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Constitutional Scholars as Constitutional Actors

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Constitutional scholars as constitutional actors[1]

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Few constitutional scholars would dispute that Carl Schmitt played a legitimating role in the downfall of the Weimar Republic, or that Albert Venn Dicey has defined the UK and other commonwealth constitutions. Why then is there no general conception of constitutional scholars as constitutional actors?[3] It is now well established that 'to understand how our Constitution and laws are practised, it is necessary to study and understand many more institutions in the system than simply the Judiciary'[4] While the focus has broadened to include a range of constitutional office holders and institutions,[5] little has been said about the role and status of the constitutional law academy.[6]

While formal constitutional recognition of constitutional scholars may be a step too far, the purpose of this paper is to explore the idea of constitutional scholars as analogous to integrity institutions. The analogy is made because of the facilitative role of the constitutional academy to 'well-functioning constitutionalism'[7] and because of its constitutive role in shaping constitutions and constitutional doctrine. By conceiving of constitutional scholars as constitutional actors in this way, the paper allows us to examine the normative implications of

1 I am grateful to Gabrielle Appleby, Vanessa MacDonnell, Karen Drake, Paul Kildea, Catherine O'Regan and the members of the Bonavero Institute of Human Rights Perspectives seminars for their comments and feedback on this paper. Dylan Lino's suggestions for further reading raised my game (though none of my mistakes are his).

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3 While attention has been paid to these actors as 'public intellectuals' or 'political actors' this is distinct in my view from the idea of 'constitutional actors' within a constitutional framework. On the role of Dicey as a 'public intellectual' see: S Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850-1930* (Clarendon Press, 2006) 288 – 299. On Carl Schmitt's role in shaping international law see: Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001) ch.6. On the role of 'legal complex' on the political stage see: L Karpik and T Halliday, 'The Legal Complex', (2011) *Annual Review of Law and Social Science* 7; Y Dezalay and B Garth, *The Internationalization of Palace Wars* (Chicago University Press, 2002).

4 G Appleby *The Solicitor-General and the Constitution* (Hart Publishing, 2016) 5.

5 Appleby (n 4); M Palmer, 'What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *Public Law Review* 133, 134; M Tushnet, 'Non-Judicial Review' (2003) 40 *Harvard Journal on Legislation* 45; A Quentin-Baxter and J McLean, *This realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland University Press, 2017).

6 Constitutional scholars refers here to scholars operating in their academic capacity within a University or independent academic institution. The boundaries of the constitutional academy are not fixed: alongside constitutional law scholars (working mostly within law faculties and departments), are historians, political theorists and other social scientists who contribute to this academic field. All are in some way engaged in shaping, interpreting and contesting constitutional traditions and structures.

7 I borrow this phrase here from Mark Tushnet's account of an independent judiciary. M Tushnet, 'Preserving Judicial Independence in Dominant Party States' 60 *N.Y.L Sch. L Rev* (2015-2016) 107, 108.

this analogy. As a form of resistance to authoritarian populism,[8] one implication of such an analogy could be to strengthen academic freedom and protect the integrity and independence of constitutional scholarship. Moreover, viewing constitutional scholars as constitutional actors sharpens our understanding of the ethical obligations of constitutional scholarship: of 'academic self-awareness' and of 'decisional' and 'institutional' independence. This duty of independence may be equally important to the public standing, expert status and integrity of the constitutional law discipline in a highly politicised populist moment.

1. *Constitutional scholarship in a populist moment*

Given the increased attacks on academic freedom globally, it should come as no surprise that those currently studying democratic backsliding are thinking about the role of the academy in the protection of constitutional democracy. Ginsburg and Huq argue that 'one of the most serious threats to constitutional democracy … derives from a steady degradation of its public sphere, and in particular the disappearance of a shared universe of facts about which policy debate can occur'.[9] Within a populist political environment academic scholarship is interchangeably vilified, discredited or glorified depending on whether it serves its general populist purpose. Indeed, we need look no further than the trial of Wojciech Sadurski, [10] and the attacks on the Crackow Institute of Criminal Law ,[11] to see the scale of the potential threats to scholastic freedom. Whether in India, Venezuela, Poland, Turkey or Hungary, the threats to academic freedom from authoritarian populism are widespread and growing.[12]

[8] S Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (forthcoming). Gardbaum distinguishes between populism which 'works within the institutional structure of constutional democracy' (political populism) and 'populist regimes' that 'undertake a a determined assault on the institutional structure of constitutional democracy' (structural populism). I adopt the term 'authoritarian populism' to describe Gardbaum's idea of 'structural populism' to emphasise the intention behind these moves as the consolidation of executive power. See: R Dix, 'Populism: Authoritarian and Democratic' *Latin American Research Review*, Vol. 20, No. 2 (1985), pp. 29-52 I also wish to distinguish this concept from 'left' populism and 'right populism'. See in general: R Brubaker, 'Why populism', *Theor Soc* (2017) 46: 357:385; C Mouffe, 'Populism is a Necessity', *The European*, 1 May 2014; P Baker, 'We the people: the battle to define populism', *The Guardian* 10 January 2019.

[9] T Ginsburg and A Huq, *How to Save a Constitutional Democracy*, (Chicago Univeristy Press, 2018) 231.

[10] A von Bogdandy, 'Countering the Judicial Silencing of Critics: Novel Ways ot Enforce European Values' *Verfassungsblog: On Matters Constitutional* 6 March).

[11] B Grabowska-Moroz, K Lokomiec & M Ziolkowski, 'The History of the 48-Hour Lawsuit: Democratic Backsliding, Academic Freedom, and the Legislative Process in Poland, *IACL-AIDC Blog* 28 June 2019.

[12] European University Association, 'Academic Freedom in Turkey: EUA calls for exoneration of academics facing prison' (28 March 2019); M Hocevar, D Gómez and N Rivas, 'Threats to Academic Freedom in Venezuela' (2017) *Interdisciplinary Political Studies* 3(1) 145-169; N Sundar, Academic Freedom and Indian Universities, (2018) *Economic and Political Weekly* 53(34), 48-57; J Johnson, Narendra Modi's culture war storms India's elite univerisities' (26 January 2020); K Lakomiec, 'Academic freedom(s) in the drift towards authoritarianism' –

Attacks on academic freedom manifest also in less overt forms. A range of 'discrediting' techniques used in populist discourse are designed to erode the epistemic authority of the academy. Discrediting strategies manifest most commonly in assertions of a 'free speech crisis' within Universities. These attacks have been growing across the UK,[13] US,[14] Canada[15] and Australia[16] over the last decade.[17] Discrediting strategies mirror populist campaigns against apex courts which are accused of bias when they stand in the way of executive action.[18] In the same way, the persistent characterisation of academics as 'woke liberal elites' is a powerful discrediting device in the current populist environment designed to caricature academics as partisan activists rather than experts in their disciplinary fields.[19]

Despite an apparent volte-face with respect to scientific knowledge during the Coronavirus pandemic, these populist discrediting strategies persist. While, populist leaders such as Jair Bolsanaro have been particularly extreme,[20] the schism between scientific advisors and US President Donald Trump is now widening dramatically.[21] In the United Kingdom, the new found deference to scientific advice has been notable. Nevertheless, it remains unclear whether

Poland', *Droit & Societe (*12 November 2019); L Gall, 'Hungary Renews its War on Academic Freedom' *Human Rights Watch* (2 July 2019).

13 E.g recent article by UK Education Secretary Gavin Williamson, 'If universities can't defend free speech, the government will' *The Sunday Times* 7 February 2020; L Hudson and I Mansfield, *Universities at the Crossroads*, Policy Exchange, 23 Feb 2020; T Young, 'Why the Free Speech Union is taking on an Oxford college' *The Spectator*, 4 March 2020; J Wolff, 'Why Toby Young and other robust white men are using free speech to whip universities' *The Guardian* 3 March 2020.

14 E.g: M Haberman and M D Shear, 'Trump Signs Executive Order Protecting Free Speech on College Campuses' *New York Times* 21 March 2019.

15 E.g Justice Centre for Constitutional Freedoms - Campus Freedom Index 2019 – available at https://campusfreedomindex.ca/

16 E.g E Mullholland, 'Free Speech Crisis at Australia's Universities Confirmed by New Research', Institute of Public Affairs, 31 August 2019 (available at: https://ipa.org.au/publications-ipa/media-releases/free-speech-crisis-at-australias-universities-confirmed-by-new-research). See further A Stone, 'The Two University Freedoms' *MLS News*, Issue 22, November 2019; *Academic Freedom & Free Speech in Universities: Debate between Adrienne Stone and John Roskam* (Episode 42) *The Policy Shop* (available at: https://pursuit.unimelb.edu.au/podcasts/academic-freedom-amp-free-speech-in-universities).

17 E Smith, 'The university 'free speech crisis' has been a rightwing myth for 50 years', *The Guardian* 22 February 2020.

18 The attacks on the UK Supreme Court were particularly vociferous after *Miller* 1 (*Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5) and *Miller/Cherry* (*Miller v The Prime Minister* [2019] UKSC 41). See also recent attacks on the Australian High Court after the *Love v Commonwealth* decision. See J Allan, 'High Court ruling: Activist justices' alien view of court's power' *The Australian* 14 February 2020.

19 J Wolff, 'Why Toby Young and other robust white men are using free speech to whip universities' *The Guardian* 3 March 2020.

20 T Phillips and Caio Barretto Briso, 'Bolsonaro's anti-science response to coronavirus appals Brazil's governors' *The Guardian* 27 march 2020.

21 R Klein and M Alice Parks, The Note: Trump vs science opens new political battle over COVID-19' ABC News 23 April 2020 – available at https://abcnews.go.com/Politics/note-trump-science-opens-political-battle-covid-19/story?id=70289511.

early scientific advice was heeded,[22] and concerns have also been expressed about the independence and transparency of scientific advisors,[23] as well as the tendency for politicians to use scientific advice to deflect from political accountability.[24] In Australia, the government's persistent pattern of discrediting scientific evidence on climate change appears to have shifted in the pandemic.[25]

Looking beyond these extreme pandemic conditions, populism as a political discourse is unlikely to shift its core approach to academic knowledge. As Brubaker argues, populism – authoritarian and democratic – is at its core suspicious of claims to elite knowledge, and easily characterise specialised expertise as out of touch elitism (particularly where it fails to support its ends):

> "The populist style performatively devalues complexity through rhetorical practices of simplicity, directness, and seeming self-evidence, often accompanied by an explicit anti-intellectualism or epistemological populism" (Saurette and Gunster 2011) that valorizes common sense and first-hand experience over abstract and experience-distant forms of knowledge" [26]

In this environment, the threat to academic freedom lies not only in attacks on individual and institutional autonomy, but also in the hyper-politicisation of the academic space and a polarisation of academic opinion. This risk of politicisation is high when the constitutional stakes are high, or where the ruling executive disagrees with the general view of the constitutional academy about basic constitutional principles. Hyper-politicisation of academia is a particular risk to well-functioning constitutionalism where 'popular constitutional knowledge remains exceedingly poor',[27] and these conflicts are played out in social and traditional media. We need only observe the polarised media presence of constitutional experts during the recent prorogation debate in the UK, and in the impeachment debate in the US, to get a sense of the challenges of hyper-politicisation.

[22] J Calvert, G Arbuthnott and J Leake, 'Coronovirus: 38 days when Britain sleepwalked into disaster' *The Times* 18 April 2020.
[23] M Landler and S Castle, 'The Secretive Group Guiding the U.K. on Coronavirus' *The New York Times* 24 April 2020; See interview with former Chief Scientific Advisor, Professor Sir David King, Channel 4 News, 6.52 pm, 20 April 2020 (Available at: https://twitter.com/Channel4News/status/1252294185224372230?s=20 accessed 24 April 2020).
[24] C Mac Amhlaigh, 'Legitimacy in the Time of Coronavirus' *Verfassungsblog* 17 April 2020.
[25] P Manning, 'Science v politics: Action on COVID-19 is science-led. Why not on climate?' *The Monthly* 5 March 2020.
[26] R Brubaker, 'Why Populism?', *Theoretical Sociology* 46 (2017) 357.
[27] T Ginsburg and A Huq, 'How to Lose a Constitutional Democracy', 65 *UCLA L. REV* 78 (2018) 79, 168.

In this politicised environment, academic freedom may not go far enough in protecting those constitutional scholars who are most likely to come into conflict with populist movements that seek to consolidate power. The fact that many constitutional scholars make propositions, as a matter of course, which may contest the power of the executive or other constitutional organs, makes the protection of their independent status particularly important.[28] In this sense, the idea of constitutional scholars as constitutional actors serves both to strengthen and to go beyond the general protections of academic freedom.

2. *Constitutional scholars as constitutional actors*

The constitutional academy can be viewed as analogous to 'integrity institutions' or 'fourth branch institutions'.[29] Paul Kildea (in this special edition) builds on Ackerman and Tushnet's view of integrity institutions as 'protective' of democracy.[30] He argues that integrity institutions 'should reflect not only on their capacity to *protect* but also to *facilitate* … integrity, democracy or some other value'.[31] Constitutional scholarship is analogous to this category because of the central role that it plays to 'well-functioning constitutionalism',[32] and the facilitative role that it plays in a healthy democracy.[33]

Vicki Jackson conceives of the broader academy in constitutional terms – alongside the press, libraries and scientific offices – as 'knowledge institutions … that help provide the epistemic foundation for a successful democracy'[34]. For Jackson, 'knowledge institutions" should not be understood as a branch of constitutional *government*, but rather as a necessary organ of constitutional democracy'. [35] As 'organs of epistemic objectivity', Jackson argues,

[28] See further section 3 below.
[29] Fourth branch institutions include a range of institutions including ombudsmen, electoral commissions and auditor generals. See: H Klug, 'Transformative Constitutions and the Role of Integrity Institutions in Tempering Power'(2019) *Buffalo Law Review* 67(3) 701; J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; G Appleby, Horizontal accountability: the rights-protective promise and fragility of executive integrity institutions' 23(2) *Australian Journal of Human Rights* (2017) 168.
[30] B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633; M Tushnet, *Comparative Constitutional Law* (Elgar, 2nd ed, 2018) ch 5.
[31] P Kildea, 'The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission', *Federal Law Review*
[32] Tushnet (n 7).
[33] Kildea (n 31).
[34] V Jackson, 'Legal Scholarship and Knowledge Institutions in Constitutional Democracy', *AALSNEWS* Summer 2019.
[35] V Jackson, 'Knowledge Institutions in Constitutional Democracies: of Objectivity and Decentralisation', *Harvard Law Review Blog*, 29 August 2019.

'knowledge institutions play special roles in representative democracies' She accounts for this special role thus:

> '… in a democracy the people as a whole – or at least a sufficient swathe of the people and of their elected representatives – need access to information to participate in governance – to be able to identify patterns of social and economic fact, as well as relevant national and world history that bear on current issues. Knowledge is needed to help develop and evaluate policy positions and distinguish claims that are well founded from those that are not. Knowledge … is needed to be to be able to resist manipulations, whether by those in high office, or running for high office, or foreign powers, or others, and – importantly – to be able to evaluate good faith arguments by opposing candidates for public office. Knowledge is needed to be able to engage in reasoned argument with fellow voters. … And knowledge is needed in order for the rule-of-law to be in effect and for the law to serve justice – so that laws, and how they are enforced, and what their effects are, can be known, and evaluated. In short, knowledge is needed for virtually all aspects of a constitutional democracy to flourish.'

Jackson's work compliments Ignatieff's ideas developed through his experience as President and Rector of the Central European University which the autocratic Orban regime forced out of Hungary in December 2018.[36] He identifies the freedom of the academy as one element of a 'counter-majoritarian fabric that is integral to the health of a democratic society.'[37] The contribution that academic scholarship makes to the health of a democratic society – through its dissemination of knowledge – is thus commonly invoked as a basis for the protection of academic freedom. The modern concept of academic freedom can be traced to the Prussian education reforms of Wilhelm Von Humboldt, which enshrined the twin concepts of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn).[38] Today academic freedom receives various levels of protection in constitutional bills of rights,[39] statutory law,[40] international declarations, [41] and vocational statements.[42] It is a freedom linked directly to the expert status of the academy. As Adrienne Stone argues, academic freedom is 'freedom to work

[36] 'S Walker, '"Dark day for freedom": Soros-affiliated university quits Hungary' *The Guardian* 3 December 2018.
[37] M Ignatieff, 'Academic Freedom and the Future of Europe', Centre for Global Higher Education Working Paper No 40 (July 2018), https://www.researchcghe.org/perch/resources/publications/wp40.pdf, 6.
[38] S Dea, 'A Brief History of Academic Freedom', *University Affairs* (9 October 2018).
[39] The German Basic Law enshrines academic freedom in Article 5 (3) – 'Kunst und Wissenshaft, Forschung und Lehre sind Frei. Die Freiheit der Lehre entbindet nicht von der Treue zur Verfassung'.
[40] See in the United Kingdom for example: Education Reform Act 1988, s 202(2)(a); and Higher Education and Research Act 2017, s 36. See further E Barendt, *Academic Freedom and the Law* (Oxford, Hart Publishing, 2010).
[41] UNESCO, 'Recommendation Concerning the Status of Higher-Education Teaching Personnel' (11 November 1997; World University Service, 'Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education' (6–10 September 1988)
[42] American Association of University Professors (AAUP), '1940 Statement of Principles on Academic Freedom and Tenure'.

within disciplinary boundaries … [it] does not give rise to a general claim to intellectual freedom in matters unrelated to research'.[43]

Two more recent declarations explicitly link academic freedom with robust democratic contestation. First, the European Parliament has passed the *Recommendation on defence of Academic Freedom* in 2018 in which the democratic value of a free academy is confirmed:

> 'Academic freedom—including its constituent freedoms of thought, opinion, expression, association, travel, and instruction—contributes to creating the space in which any open and stable pluralistic society is free to think, question, share ideas and produce, consume and disseminate knowledge [44]

Secondly, the statement on academic freedom Australian Assocation of University Professors in January 2020 has connected academic freedom to a well functioning democratic and civil society:

> 'Academic freedom is essential for the pursuit and dissemination of knowledge, which is itself a public good. It is also a means for the promotion of a healthy democracy, and well-functioning civil society through the cultivation of informed, engaged and democratically competent citizens.'[45]

While this special contribution to democratic deliberation is used as a basis for the protection of academic freedom generally, it also supports the analogy beween the constitutional academy and integrity institutions. This analogous argument is implicit in Tushnet's assertion that constitutional scholars have a particular role to play in enhancing judicial accountability (which he views as consisting 'primarily' in accountability to the law). For Tushnet, accountability to law means 'accountability to contemporaries in the legal profession, who identify the modes of reasoning they take as defining what acting according to law is'. [46] Constitutional scholars within the legal community thus set the professional norms and 'ultimately determine whether a [judicial] opinion is appropriately oriented to "the law" and so whether judges are indeed accountable to the law'.[47] Similarly, Khaitan makes the case for scholars as a realm of judicial accountability, drawing specifically on their independent status:

[43] Stone (n 49).
[44] European Parliament Committee on Foreign Affairs, 'Report on European Parliament Recommendation on Defence of Academic Freedom in the EU's External Action', Preamble Point E, A8-0403/2018 (27 November 2018).
[45] Australian Association of University Professsors, Statement on Academic Freedom & The Pillars of the University 2 January 2020 available at http://www.professoriate.org/2020/01/02/statement-on-academic-freedom-the-pillars-of-a-university-what-a-university-should-be/
[46] M Tushnet, 'Judicial Accountability in Comparative Perspective' in N Bamforth and P Leyland, *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 57, 74.
[47] Idid 73.

> 'The best people to check whether a judge has worked within … constraints are those who are also trained in this technical process of reasoning and are independent of the judiciary. The Bar satisfies the first requirement, but is too closely entangled with the Bench to perform the oversight function adequately. The responsibility must therefore fall on legal academy. It is the legal academic's duty to examine whether judicial decisions are adequately reasoned, whether they satisfy the bounded rationality of law and its justice. Academic criticism is an important check on judicial power in a democracy'.[48]

Constitutional scholarship is not only limited to judicial accountability, however, as it also plays a role in scrutinising all claims to the constitutionality of political action. Indeed, constitutional scholars hold a special role in holding constitutional reasoning to account. This is particularly important where constitutional arguments are presented by the executive or Parliament, and where these arguments remain – often for good reason - outside of the judicial realm. Viewed through this lens, the protection of academic freedom enhances the accountability fabric of the constitutional order by underpinning the independence of the constitutional academy, and protecting its expert status. Importantly, it is not only that individual constitutional scholars should be free to make their arguments, but also that the critical scrutiny of constitutional organs depends on the 'institutional autonomy' of the constitutional academy.[49]

Beyond facilitating robust democratic and constitutional debate, constitutional scholarship is also constitutive of the constitutional order itself. Albert Venn Dicey has constituted the UK and other commonwealth constitutions,[50] while Sir John Salmond played a similar role in New Zealand.[51] The constitutive role of scholarship in the formation of constitutional rights doctrine in post-war Germany has also had implications across European constitutional cultures.[52] Smaller interventions by contemporary constitutional scholars may also prove to be of equal significance. John Finnis's front page article in *The Telegraph* during the Brexit debate

[48] T Khaitan, '*Khoushal v Naz*; Judges Vote to Recriminalise Homosexuality' (2015) 78(4) *Modern Law Review* 672, at 678.

[49] Adrienne Stone distinguishes between academic freedom as a 'freedom possessed by individuals' as well as a requirement of 'institutional autonomy' see A Stone, 'The two university freedoms' in *MLS News*, Issue 22, November 2019. The distinction between individual independence and institutional independence is key also to Tushnet's account of judicial independence. See M Tushnet, 'Preserving Judicial Independence in Dominant Party States' 60 *N.Y.L Sch. L Rev* (2015-2016) 107, 108.

[50] D Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) *Oxford Journal of Legal Studies* 36(4) 751; 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context (2018) *Modern Law Review* 81, 739.

[51] J McClean, 'The unwritten political constitution and its enemies' (2016) *International Journal of Constitutional Law* 119, 123-124.

[52] A scholar of particular influence is Georg Jellinek – see G. Jellinek, *System der subjectiven offentlichen* (2nd edn Tubingen, 1905, reprinted Scientia Verlag, 1964).

prompted the government policy that prorogation was an appropriate response to an activist opposition in a hung Parliament.[53] Finnis's standing as an 'eminent Oxford Professor' was referenced repeatedly in right wing media as a form of constitutional legitimation for prorogation.[54] Indeed, it is the description of Finnis as 'arguably the most distinguished lawyer of our time' which continues to be used as validation for reforms of the Supreme Court in light of the *Miller/Cherry* decision.[55]

Constitutional influence of the academy is in no way restricted to one side of the constitutional debate. For example, the arguments of Jeff King, Nick Barber and Tom Hickman led directly to the legal application in *Miller* and were accepted by the Supreme Court.[56] Going further back and to the shape of legislation, constitutional scholars were constitutive of the UK New Labour constitution – in particular the UK Human Rights Act in 1998. This particular set of propositions, by scholar Francesca Klug, became a matter of legislation that is yet to be repealed.[57] Indeed, this legislation may be said to be a fundamental shift in constitutional and judicial culture in the United Kingdom. Outside of the UK, the work of constitutional scholars in Australia around the Uluru Statement from the Heart,[58] and the activism of US constitutional law professors around Trump's impeachment proceedings, are just two examples of such engagement.[59] There is also no doubt that the constitutional law academy played a formative

[53] J Finnis, 'Only one option remains with Brexit – prorogue Parliament and allow us out of the EU with no-deal', *The Telegraph*, 1 April 2019.
[54] For example: P Hitchens, 'The Rule of Lawyers' *Mail on Sunday* 29 September 2019.
[55] *R (Miller) v The Prime Minister* [2019] UKSC 41; C Moore, 'Fixing the Supreme Court should be Boris Johnson's constitutional priority' *The Telegraph* 7 February 2020. Finnis has continued to argue against the Supreme Court ruling in the Miller/Cherry decision and for reform of the 'politicised' judiciary. His role in Policy Exchange and its Judicial Power Project (alongside Richard Ekins) is proving to be an effective political strategy in the current regime. See: J Finnis, *The unconstitutionality of the Supreme Court's prorogation judgment*, Policy Exchange (28 Sep 2019); *The Law of the Constitution before the Court*, Policy Exchange (8 February 2020).
[56] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; 'UCL Laws Academics praised for the argument that led Gina Miller to victory', UCL Faculty of Laws, 2 February 2017, https://www.ucl.ac.uk/laws/news/2017/feb/ucl-laws-academics-praised-argument-led-gina-miller-victory
[57] F Klug, 'A Bill of Rights' LSE Law, Society and Economy Working Papers 2/2007, p. 2 – 5 (available at: https://core.ac.uk/download/pdf/95326.pdf)
[58] A Twomey, 'Putting words to the tune of Indigenous constitutional recognition' *The Conversation* 19 May 2015; M Davis, 'The long road to uluru: Walking together: Truth before Justice, (2018) *Griffith Review* 60, 13; G Appleby and M Davis, 'The Uluru Statement and the Promises of Truth' (2018) *Australian Historical Studies* 49(1), 501; G Appleby, 'Looking forward to constitutional reform by looking back at Uluru' *Inside Story* 22 January 2019; M Davis, R Dixon, G Appleby, N Pearson, 'The Uluru Statement' *Bar News* March 2018, 41; D Lino, 'Towards Indigenous-Settler Federalism' (2017) *Public Law Review* 28; D Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (The Federation Press 2018).
[59] US Impeachment hearing (letter from 604 constitutional law scholars declaring Trump Impeachable - https://medium.com/@legalscholarsonimpeachment/letter-to-congress-from-legal-scholars-6c18b5b6d116) which starts : 'We, the undersigned legal scholars, have concluded that President Trump engaged in impeachable conduct'.

and central part in the drafting and continued interpretation of the South African Constitution in 1990s.[60]

These are but a few random examples, but the message is clear: whether indirectly - through teaching and training of future lawyers (and politicians),[61] publishing research, writing textbooks, practitioner handbooks and constitutional commentaries - or directly through active public engagement - constitutional scholars facilitate robust constitutional debate, and shape the constitution. They are part of the formation and development of constitutional texts, doctrine, interpretations of doctrine and conventions, evaluation of judicial pronouncements on doctrine and constitutional arguments before courts. Their diverse contributions constitute part of the constitutional accountability fabric and shape the environment in which constitutions are formed.

This is not to ignore that constitutional scholars may commonly act as constitutional office holders: such as government advisors, or constitutional advisors to Parliamentary committees (e.g. legal advisor to Joint Parliamentary Committee). But these roles come with a particular mandate and official responsibility, and it is now broadly accepted that these officers are constitutional actors in the formal sense.[62] It is the point here, however, to provoke a discussion on the idea of constitutional scholars, when acting outside of any official designated capacity, as constitutional actors. The argument to characterise them as such, and as analogous to integrity institutions, flows from their expert and pervasive influence on the shape of the constitution, their accountability role in critiquing and engaging with official assertations regarding constitutional law, their facilitation of robust democratic and constitutional debate,[63] and their contribution to 'well-functioning constitutionalism'.[64]

3. *The duties of scholars as constitutional actors*

> 'Everything I know about the Constitution and its values, and my review of the evidentiary record, and here Mr. Collins, I would like to say to you Sir, that I read transcripts of every one of the witnesses who appeared in the live hearing, because I would not speak about these things without

[60] J Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) *U. Pa. J. Const. L.* 1, 176, 180.
[61] Jackson (n 34).
[62] Appleby (n 4); Palmer, (n 5); Tushnet (n 5); Quentin-Baxter and McLean (n 5) .
[63] Kildea (n 3133).
[64] Tushnet (n 7).

> reviewing the facts, so I am insulted by the suggestion that as a Law Professor I don't care about those facts'. [65]

On the 4th of December 2019, before the House Judiciary Impeachment Hearing, Professor Pamela Karlan of Stanford Law School, defended her objectivity as a Law Professor and her capacity to evaluate the evidentiary record in light of her knowledge of the US Constitution. It was a confrontational moment, as Karlan addressed her epistemic capacity to evaluate the impeachability of President Trump. Karlan's testimony was a manifestation of exactly the principle that Jackson foreshadowed. Given the importance of the 'knowledge ecosystem' to the epistemic foundations of democracy, Jackson argued that knowledge institutions should be governed by the principles of 'objectivity' and 'decentralisation' (described as the encouragement of a diversity of sources and open and free exchange of ideas). [66]

Jackson acknowledges that objectivity may well not be an achievable end state of the pursuit of knowledge, resting her case on an aspiration to 'better and more accurate understandings of realities'. Indeed, she asks whether 'constitutional democracies [might] articulate a principled commitment to … support gathering and disseminating objective information', 'promote aspirations towards objectivity by government officials in evaluating facts', and whether 'academics, many of us steeped in respect for the value of recognizing a diversity of perspectives and viewpoints' can 'find a way at the same time to embrace and articulate legal frameworks for promoting more reliable, rather than less reliable, understandings of important social and scientific facts'. Jackson goes on to suggest that 'promoting respect for the goals of accuracy and objectivity in identifying facts relevant to public decisions may well entail articulating the grounds for respecting particular disciplinary norms – whether academic, journalistic, or judicial – of proper research, reporting, or factfinding, and understanding the purposes for which facts asserted in these different domains warrant respect in public decision-making domains'.[67]

Jackson's views on 'objectivity' and 'expertise' are voiced by Eric Segall who has concerns about the role that Law Professors play in constitutional politics: 'As I watched three of my favorite colleagues … testify in front of Congress last week, I couldn't help wondering what

[65] Testimony of Professor Pamela S. Karlan to House Judiciary Impeachment Hearing, 4 December 2019.
[66] Jackson (n 35).
[67] Jackson (n 35); see also in this vein: B Williams, *Truth and Truthfulness* (Princeton University Press 2002).

should be the appropriate role for law professors in current political and legal disputes'.[68] Segall is concerned about the rise in professorial engagement in constitutional politics and argues: 'we are supposed to be, I think, primarily academics not advocates, and I'm not sure how often we should blur those roles'. His preliminary solution is to restrict academics to engagement on their specific constitutional expertise, rather than joining the general campaigns of constitutional areas in which they are not expert.[69]

Segall and Jackson's interventions are indicative of a larger debate about the role of law professors in the current populist moment. Indeed, in the UK there are misgivings articulated about constitutional scholars working within politically partisan think tanks such as Policy Exchange. As Paul Craig argues, 'the Judicial Power Project seeks to exert political influence. That is readily apparent from its placing within the larger Policy Exchange network, from the fact that the Secretary State for Justice turns up when the leading JPP theorist is giving a lecture and from multiple other sources on the site'.[70] This discomfort suggests a desire to find the line within the constitutional academy between expert knowledge and partisan political activism This line between partisan political speech and academic expertise is implicit in Stone's distinction between academic freedom and freedom of speech. For Stone 'academic inquiry is pursued through distinct disciplines, each of which is characterised by methods and standards designed to ensure expertise and independence in research'. Moroever, the 'constraints of the disciplines, the commitment to academic methods and standards are designed precisely to address the kinds of problems that bedevil public discourse'.[71]

How then, do we go about determining the line between political activism and constitutional expertise? Max Weber, in his famous essay *Science as Vocation*, confronted this question. For Weber, the 'prophet and the demagogue do not belong on the academic platform'[72]. He was emphatic about the distinction between academic scholarship, or 'science' as he called it, and

[68]E Segall, 'What are Law Professors For Anyway' Dorf on Law, 9 December 2019 available at" http://www.dorfonlaw.org/2019/12/what-are-law-professors-for-anyway.html

[69] Segall questions whether all 800 US Law Professors who signed the Letter issued by 'Legal Scholars on Impeachment' were acting in their expert capacity – see n 59.

[70] P Craig, 'Judicial Power, the Judicial Power Project and the UK' , 36(2) *University of Queensland Law Journal* 2017. See also T Poole, The Executive Power Project, *London Review of Books* 2 April 2019. On the role of think tanks in US policy see: T Medvetz, *Think Tanks in America* (University of Chicago Press, 2014).

[71] Stone (n 49).

[72] Max Weber, 'Science as Vocation', in Hans H. Gerth and Charles W. Mills (Translated and edited), *From Max Weber: Essays in Sociology* (OUP 1946), pp. 129-156 at p. 140.

politics and religion.[73] Weber viewed the scholar as teacher, which in turn gives rise to a particular set of responsibilities relating to the presumption of authority and expertise. So while 'the prophet' and 'demagogue' could speak 'openly to the world … where criticism is possible', teachers 'stand opposite' their audience, who have 'to remain silent'.[74] Thus, Weber's conception of *Wissenschaft* rested on the ideal of 'value-freedom' as an 'elementary duty of academic self-control'.[75] This duty was closely aligned by Weber with 'the duty to observe intellectual honesty and integrity' which remained central to an 'authentic' *Weltanschaung'* and which was 'the only specific virtue' that should be taught in a University'.[76]

For Weber, the notion that scholars are all morally bound by the pursuit of 'value-freedom' did not necessarily result in the pursuit of technical 'objectivity' as an end of scholarly work. On the contrary, 'one of the primary functions of "value-free" *Wissenschaft* is not merely to produce good technical work … but to lay bare the comprehensive value-context within which both the academic and the users of *Wissenschaft* (the student and the politician) must operate: that is, the 'struggle' of a plurality of ultimate values and value-axioms'.[77] The whole idea of 'value-freedom' thus rested for Weber on a conception of value plurality and conflict. It was the task of the academic to render such conflicts transparent: 'the academic teacher [was] strictly obliged … to make the professorial chair not a seat of battle, but a place of historical and intellectual understanding of alien world-views, diverging from his own'[78] So for Weber, value-freedom resulted not only in a methodological premise that academics made their value preferences clear, but also to engage rigorously and openly with opposing value claims . This is a duty of 'self-awareness' mirrored in Weber's methodological conception of the 'ideal type'.[79]

The values that Jackson and Segall aspire to are well captured in Weber's conception of academic self-awareness. This notion captures a range of vocational and ethical aspirations in

[73] See also Amlaigh (n 24) who relies on Weber's distinction between science and politics in his analysis of political accountability and scientific expertise in the Coronavirus pandemic.
[74] Weber (n 72) 140.
[75] W Hennis, *Max Webers Wissenschaft vom Menschen* (Mohr Siebeck, Tübingen, 1996), 200 cited in P Ghosh, 'Why should we read Max Weber today? His conception of Wissenschaft' (Max Weber Lecture No. 2014/07, European University Institute Max Weber Programme) 5.
[76] Hennis (n 75).
[77] Ghosh (n 75) 24.
[78] 'Die Lehrfreiheit der Universitäten', pr. Dreijmanis, 83. Quoted in Ghosh (n 75) 25.
[79] Ghosh (n 75) 39.

a discipline characterised by inherent normative contestation.[80] Academic self-awareness is expressed not only by rendering one's own value framework transparent, but also in good faith engagement with opposing value arguments. It neither requires that value neutrality can ultimately be achieved, nor does it go as far as adopting the post-structural practice of announcing one's positionality.[81] Much like Jackson's idea of objectivity and decentralisation, or Bernard Williams conception of 'truthfulness',[82] academic self-awareness is the practice of engaging with a diversity of value claims with 'intellectual honesty and integrity'.

4. *Conclusion: the duty of independence*

With scholarly expertise comes the claim to authority. That claim was on full display at the US impeachment hearing. The premise of the testimony provided, even where they disagreed, was that Law Professors are judged by their peers, and the broader public, to be experts. Scholarly expertise is protected by academic freedom, and it is also recognised publicly as a claim to authority in democratic discourse beyond the internal audience of the academy. Academic self-awareness must thus include a consciousness of the use of their authority in this public realm, and the potential for that authority to legitimate, or conversely undermine, constitutional propositions: in short the power to shape constitutions.

Academic authority and expertise is symbiotic with academic self-awareness. As Williams so aptly puts it: 'the authority of academics must be rooted in their truthfulness in both respects: they take care and they do not lie'.[83] But of equal importance to the public trust in academic authority is trust in academic independence. Certainly, if we think of constitutional scholars as constitutional actors that are analogous to integrity institutions, then it becomes even more important that academic propositions, conclusions and reasons must be formed independently. The independence of integrity institutions is described as their 'single greatest hallmark'.[84] As Appleby explains this independence must be capable of being exercised in the subjective sense,

[80] On this see: D Kennedy *A World of Struggle* (Princeton University Press, 2016); see also on the distinction between high and low politics: S Levinson and J Balkin, *Democracy and Dysfunction* (University of Chicago Press, 2019).
[81] I am grateful to Karen Drake for pointing me to this distinction. According to Drake, 'academic self awareness' here resonates with Anishinaabe protocols. See also: Leanne Betasamosake Simpson, 'Land as pedagogy: Nishnaabeg intelligence and rebellious transformation' (2014) *Decolonization: Indigeneity, Education & Society*, 3(3) 1
[82] Williams (n 67).
[83] Williams (n 67) 11
[84] Appleby (n 29) 171.

but also in the objective sense: that the public can be confident of their independence.[85] Independence must also be 'decisional' in the sense of having a 'personal independence of mind' and 'institutional' in the sense of being operationally independent. Institutional academic independence may require higher scrutiny where research and writing is funded by an institution with particular political goals.[86] Decisional independence may also be undermined where improper influence is exercised upon the academic expert.

While individual and institutional independence underpins academic freedom, it also constitutes a public ethical expectation against which the constitutional academy is held accountable. As Kildea argues, 'the flipside of independence is accountability'.[87] The freedom and professional accountability of constitutional academics consequently needs reconciliation. As Tushnet notes, 'the tension between accountability and independence is not unique to judges. Whenever we design institutions to commit some substantial amount of public power to professionals – scientists or social workers, no less than lawyers and judges – we do so because we want to combine accountability to the profession's norms with accountability to the people'.[88]

Scholarly authority is, and ought to be, intrinsically connected to its independence both decisionally and institutionally. Simply put, academic authority should not be be bought and sold for the delivery of convenient ideas, or shaped merely in the pursuit of government, corporate or institutional policy. It ought to be the product of an independence of mind and conviction. Consequently, for the claim to authority to be legitimate it ought to be exercised independently of political power. 'Freedom from political interference' is consequently required for example in the *Principles of Scientific Advice for Government* in the United Kingdom,[89] a principle which is now urgently essential (and more frequently tested in populist environments) in the current Coronavirus pandemic.[90] This crucial element of academic

[85] Appleby (n 29) 171-2.
[86] There is a range of literature on the influence of think tanks on academic scholarship (see for example: Medvetz (n 70)), as well as the influence of government research funding strategies (see M Thornton, 'The Retreat from the Critical: Social Science Research in the Corporatised University', ANU College of Law Research Paper No. 08-35).
[87] Kildea (n 30)
[88] Tushnet (n 46) 58.
[89] https://www.gov.uk/government/publications/scientific-advice-to-government-principles/principles-of-scientific-advice-to-government.
[90] See interview with former Chief Scientific Advisor, Professor Sir David King (n 23).

independence is central to the notion of academic credibility and the capacity of knowledge institutions to inform democratic decision making.

For these reasons, public confidence in academic independence must be safeguarded by a strong professional and public commitment to a duty of disclosure, a common practice in academic writing.[91] The objective is to make transparent when an academic is writing in a non-independent context or for specific partisan purposes. The objective of this disclosure is to distinguish transparently between independent scholarship which engages in a political or constitutional debate on the one hand, and scholarship which acts as a mouthpiece for particular political influence (government, think tanks, foundations, political parties and trade unions etc) on the other. Finally, there may be a case for a special and more exacting duty of dislosure where scholarship is conducted on behalf of the executive by direct arrangement. Indeed, the duty of disclosure is at its most important when constitutional scholarship legitimates the case for an increase in constitutional power. Simply put, while independent constitutional scholarship may itself be supportive of claims to constitutional authority, it must be distinguishable from scholarship which has been gamed to legitimise such authority. In short, while the independence of constitutional scholars must be safeguarded by the protections of academic freedom, constitutional scholars as constitutional actors can be expected to act independently of all actors within a constitutional order.

[91] See disclosure statements required in *The Conversation* or for journal submissions for example.