006, New York). You might need to include pincites here before publication.

⁹R Koselleck, S-L Hoffmann and S Franzel, *Sediments of Time: On Possible Histories* (Stanford University Press, 2018, Stanford); H Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press, 2013, New York); C Bode, 'Europe' in N Roe (ed), *Romanticism: An Oxford Guide* (Reprinted, Oxford University Press, 2008, Toronto).

¹⁰M Berman, *All That Is Solid Melts into Air: The Experience of Modernity* (Nachdr, Verso, 2002) 17.

¹¹P Dann, 'Temporality and Liberal Constitutionalism' in TA Börzel, J Gerschewski and M Zürn (eds), *The Liberal Script at the Beginning of the 21st Century* (1st edn, Oxford University Press, Oxford, 2024).

¹²R Terdiman, *Present Past: Modernity and the Memory Crisis* (Cornell University Press, 2018, Ithaca).

¹³K Parker, 'What Originalism Can Teach Historians: History as Analogy, Means-Ends Tests, and the Problem of History in Bruen' (2024) 99 *Notre Dame Law Review* 1541.

¹⁴WE Forbath, 'Constitutional Change and the Politics of History' (1999) 108 *The Yale Law Journal* 1917.

¹⁵Parker (n 13) 1546.

consequence, among other elements, of the recognition and acceptance of uncertainty: foundational history must be replaced with antifoundational history when a direction can no longer be found. The twentieth century, Parker points out, saw the same antifoundational history dismantle the idea that law was composed of 'truth, morality, logic and rationality'.¹⁶ This is also part, and a consequence of, an emotional experience of time: first, the nineteenth century abandons foundational history when a history of continuities is replaced by one of discontinuity, replacing it with 'truths' – which are *a-historical*; second, although not the object of this article, twentieth-century constitutionalism must abandon timeless truth and instead turn to regulating the processes of *making* and *changing* the constitution.

The emotional experience of time also plays an important role in understanding constitutional historiography. Allowing for a past that is contingent and leaves the future open-ended, the historian, as opposed to the legal historian, produces a more future-oriented work. Forbath concludes in his analysis of Ackerman's *We the People: Transformations*.¹⁷ That is because the legal historian is more concerned about the past as binding. This evidences the claim to *a-historicity* that appears in the constitutional debates of the seventeenth and nineteenth centuries: rather than a claim for a contextualised, contingent past that allows for different possible futures, the legal historian seeks to control the future through present claims of an *a-historical* past. Whether this *a-historical* past takes the form of a past that is 'immemorial' in the seventeenth century, or of the timeless truth of the nineteenth, law's claim for stability requires distance from historical contingency.

In 'Temporality and Liberal Constitutionalism', Dann brings temporality to the forefront of constitutional debates. By recognising that liberal constitutionalism shaped and was shaped by conceptions of past, future, sequence and pace, he develops a framework to analyse these four categories in contemporary constitutional theory. Dann begins this discussion by attributing a future-oriented character to liberal constitutionalism: rather than being bound by the past, liberal constitutions open space for the future to be shaped by the majority. The tension between allowing the law to be shaped by the majority and guaranteeing security and continuity makes itself present still.¹⁸

Considering Dann's investigation of the role of temporality in the constitutional debate through the lens of the emotional experience of time, I propose a new lens for understanding the *future-orientedness* of modern liberal constitutionalism.

Analysing crises and processes of legitimisation, '[c]laims to legitimacy', says Lazar,

ultimately draw from two wells. First, leaders may try to associate a political order with some underlying idea of order that is already accepted as legitimate. Here, because a temporal construction invokes nature or reason, time framing is among the useful available tools. Second, leaders may stake their legitimacy on a claim (and performance) of capacity to maintain just order and security. Through the apt organization of time in the service of managing risk, and the display of a capacity to do so, using time as a frame helps leaders draw from this other well of legitimacy too.¹⁹

¹⁶Ibid 1559.

¹⁷B Ackerman, *We the People, Volume 2: Transformations* (Harvard University Press, 2000, Cambridge, MA (US)) <https://doi.org/10.2307/j.ctvj2z0k>.

¹⁸Dann (n 11).

¹⁹Lazar (n 3) 17.

The nineteenth century, characterised by a 'break with the past', or 'the end of history',²⁰ saw the first well of legitimation Lazar refers to, that is, the recourse to the familiar, to the past, become increasingly less helpful than the second. Within an emotional experience of a time of disruption, where continuity and tradition once dominated, claims to the capacity to 'maintain just order and security' became more important than the 'order that is already accepted as legitimate'.²¹

This is what Körtvélyesi recognises in his comparative study of the Hungarian and the American constitutional processes:

Indeed, legitimizing a constitution-making process always requires some opposition to, thus rupture with, the old constitution: the constitution-makers need to argue their case, explain why change is necessary, and identify what is missing under the old regime. On the other hand, the examples might be read as demonstrations that most constitution-making procedures are marked by a fear of a complete rupture with the past.²²

Edelstein analyses the legitimation of revolutionary regimes as a legitimation in the 'future perfect', where non-elected regimes, not being able to rely on the approval of the majority, instead placed their claims to legitimacy in the future achievement of order and 'progress', which Edelstein characterises as 'prospectively retrospective' legitimation.²³

The emotional experience of time thus shapes the rhetorical framing that participates in the legitimation process of liberal constitutionalism in its future-orientedness.

Temporality is not regarded here as a naturally occurring unidirectional line in which events can be allocated. This 'spatialised' view of time has been criticised by studies in law and temporality, ranging from Mawani and Grabham to Chowdhury, van Oorschot and Lazar.²⁴ These different accounts cannot be unified into one definition of temporality, nor is providing a definition of temporality the aim of this article. They show, however, certain common traits: time as malleable; time as created by and creator of law; and time as an experience.

Analysing the idea of 'social time' from Durkheim²⁵ and through anthropological studies of time that draw from and at times challenge this notion,²⁶ Greenhouse indicates that 'anthropological writing on social time naturalizes social practice by refashioning

²⁰Dann (n 11).

²¹Lazar (n 3) 17.

²²Z Körtvélyesi, 'Continuity, Discontinuity and Constitution-Making: A Comparative Account' in M Feischmidt and B Majtényi (eds), *The Rise of Populist Nationalism: Social Resentments and Capturing the Constitution in Hungary* (Central European University Press, 2019, Budapest) 4.

²³D Edelstein, 'Future Perfect: Political and Emotional Economies of Revolutionary Time' in D Edelstein, S Geroulanos and N Wheatley, *Power and Time: Temporalities in Conflict and the Making of History* (University of Chicago Press, 2020, Chicago), available at <https://www.bibliovault.org/BV.landing.epl?ISBN=9780226706016>.

²⁴R Mawani, 'Law As Temporality: Colonial Politics and Indian Settlers' (2014) 4 *UC Irvine Law Review* 65; E Grabham, *Brewing Legal Times* (University of Toronto Press, 2016, Toronto); T Chowdhury, *Time, Temporality and Legal Judgment* (Taylor & Francis Group, 2020, London); I van Oorschot, 'Doing Times, Doing Truths: The Legal Case File as a Folded Object' in SM Beynon-Jones and E Grabham (eds), *Law and Time* (Routledge, 2019, Oxon); Lazar (n 3).

²⁵É Durkheim, C Cosman and MS Cladis, *The Elementary Forms of Religious Life* (Oxford University Press, 2008, New York).

²⁶See, eg, C Geertz, *The Interpretation of Cultures: Selected Essays* (Repr, Basic Books, 2009, New York); ER Leach, *Rethinking Anthropology* (Taylor & Francis Group, 1966, London); C Lévi-Strauss, *Mythologiques. 1: Le cru et le cuit* (Plon, 2001, Paris).

time as the aggregate time sense (rather than the collective representation) of people who experience time the same way – as motion, moments, repetition, consciousness of mortality, and various forms of activity'.²⁷ Questioning this, Greenhouse points to the creative aspect of law, administration, bureaucracy and the State in relation to time: 'social time' might be better understood not as the totalising 'concept of time' that unites and mediates individual experiences of time, but as arising from 'the temporal assumptions embedded in specific state practices (...) and through a variety of executive, legislative, and judicial powers'.²⁸

It is my argument that besides the mediating devices that allow us to 'count' time, the experience of time is mediated through emotion; that is, the experience of time is an *emotional experience*. In this role of creating and mediating time, the time of the State as constitutive of this 'social time' is mediated, too, by emotion.

Nineteenth-century constitutionalism *could not be* past-oriented because the nineteenth century no longer had access to a past that would flow seamlessly into the future. This is not to indicate an univocal and unidirectional causal connection between the emotional experience of time and nineteenth-century future-oriented constitutionalism. On the contrary, as much as the emotional experience of time underlies the future-orientedness of nineteenth-century constitutionalism, nineteenth-century constitutionalism creates the very break with the past that characterises this emotional experience of time.

Nineteenth-century English modernity was marked by the effects of the French Revolution, by the fast-paced industrial, technical and scientific developments, and by the process of urbanisation that accompanied industrialisation. Considering the nineteenth century as a time of disruption, of an anxiety about the future and an emphasis on the ideas of progress and individualism means to consider temporality in its emotional dimension. It means to consider this experience as the result of the conative and cognitive process of recognising time as disruptive and therefore feeling anxious about it; and recognising time as disruptive because we feel anxious about it.²⁹

The French Revolution, according to Fritzsche, was an unprecedented reality, leaving historians, journalists and political commentators at a loss. He attributes this to the unfamiliarity of the present and the impossibility of reaching into the past to inform this unknown reality. This, according to him, left the nineteenth century *stranded in the present*, claiming for modernity 'the special consciousness of transition and indeterminacy'.³⁰ There was 'a history of the new, and it prepared people to see themselves not simply as contemporaries, but as inhabiting a particular time and place, a quite particular context, which is familiar and makes preceding epochs and periods unfamiliar'.³¹

The particularity of acceleration that Koselleck identifies in modernity is one that relates to 'progress'. Acceleration, Koselleck notes, is 'old' and refers to a framework of repetition apparent in political and constitutional crises. The acceleration brought by the French Revolution is the kind that, he writes, 'draws on something long familiar, merely

²⁷ CJ Greenhouse, *A Moment's Notice: Time Politics across Culture* (Cornell University Press, 2018, Ithaca) 47.

²⁸ *Ibid* 73.

²⁹ J Morrow, 'Romanticism and Political Thought in the Early Nineteenth Century' in GS Jones and G Claeys (eds), *The Cambridge History of Nineteenth-Century Political Thought* (Cambridge University Press, 2011, Cambridge) 29–76.

³⁰ P Fritzsche, *Stranded in the Present* (Harvard University Press, 2004, Cambridge) 54.

³¹ *Ibid* 53.

seeing it as taking place in a much shorter time period'.³² It is the industrial revolution that brings about the experience of a new time. The acceleration of time towards a new order, the acceleration that is produced by the political crisis of the French Revolution, is one that simply shortens the time-span of political change. But the singularity of the experience of acceleration in modernity, as compared to the acceleration towards the Apocalypse that, too, is 'old' and characteristic of Christian tradition 'is that the end was no longer approaching more quickly; rather, compared to the slow progress of the previous centuries, the current steps of progress come about ever more quickly. The telos of mastering nature and organizing society more justly became a sliding goal and every over-ambitious intention lent itself well to being interpreted as long-delayed progress'.³³

Although recent studies on the French and the industrial revolutions point to less drastic discontinuities than generally assumed in scholarship, these events have left 'cultural marks'³⁴ that represent and contribute to the emotional experience of 'acceleration'.³⁵ It is to this acceleration in the name of progress that the romantic literary movement responds.

This article focuses on the 'cultural marks' of the industrial and French revolutions that added to the 'shared feeling' as described by Berman 'of living in a revolutionary age, an age that generates explosive upheavals in every dimension of personal, social and political life'.³⁶

Fiction provides one lens through which to identify the experience of time in the nineteenth century. I borrow from Koselleck's analysis of fiction as constitutive of and constituted by 'historical reality'³⁷ to consider constitutional theory as constitutive of and constituted by the emotional experience of time. In the same way that the collected narrated dreams at the eve of the Second World War that Koselleck refers to at the same time 'point to the conditions' that made them possible and 'are modes of implementing' the terror they represent, legal and constitutional theory 'point to the conditions' that made them past- or future-oriented and 'are modes of implementing' an emotional experience of time as continuous or disruptive.

Highlighting the always-present distance between experience and their linguistic expressions, Koselleck provides a good framework to the role of fiction as a historical source: the historian is always looking for something that is beyond the text, 'what constitutes historical reality is not only decided on the methodological level of source control, but already occurs whenever the attempt is made to articulate this reality linguistically'.³⁸ The gap between experience and its linguistic articulation is what approximates history and fiction, but it is also what allows fiction to be a window of exploration of experience.

³²Koselleck, Hoffmann and Franzel (n 9) 96.

³³Ibid.

³⁴The perceived idea of an Industrial Revolution that overwhelmingly and consistently populated England with new factories and new classes of workers is challenged by modern economic history (see WJ Ashworth, 'Industry and Transport' in C Williams (ed), *A Companion to Nineteenth-Century Britain* (Wiley-Blackwell, 2008, Malden); EP Thompson, *The Making of the English Working Class* (Penguin, 2013, Harlow) 189–212), but the cultural marks and perceived accelerated time of this Industrial Revolution are the focus of this research, rather than the *actual* economic or technological growth. In other words, whether cotton mills and factories 'sprung into sudden existence like Minerva from the brain of Jupiter' (Taylor, 1842, *apud* ibid 190) or not is not the object of this article, but rather that they seemed to do so.

³⁵Koselleck, Hoffmann and Franzel (n 9).

³⁶Berman (n 10) 17.

³⁷Koselleck, Hoffmann and Franzel (n 9) 21.

³⁸Ibid.

Within this framework, one can understand romanticism as symbolically representative but also constitutive of the emotional experience of time in the nineteenth century. As proposed by Bode:

Even the apparent contradictions and seeming incompatibilities within European Romanticism have common roots in that they form diverging responses to the same set of cultural challenges: (...) they all form possible answers to a unique historical situation in which, it seems, nothing can be taken for granted anymore and in which a reaching out for new (or old) securities is the order of the day.³⁹

Romanticism appears here as a response to the modern emotional experience of time. It is my claim that so is the future-oriented character of nineteenth-century constitutionalism.

Time as a destructive force appears in nineteenth-century romanticism in many different, and sometimes contradictory, forms. Percy Shelley's *Ozymandias* is one example of the danger of the passage of time, destroying even the mightiest king; Edgar Allan Poe's *The Pit and the Pendulum* depicts Time himself as the executioner; the horror of repression in Blake comes alongside the torture of industrialisation; Coleridge discussed the 'problems of commerce, war and sexual exploitation'⁴⁰ in his works; Mary Shelley's *Frankenstein* as the first science-fiction novel questions the myth of origin, warns against the pursuit of progress at all costs and materialises in the creature the encounter of past and present, alchemy and galvanism, dead body parts and new life; Walter Benjamin famously analyses Klee's *Angelus Novus* as representative of history being carried by the storm of progress; the image of the train in Adelbert von Chamisso's 'Das Dampfroß' (The Steam Steed) prefaces and illustrates Koselleck's analysis of the acceleration of time in the nineteenth century; and the image of the ruin represents the nineteenth century 'stranded in the present' for Fritzsche.

Considering fiction as a symbolic representation of experience,⁴¹ and considering the romantic movement as a response to the experience of the nineteenth century, 'acceleration', or what I call the emotional experience of time, allows us to also insert the shift from a past-oriented to a future-oriented constitutionalism as a response to the experience of temporality. In other words, we need to look at this shift as inserted in, but also constitutive of, the experience of a time when a history of continuity is replaced by one of dis-continuity and constant change. The romantic longing for a past that flows seamlessly into the present, and the sense of instability and anxiety about the future, are therefore also present in the nineteenth-century constitutional debates that will be analysed in the third part of this article.

The sword giveth and the sword taketh away: 'time out of mind' and the ancient constitution

Considering the experience of time as an *emotional* experience, and considering that legal and political processes of questioning and creating legitimacy are informed by emotion,

³⁹Bode (n 9) 135.

⁴⁰RJ Walker, *Labyrinths of Deceit: Culture, Modernity and Identity in the Nineteenth-Century* (Liverpool University Press, 2007, Liverpool) 42.

⁴¹Koselleck, Hoffmann and Franzel (n 9) 10–23; R Wellek and A Warren, *Theory of Literature* (3rd edn, Harcourt, Brace and Company, 1949) 93; R Chartier, 'Le Monde Comme Représentation' (1989) 44 *Annales. Histoire, Sciences Sociales* 1505.

this article frames the constitutional debates of the seventeenth and nineteenth centuries as partly responding to the experience of time. This section will explore Sir Edward Coke's defence of the English constitution, like his defence of the common law, as reliant on the continuity of its past. As chief justice of the Court of Common Pleas, Sir Edward Coke is now known as the main seventeenth-century jurist to defend the authority of the common law against the centralising efforts of King James I.

The legitimisation of the English constitution in the seventeenth century draws primarily from the first of the two wells Lazar refers to. Because the constitution had been legitimate since 'time out of mind', highlighting and relying on the continuity between past, present and future, the appeal to the capacity to maintain order is also seeded in this claim to historicity.⁴²

If the constitution, as the common law, existed as such since before historical record, that meant it had been merely confirmed by the crown in the past, but had never been a creation that could be attributed to any one king or parliament. The English constitution was therefore, in Coke's historical thinking, protected from the centralising wishes of the crown: it was not subject to alteration by any one power.⁴³

Engaging a very particular form of historiography, Coke traces the constitution of England to a 'time immemorial'. The English constitution, insular and particularly created, had its origin in custom and had never been the object of a parliamentary or monarchical⁴⁴ creation. It was on this basis that Coke defended the supremacy of the common law over King James.⁴⁵

The Magna Carta was considered but a declaration of ancient laws that had been in use since 'time out of mind' rather than a document creating new law.⁴⁶ The constitution and the common law are, in Coke's view, essentially associated: the common law determined the constitution because the constitution originated in the common law.⁴⁷ Parliament, like the common law and the constitution, existed since before the conquest, before any register, and derived its legitimacy from its antiquity and continuous existence through time.⁴⁸

Coke's approach in the *Second Part of the Institutes*, says Williams, limits the powers of the monarch in borrowing from the medieval ideas of 'bodies politic' and integrating the king, as analogous to a corporate body, 'into the legal system, rather than outside it'.⁴⁹ The king was always subject to the law and had no power over it: if a law⁵⁰ by the monarch or parliament was unjust, the judges were not to take it as law, and overrule it in adjudication; all law depended on confirmation through its use in the common law. In this sense, he

⁴²Lazar (n 3) 17.

⁴³JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge University Press, 1987, London).

⁴⁴*Ibid* 36.

⁴⁵H Potter, *Law, Liberty and the Constitution* (NED-New edn, Boydell & Brewer, 2015, Woodbridge) 119–32.

⁴⁶E Coke, *The Second Part of the Institutes of the Laws of England Containing the Exposition of Many Ancient and Other Statutes, Whereof You May See the Particulars in a Table Following/ Authore Edw. Coke* (Printed by W Rawlins for Thomas Basset, 1681) 5–10.

⁴⁷I Williams, 'Edward Coke' in D Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press, 2014, Oxford) 51–66.

⁴⁸E Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of Courts/ Authore Edw. Coke* (Printed by W Rawlins for Thomas Basset, 1681, London).

⁴⁹Williams (n 47) 95.

⁵⁰E Coke, 'Part Three of the Reports' in S Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003, Indianapolis).

presupposed the supremacy of law: not even the king could act contrary to law, at least in the sense that unlawful actions would not be enforceable'.⁵¹

The Parliament is considered in the first chapter of Coke's *Fourth Part of the Reports* as a court of law.⁵² To him, 'all governmental bodies were courts and their activity was "judicial."'⁵³ This is a consequence of Coke's view of the constitution as arising from and being part of the common law: as the common law was the supreme evidence of reason, having been through the trial of time, it was the basis of every governmental power, and, therefore, all governmental bodies were judicial bodies.

The fourth part of the *Institutes* suggests that Parliament holds the highest legislative power in the kingdom, over the king, and it seems to suggest that its laws are superior.⁵⁴ However, in the preface to the third part of the *Reports*,⁵⁵ Coke seems to argue that Parliament ought not to change the common law. Moreover, in *Dr. Bonham's Case*, he asserts that the courts of law can judge parliamentary acts to be void and unapplicable.⁵⁶

It is nonetheless a constant in Coke's writing that the king holds no power to alter the common law: he must abide by it and not interfere with adjudication because he lacks the 'artificial reason' of judges to declare the immemorial custom that makes the common law.⁵⁷ More importantly, the king lacks artificial reason because he is not trained in the study and analysis of the long history of interpretation of this ancient law. The king must not interfere with the laws of the kingdom because these laws predate him and all previous kings in history. In fact, these laws predate *history*. The ancient character of the common law, as the ancient character of the constitution, is the main source of legitimacy for seventeenth-century English constitutionalism.

History, however, is less a legitimating concept and more *evidence* of a legitimacy that is anchored in a previous, 'immemorial' past. It is perhaps not the *historicity* of the constitution that legitimised it, but its *a-historicity*, and history served merely as proof of its a-historical character. This indicates a point of continuity into nineteenth-century constitutionalism: the categories of *past* and *future* are not enough to characterise the 'orientation' of the constitutional theory in the seventeenth and nineteenth centuries. It is necessary that they are a *qualified 'immemorial' past* in the seventeenth century and a *qualified eternally 'progressive' future* in the nineteenth. A-historicity, therefore, is an indispensable category of temporality in constitutionalism, albeit one that is so far underexamined.

The constitutional debate in the seventeenth-century revolution evidences the importance of the ancient character of the common law to seventeenth-century lawyers in the question of the Conquest. This both evidences and constitutes a particular emotional experience of time: one where the continuity of the past is assumed and relied on in the present. Just as the accelerated time of the nineteenth century can be seen in romantic and gothic fiction, Koselleck notes that prior to the nineteenth century, the literary references

⁵¹Williams (n 47) 95.

⁵²E Coke, 'Fourth Part of the Reports' in S Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003, Indianapolis).

⁵³Williams (n 47) 96.

⁵⁴Coke (n 48).

⁵⁵Coke, 'Part Three of the Reports' (n 50).

⁵⁶E Coke, 'Part Eight of the Reports' in S Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003, Indianapolis).

⁵⁷E Coke, 'Prohibitions Del Roy, Part Twelve of the Reports' in S Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003, Indianapolis).

to the mechanical clock were associated with order and regularity and stability⁵⁸; even the 'merchant's time' that competed with and increasingly took the place of the 'church time' is one that 'became measurable, took a direction and could be foreseen'.⁵⁹ I identify these as evidence of an *emotional* experience of time. The perception that time is slowing down or accelerating, that it is continuous or disruptive, cannot be wholly understood with reference to any measurement of time or concept of temporality, but indicates an *embodied knowing*, part of a process of understanding, sharing and communicating experience.

During the Interregnum, Pocock identifies a royalist reaction in historiography. He analyses Hyde's work in trying to determine that the king had sovereignty and power to change the laws and constitution: criticising Hobbes, Hyde mainly attacked the idea that William I had been a conqueror and therefore the laws confirmed by him 'continued to exist only by his will, and that his right over them had consequently been absolute and had descended intact to his successors'.⁶⁰

Pocock highlights the continuous attempts by those who subscribed to Coke's theory of the 'ancient constitution' to undermine the idea that the conquest had brought any change to the English law – even if the claims that it had done so by the royalists were rare. Noting this seemingly unprovoked defence, Pocock suggests that the rarity of the royalists' attempt to date the English law to the Conquest may have been because this argument would only give the law 'an appeal to the sword', which would, as a theoretical explanation to the power of the king, 'seem impermanent and subject to fortune'.⁶¹

Instead, what royalists searched for was an appeal to reason that did not depend on the consent of the people. When the House of Lords was abolished in 1649, Filmer claimed that the decision of the House of Commons was illegitimate because, unlike the House of Lords, its summoning was dated. The debate, according to Pocock, was whether one could identify a year in which the Commons had been summoned. If that was possible, 'they owed their being to some pre-existing authority', whereas if there was no record of a first summoning of the Commons to counsel, 'then they were immemorial and their privileges were secure'.⁶²

These two points are representative of the justification of the present in the past and the role of *a-historicity* rather than *historicity* in constitutionalism.

If the immemorial character of the House of Commons would secure their legitimacy and their role within the English constitution, whereas the possibility of dating their origin would mean that their power was dependant on the higher authority that created them, then the reliance on the 'time out of mind' is also the reliance on an undated, perhaps mythical origin: one that cannot be identified, contextualised or questioned, because it is *out of history*.

If the argument that the power of the king to legislate arose from the conquest, 'from the sword', rather than from an ancient constitution which, having been followed continuously, made it 'subject to fortune', the importance and the danger of historicity is highlighted once more. The debate was not only about *how old* the constitution was, but about the constitution being older than record, *older than history*, and therefore not

⁵⁸Koselleck, Hoffmann and Franzel (n 9) 84–85.

⁵⁹J Le Goff, 'Church Time and Merchant Time in the Middle Ages' (1970) 9 *Social Science Information* 151, 159.

⁶⁰Pocock (n 43) 149.

⁶¹Ibid 150.

⁶²Ibid 153.

originated, but only confirmed, by history. The role of the time out of mind is thus the role of an a-historical past, not just of a past that is *so ancient* that it is 'out of mind'.

If constitutionalism is considered as, partly, a response to an emotional experience of time, then the a-historicity of this past reveals something that may be one point of continuity in this shift between a past-oriented and a future-oriented constitutional theory: the recognition of the danger of historical contingency.

The seventeenth-century defence of the 'ancient constitution' claimed that it was bound to continue to uphold order and security because it had done so since 'time out of mind'. However, as Pocock notes, the role of the historical record, for Coke, was proof that the common law (and the constitution) predated historical record. The discussion on the dating (or not) of the summoning of the House of Commons and of the House of Lords, and the discussion on dating (or not) the origin of the common law to the Conquest, indicate that the 'past' that could legitimise the constitution was an a-historical past. The legitimising past *had to be* a-historical, because a historically contingent past is a past that can be overthrown and overridden; in other words, it is subject to change.

Moreover, if the 'perfect balance' of the three powers was held by this reliance on the continuity of a timeless past, when the nineteenth century can no longer rely on this continuity, then the issues of representation and democracy can also be explained, among other elements, as responses to the emotional experience of time. If the consent of the people cannot be proven to originate in an insular and communal customary creation from 'time out of mind', this consent will need to be renewed: future-oriented constitutionalism relies on the majority of the present to uphold the future because it cannot rely on the majority of the past.

Eighteenth-century constitutional theory, although informed by theories of social contract such as those defended by Rousseau or Locke, seemed, if Blackstone can here be considered as representative, to follow Coke's arguments on the supremacy of the English 'mixed' monarchy.⁶³

Although the eighteenth century will not be studied in depth in this article, it is important to understand that projects to 'rationalise' the law did not emerge suddenly with the advent of the nineteenth century, nor did the shift in the emotional experience of time that I propose to address. On the contrary, the Enlightenment and ideas of progress that inform the legal and political theories of the eighteenth century inform, too, the events and culture of the nineteenth century. From linear progress and Blackstone's rationalisation of common law into a didactic course to the defence of projects of codification and a time of constant change, seventeenth- to nineteenth-century legal theories demonstrate the shift in the emotional experience of time with clarity. This does not mean, however, that the French, Industrial or American revolutions completely overturned the perception and emotional experience of time in one single moment.

The emotional experience of time in nineteenth-century claims for 'pure' democracy

In the seventeenth century, reliant on the continuity of history, the 'immemorial past' occupied the constitutional legitimising space; in the nineteenth century, it is not only the a-historical but also the a-temporal *truth* that takes its place to guarantee stability for the future.

⁶³W Blackstone and D Lemmings, *Commentaries on the Laws of England: Book I: Of the Rights of Persons* (Oxford University Press, 2016, Oxford).

What I suggest is a possible thread of continuity that has not been explored in the shift from past-orientedness to future-orientedness of the constitutional debate. If we consider constitutionalism as partly responding to an emotional experience of time, and if we consider that the past that upheld the constitution until the nineteenth century is this a-historical past, then the 'classical' constitutionalism fails in the nineteenth century in two instances: first, because the nineteenth century was especially conscious of its historicity and 'always historicise!' was the maxim to be upheld⁶⁴ – an 'immemorial past' is therefore inaccessible; second, the 'immemorial past' is less useful because the nineteenth century can no longer rely on the continuity of history that underlay the argument of the ancient constitution. Because continuity could no longer be expected of history in the nineteenth century, it is no longer on a mythical origin in a past that is lost to memory that the English constitution must rely for its legitimacy. It becomes, then, a matter of looking to the future: a (perhaps equally mythical) future-oriented claim for legitimacy bases the constitution on the promises of progress and expectation, effectively evidencing and simultaneously contributing to the break with the past that characterises the nineteenth-century emotional experience of time.

The nineteenth-century democratic critique of the mixed government, contrary to Coke's justification of the constitution based on time out of mind, shows a future-oriented view of what makes a government good and legitimate. The second well of legitimacy⁶⁵ thus gains force in a history of discontinuity.

This is inserted in an emotional experience of time that can no longer rely on the seamless flow of past into present but, on the contrary, sees a history of rupture and revolution, one in which even the mightiest Ozymandias⁶⁶ is destroyed by the sands of time.

When 'revolutions' become 'the locomotives of history',⁶⁷ the focus shifts from Coke's argument on the permanence of the constitution since before the conquest – since before history – to Paine's illegitimacy of the constitution as the product of a conquest: discontinuity and instability become the centre of the legal-historical argument. It is here too that the 'break with the past' Dann refers to⁶⁸ creates the need for an alternative source of legitimation for the constitution: questions of democracy and representation arise as possibilities for the present to uphold and maintain order for the future.

Godwin's ideals were not in contrast with the principle of change that characterised the nineteenth century.⁶⁹ The five principles Godwin believed would make it possible for government to disappear (for him, as for Paine, an evil), seem instead to incite and praise change in the form of improvement of humankind and general progress:

First, that the moral characters of men are the result of their perceptions: and, secondly, that of all the modes of operating upon mind government is the most considerable. In addition to these arguments it will be found, thirdly, that the good and ill effects of political institution are no less conspicuous in detail than in

⁶⁴J Chandler, *England in 1819: The Politics of Literary Culture and the Case of Romantic Historicism* (University of Chicago Press, 1998, Chicago) 47–85.

⁶⁵Lazar (n 3) 17.

⁶⁶PB Shelley, 'Ozymandias' in N Rogers (ed), *The Complete Poetical Works of Percy Bysshe Shelley* (Clarendon Press, 1975, Oxford).

⁶⁷K Marx, *The Class Struggles in France* (Electric Book Co, 2001, London) 134.

⁶⁸Dann (n 11).

⁶⁹Berman (n 10).

principle; and, fourthly, that perfectibility is one of the most unequivocal characteristics of the human species, so that the political, as well as the intellectual state of man, may be presumed to be in a course of progressive improvement.⁷⁰

Education played a key role to Godwin in the constant improvement of humankind. He upheld the notion that humans are not born with a tendency to either good or evil – if anything, justice is the only constant humankind will seek – but ‘our virtues and vices can be traced to the incidents which make the history of our lives, and if the incidents could be divested of every improper tendency, vice would be extirpated from the world’.⁷¹ Education was the way through which humans would improve to a state in which government would no longer be necessary.

Although human improvement and change seem to be a constant to Godwin, the *truth* he refers to throughout his *Political Justice* is not ever-changing and evolving, but rather an immutable truth. Truth is there to be found by the inquiring mind – the inquiring mind that has learned, or been taught, the virtues of justice. It is in the broader context of nineteenth-century scientism that the inquiring mind seeks to learn the immutable laws of the universe. It is, in other words, the *timeless* truth. *A-historicity*, thus, is also present in the process of legitimation and the constitutional debate in the nineteenth century, although under a different guise: rather than an undated past ‘out of mind’, it is the *timeless truth* of nineteenth-century scientism that underlies constitutional theory and protects the constitution from historical contingency.

The past-looking justification of the common law and of the English constitution in Coke’s time out of mind is no longer appropriate. The new debate focuses on whether the constitution, as it is, serves the purpose of progress.⁷² Forward-looking nineteenth-century theory is not, as the seventeenth-century theory was, satisfied with an ancient constitution. In other words, the question is no longer how old the English constitution is – if it predates history – but rather for how long and in which ways the present constitution can promote progress.

Given this break with the past, Godwin did not subscribe to the theory of the social contract. On the contrary, to him, no past could sufficiently justify a present government: even if my ancestors had decided to gather under a specific form of government and had freely chosen the government to be one or another, that does not – in fact, it cannot – bind me to their decision. Even the promise made (by me or by my ancestors) of obedience is not enough to justify my acquiescence with the government. The only acceptable cause and source of legitimation to an authority is the sense of justice, as a means to the improvement of the individual and collective through virtue.⁷³ Justice, it is important to keep in mind, is a constant, *a-historical* truth.

On the English government, Godwin believed that monarchy and aristocracy, founded upon the principle of inequality, were unacceptable.⁷⁴ Weston points out that, according to Godwin, ‘to teach men that kings and nobles were wiser than their humble neighbours, he insisted, was to practice deception and fraud and to violate reason and truth, the

⁷⁰W Godwin, *An Enquiry Concerning Political Justice, and Its Influence on General Virtue and Happiness* (GGJ and J Robinson, London, 1793) 11.

⁷¹Ibid 18.

⁷²Ibid.

⁷³Ibid.

⁷⁴Weston (n 2) 209.

triumph of which would secure the perfectibility of mankind'.⁷⁵ Merit, for him, should be the only source of distinction of a man in society.⁷⁶ Similar to Paine, Godwin's project for the government did not have two parliamentary houses, but one, which would discuss in six rounds the projects of law.

By 1800, however, 'Napoleon had overthrown the French Republic. And the English idealists who had looked to France for inspiration saw there only a military despotism, a confirmation of the statement so generally received in the eighteenth century that a pure, "unmixed" democracy was a form of government unsuitable for states as large as France and England'.⁷⁷

Early in the nineteenth century, Weston identifies a return of the critique towards the English-mixed government. Bentham, who had previously defended that any government would be able to create and maintain justice as long as it followed the utilitarian principle, in his later writings instead adhered to Paine and Godwin's ideas of unmixed democracy. Bentham's *Constitutional Code*, published in 1823 after the Portuguese government had accepted his offer to write a civil and a penal code, attests to such a shift. By this time, disappointed with the failure of his Panopticon and the failure of monarchies to listen to his utilitarian projects of codifying law, Bentham prescribed the 'democratic ascendancy of the House of Commons'⁷⁸: the interests of the people should be the only ones to inform government policies; and the House of Lords could only represent those of the monarchy and of the few who composed aristocracy.

The utilitarian test, then, could not be passed by a mixed government, but only a democratic one. As Bentham seems to understand in his later works, any other type of government would, even having the power to promote the greatest happiness to the greatest number, prefer to promote the greatest happiness to those in power. This is why, for Bentham, the objective of a constitution is not to be a bill of rights protecting the interests of the people against the power of the government. He dedicated his *Constitutional Code* to the rules of appointment and duties of government officials, 'from determining the location of supreme power to specifying the duties of the lowliest official'.⁷⁹

His view of the constitution, as well as his late works' disbelief in forms of government other than republican democracy, also stemmed from utilitarianism and his conclusions about human nature – the premises for which are mainly found in his earlier work, *Principles of Moral and Legislation*.⁸⁰ Having rejected the theory of the social contract, there were only two premises to all constitutions, which needed to be joined by a third one: the first is that the objective of any good government was to procure the greatest happiness to the greatest number; the second is that the interest of the persons in the government were, in reality, to procure the greatest happiness only to themselves. This is why a third premise was necessary: that the constitution should guarantee that the

⁷⁵Ibid 209.

⁷⁶Godwin (n 70).

⁷⁷Weston (n 2) 215.

⁷⁸Ibid 234.

⁷⁹P Schofield, 'Jeremy Bentham' in D Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press, 2014, Oxford) 234.

⁸⁰J Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart (eds), Clarendon Press and Oxford University Press, 1996, Oxford).

greatest happiness of the government would be dependent on the efficient provision of the greatest happiness to the greatest number.⁸¹

It is important to note that these premises are based, once again, on *timeless truths* that Bentham claims to have discovered: part of the scientism recognised in the nineteenth century, Bentham's analysis of law also stems from the assumption that there is an immutable 'human nature' that can be engaged in proposing social analyses. Once again, one can note the role of *a-historicity* in nineteenth-century constitutional debate.

The highest power should, then, lie with the people: they would, on the principle of 'one man, one vote' and with the guarantee of the secrecy of the vote, choose their representatives for the legislature; and the public opinion would be offered a mechanism to remove from office those who were no longer serving their purpose of promoting the greatest happiness to the greatest number.⁸² In this sense, attending to the interests of the people would be in the interests of those in power because they were subject to being punished by public opinion and losing their office if they acted against them.⁸³ Sovereignty, then, as described by Bentham, seems to be the power to legislate,⁸⁴ and it is 'in *the people*. It is reserved by and to them'.⁸⁵

What is important to note in Bentham's theory is that it is also detached from a past-oriented justification of power: it is, like Godwin's, future-oriented. Bentham's constitutional theory, in fact, is so future-oriented that he objected all mechanisms to restrict the amendment or change of any laws, including constitutional ones: no legislature can be so sure of having made an infallible law.⁸⁶ What is necessary is that changes to this law must come from Parliament, the legislative power elected by the people. Although Godwin's and Bentham's theories differ in various ways, Godwin also believed that the past decisions of a legislature or people should not bind future generations.⁸⁷ When the power to shape the future can no longer depend on the power of the past 'out of mind' to shape the present, it is in the present majority, the regularly renewed consent of the people, that the constitution must find its legitimacy. Considering these theories as responses to an emotional experience of time as disruptive, where change is inevitable, provides a new level of explanation to the constitutional debates and institutional changes that relate to and rely on matters such as democratic vote and representation.

These ideas, represented in this section mainly by Godwin and the later works of Bentham, did not overturn the reliance on a mixed government, but they did change the role of the House of Lords, which, although still a part of the constitutional elements of the English government, was no longer the place where its balance resided. The balance was now placed in the House of Commons, where representatives were elected by the people.

The theories of representation, as Dann recognises, are part of this movement from past to future, from tradition to modern liberal constitutionalism. 'The "lens of temporality,"' says Dann, is revealing of liberal constitutionalism in the shaping of its ideals: it is the linearity and 'openness to an uncharted future' that underlies how liberal constitutionalism 'leaves room for any legislature and new political majority to shape the

⁸¹Schofield (n 79).

⁸²J Bentham, 'Constitutional Code' in J Bowring (ed), *The Works of Jeremy Bentham*, vol 9 (William Tait, 1827, Edinburgh).

⁸³Schofield (n 79).

⁸⁴Ibid.

⁸⁵Bentham (n 82) 291.

⁸⁶Schofield (n 79).

⁸⁷Godwin (n 70).

future, to change policies, approaches, procedures, even institutions – as long as the modification takes place in the framework of the constitutional order. According to Dann, this ‘is a central contrast to illiberal or other conceptions that LC is not bound by “laws of history,” traditions, or assumed fixed parameters (culture, race, religion), but it is open to try whatever strikes the political majority at a time to be the best path forward’.⁸⁸

This is part of the liberal emphasis on the capacity of individuals to shape the future. Constitutionalism in the nineteenth century, thus, both evidenced and participated in the break with the past or the ‘end of history’ that Dann refers to, and the originalism Parker identifies. My emphasis here is not on nineteenth-century constitutionalism as the operator of the break with the past,⁸⁹ but on highlighting the role of the emotional experience of time in shaping nineteenth-century constitutionalism. I argue that one is necessary for the making of the other: as liberal constitutionalism tries to pave the way to the future and steps away from the traditional justification of the governmental and legal institutions, the emotional experience of time is also an active agent in the need for a different, future-oriented justification for the new orders that emerge in this ‘revolutionary age’.⁹⁰

Conclusion

This article developed a historical analysis of constitutionalism in the nineteenth century through the lens of the emotional experience of time, engaging a comparative study with seventeenth-century constitutionalism. Following Dann’s suggestion that constitutional theories are shaped by and shape time in ways so far unexplored, I have demonstrated the role of the emotional experience of time in seventeenth- and nineteenth-century constitutional debates. In this way, I explored the shift from a past-oriented to a future-oriented constitutional theory as a response to different emotional experiences of time. I have also suggested the role of *a-historical temporalities* in both past- and future-oriented constitutionalism.

I have reframed the future-orientedness of nineteenth-century constitutionalism and the past-orientedness of seventeenth-century constitutionalism as responses to different emotional experiences of time, rather than simply characteristics of ‘classical’ and ‘modern’ constitutional theories, or consequences of ideological commitments. This highlights not only the role of temporality in processes of legitimisation but also the role of emotion in framing and legitimising legal and political systems. As such, this article opens new paths of investigation.

First, considering temporality as an emotional experience, inserted in the cultural and embodied dimensions of social life, may bring new levels of exploration of judicial and constitutional thinking. How we relate to time and how we relate to law are intimately related.

Second, it is my claim that the already recognised future-orientedness of liberal constitutionalism may not only be a consequence of the Enlightenment, but the emphasis

⁸⁸Dann (n 11) 217–18.

⁸⁹N.B.: This article does not counter the claim that future-oriented constitutionalism participated actively in the emotional experience of time in the nineteenth century, producing in its own way this ‘break with the past’. Rather, I argue that both movements are concomitant: liberal constitutionalism participates in a break that also shapes it.

⁹⁰Berman (n 10) 17.

in the ideal of progress may have been related, too, to a gap left by tradition and the reliance on the continuity of history that was part of the experience of a time of disruption.

Third, I suggest that looking at the seventeenth- and nineteenth-century constitutionalism through the lens of temporality may reveal not only the differences between the two but also one important continuity. In drawing from the two wells of legitimacy,⁹¹ both forms of past- and future-oriented constitutionalism have a timid, but perhaps more revealing claim than legal scholarship has so far considered: a claim for *a-historicity*. A past that is ‘out of mind’ cannot be historicised; it is protected from the appeal to the sword, from a dated summoning of the House, from historical contingency. An ideal of justice, or happiness as a constant truth to pursue or even an ideal of constant progress, too, is *a-historical*. Because historicity invites considerations of context, change and contingency, perhaps it is not solely from the *historical* past – that is, only ‘out of mind’ because it is too ancient – that seventeenth-century draws legitimacy, but from a mythical past that, as *a-historical*, can be immutable. Perhaps *a-historicity* is also what nineteenth-century constitutional theory searches for in timeless truths. In our considerations of past, present and future in the law, should another category be considered, that of *a-historicity*?

Competing interests. The author declares no competing interests.

⁹¹Lazar (n 3) 17.