Explanatory Power, Theory Formation and Constitutional Interpretation:

Some Preliminaries*

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'[t]he logic of interpretation is the Peircean logic of abduction'[1]

'[a]n interpretation of something is an explanation of its meaning'[2]

I. Introduction

This article proposes a new model of constitutional interpretation based on a particular account of theory formation within the discipline of law. The novelty of the model lies in its exploration of the role of 'explanatory power' as a prime desideratum of theory formation within legal studies generally and in constitutional interpretation in particular. The article starts from the intuition that when we formulate and assess theories within the discipline of law we routinely, though often only tacitly, appeal to standards of explanatory power which philosophers of the natural and social sciences say are constitutive of the norms of theory formation in all disciplines that seek to

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1 Umberto Eco, *The Limits of Interpretation* (Indiana University Press, 1990) 59.

2 Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford University Press, 2001) 1, 1.

describe and explain phenomena. Even when explanatory power is explicitly appealed to by legal scholars or judges, they typically do not explain what is meant by the idea, but rather use the term as if its meaning was somehow self-evident.[3] The aim of this article is to make this meaning more explicit and precise, by analysing the role that the idea plays in philosophical discussions about theory formation in the natural and social sciences, and then critically to explore its application as a norm of theory formation within the discipline of law, with special attention to its application to constitutional interpretation. To do this, the article proceeds in three steps.

The first part of the article critically discusses what philosophers of the natural and social sciences have said about the nature and constituent features of a theory that has explanatory power. This part of the article surveys the various philosophical approaches to explanatory power advanced by philosophers such as Karl Popper, Charles Sanders Peirce, Carl Hempel, Paul Oppenheim and others, and classifies them into three broad categories, namely 'nomological', 'counter-factual' and 'unificationist'. On this basis, the article then presents an account of explanatory power which synthesises the relevant insights of each approach into a format that is more readily applicable within the discipline of law. In particular it is argued that the explanatory power of a theory is a function of four paired qualities, each pair expressing an irreducible tension between two desirable but contrasting features of an explanatory theory. These paired qualities are: (1) the simplicity and intricacy of the theory, (2) the range and complexity of the phenomena that the theory seeks to explain, (3) the specificity and generality of the theory's explanations in relation to those phenomena, and (4) the capacity of the theory to be integrated with other theories or to unify the explanations provided by them.

The second part of the article is concerned with the application of this theory of explanatory power to the interpretive tasks and normative goals that are characteristic of the discipline of law. In particular, this part addresses four important objections that can be made against the proposition that explanatory power has an application to the formation and assessment of legal theories. These objections have to do with four important qualities of human law, namely that law is (1) social, (2) normative, (3) linguistic, and (4) complex. Each of these characteristics might be taken to suggest that the task of knowing or understanding the law cannot simply be a matter of explanation, analogous to the kinds of explanations that are characteristically offered by the natural

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3 Examples across a wide range of legal fields include: Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68(2) *Modern Law Review* 320, 323, passim; Jack Balkin, 'Commerce' (2010) 109 *Michigan Law Review* 1; John Merryman, 'Civil Law Tradition' (1987) 35(2) *American Journal of Comparative Law* 438, 439; Lawrence M. Friedman, 'Law, Lawyers, and Popular Culture' (1989) 98(8) *Yale Law Journal* 1579, 1582; Jules L. Coleman, 'The Structure of Tort Law' (1988) 97(6) *Yale Law Journal* 1233, 1235, passim; Joel B. Grossman, 'Social Backgrounds and Judicial Decision-Making' (1966) 79(8) *Harvard Law Review* 1551, 1561, passim; H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1961) 81; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 1, 5, passim.

and social sciences. However, while these objections draw attention to four very important qualities of law that must be taken fully into account, it is argued that it remains appropriate, possible and indeed fruitful to think about theorisation within the discipline of law as involving in certain important respects a kind of explanation in which the explanatory power of our theories is a prime desideratum.

The third and final part of the article explores how explanatory power as a fundamental norm of theory formulation might apply in practice, with particular attention being given to its potential application to a specific area of law: in this instance, constitutional law.[4] The objective of this part of the article is to identify the practical difference that a deliberately rigorous pursuit of explanatory power makes to the formation and assessment of theories of particular areas of law. This is pursued through a critical discussion of the influential theories of constitutional and legal interpretation advanced by Philip Bobbitt, Ronald Dworkin and Jules Coleman. Taking Bobbitt's well-known six modalities of constitutional interpretation as a starting point, it is argued that *maximising the explanatory power of one's interpretation will involve a rigorous inquiry into the text and* structure of the Constitution, understood in the light of its history, illuminated by the prudential judgments and ethical goals that demonstrably shaped that text and structure. Contrary to Dworkin's approach, which settles for a preliminary analysis of text and structure at a relatively high level of abstraction (thus leaving room for substantive normative assessment to do most of the decisive work), such an approach seeks to maximise our understanding of text and structure, using history, ethics and prudence to illuminate the entirety of the document itself, down to its finest details and extending to its most fundamental principles and comprehensive structural ideas. Indeed, it is argued that there is an important relationship between text, structure and history such that when these three modalities of constitutional interpretation are pursued with as much rigour as the available evidence allows, they tend to shed light on the prudential judgments, ethical goals and comparative models which actually shaped the Constitution's text and structure, thus reinforcing each other and helping us to maximise the explanatory power of our interpretations.

Not only is such an approach attractive for its capacity to maximise both the generality and specificity of our understanding of the Constitution, but it better describes and explains the practices of constitutional interpretations routinely labelled as alternatively 'historical', 'textualist' and 'structuralist' respectively, because it helps to uncover the underlying norms of theory formation that motivate judges and scholars who subscribe to these modes of constitutional interpretation. However, unlike any

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4 This part of the article draws on and develops the argument advanced in Nicholas Aroney, 'Towards the "Best Explanation"of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*' (2011) 30 *University of Queensland Law Journal* 145 and Nicholas Aroney, 'The High Court on Constitutional Law – The 2012 Term: Explanatory Power and the Modalities of Constitutional Reasoning' (2013) 36 *University of New South Wales Law Journal* (forthcoming).

approach that would be narrowly historical, textualist or structuralist, the explanatory power model advanced in this article proposes a way in which these three modalities can be brought together into a coherent approach that does justice to the strengths of each one, while also providing a clear and integrated account of the *disciplined* roles that ought also to be played by ethical, prudential and 'comparative' modalities as well – disciplined, that is, by an historically informed analysis of the text and structure of the Constitution.

II. What is explanatory power?

Explanatory power is widely thought to be a fundamentally important norm of theory formation and assessment within the natural and social sciences, and even within at least some of the humanities. Philosophers of science from a wide variety of perspectives have drawn attention to its importance and have proposed specific accounts of its nature and operation.

Karl Popper made the idea of explanatory power intrinsic to his account of the logic of scientific discovery. For Popper, scientific method involves the scientist in successively formulating hypotheses and then performing experiments to test and potentially refute those hypotheses. Scientific progress is not one of accumulating experimentally verified knowledge, but of holding tentatively only to those hypotheses that survive experimental attempts to refute them. Accordingly, scientists ought not to say that such hypotheses are objectively true, but rather conceive of them as conjectures that are to be subjected to a continuing process of scrutiny, by observation and experiment. If the hypotheses are not contradicted, then we continue to use (and refine) them; if they are falsified, we discard them. Scientific progress is thus constituted by a process of conjecture and refutation.[5]

On this account, the value of a scientific hypothesis or theory lies not in its verification by observation and experiment, but in its explanatory power.[6] Popper argued that the probability of a theory being true is inversely proportional to its explanatory value. This is because high probability is a feature of theories that have minimal content — the more meagre the content, the more a proposition, un-contradicted by the evidence, is likely to be true. But such theories are not very powerful because they make only limited truth claims. Rather, the theories that are most useful are those that are ambitious in their explanatory range, even though they may be less likely to be true than thinner theories that make only very minimal claims. In other words, for Popper the testability of a hypothesis depends on its empirical content, and the greater its empirical content, the more testable the hypothesis is. But at

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5 For an accessible introduction, see Karl Popper, 'The Logic and Evolution of Scientific Theory' in Karl Popper (ed), *All Life is Problem Solving* (Routledge, 1999) 3.

6 Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge, revised ed, 2002), 77, 189, 259–60, 319.

the same time, the wider the empirical range of a theory, the greater its explanatory power. As a consequence, the testability of a theory is correlative to its explanatory power. Explanatory power is tied to the empirical content and testability of a theory.[7]

Popper also endorsed the widespread preference for 'simple' or 'elegant' theories. The point is not paradoxical. The simplicity of such theories lies not in the number or complexity of the facts that they seek to explain but rather in the range of concepts they use in order to explain those facts. A theory possessing a high degree of explanatory power will seek to explain a wide range of facts but will do so with an economy of explanatory concepts. However, rather than relying upon an *a priori* defence of the virtue of simplicity (for example, on metaphysical, logical or aesthetical grounds, as many had done in the past), Popper proposed that simple theories are preferable precisely because they are the most easily testable.[8] Thus, Popper's defence of simplicity cohered with his general account of the scientific method as consisting of a succession of proposed conjectures and attempted refutations, an account in which the value of a theory is measured by its testability and its explanatory power.

Another helpful way to think about the explanatory power of a theory is to relate it to the form of logic that Charles Sanders Peirce called 'abduction', the kind of reasoning by which we formulate explanations in order to explain phenomena.[9] For Peirce, abduction is logically distinguished from both deduction and induction on the basis of his analysis of the role of the three fundamental components of reasoning which he called the 'rule', the 'case' and the 'result'. Deduction, Peirce pointed out, moves from a 'rule' or major premise (eg, all the beans from this bag are white) and a 'case' or minor premise (these beans are from this bag) to a 'result' or conclusion (these beans are white). Induction, on the other hand, moves from a case (these beans

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7 Even Thomas Kuhn, a trenchant critic of Popper's approach, observed:

> With the passage of time, scientific theories taken as a group are obviously more and more articulated. In the process, they are matched to nature at an increasing number of points and with increasing precision. Or again, the number of subject matters to which the puzzle-solving approach can be applied clearly grows with time. There is a continuing proliferation of scientific specialities, partly by an extension of the boundaries of science and partly by the subdivision of existing fields.

See Thomas Kuhn, 'Logic of Discovery or Psychology of Research?' in Imre Lakatos and Alan Musgrave (eds), *Criticism and the Growth of Knowledge* (Cambridge University Press, 1970) 1, 20. Reading Popper in the way described brings him closer to the 'methodological falsificationism' which Imre Lakatos developed in response to Kuhn's criticisms of Popper's account. See Imre Lakatos, 'Falsification and the Methodology of Scientific Research Programmes' in Lakatos and Musgrave (eds), above n 7, 91.

8 Karl Popper, *The Logic of Scientific Discovery* (Routledge, first published 1959, 1992 ed) ch 7.

9 Charles Sanders Peirce, 'Abduction and Induction' in Justus Buchler (ed), *Philosophical Writings of Peirce* (Dover Publications, 1955) 150.

are [randomly selected] from this bag) and a result (these beans are white) to the inference of a general rule (all the beans from this bag are white). In contrast to both of these, abduction moves from a result (these beans are white) and a rule (all the beans from that bag are white) to an explanation in the form of a case (these beans are from that bag). In other words, abduction proposes an explanation for a phenomenon by reference to a rule; it reasons backwards from a 'result' to an explanatory hypothesis: 'from consequent to antecedent', as Peirce put it.[10] As will be seen, there is reason to think, as Umberto Eco has argued,[11] that an interpretation of a text is a kind of abduction in Peirce's sense: a text is a 'result' that we interpret or explain by reference to a 'rule'; in so doing, we assert that the text is a 'case' of that rule.

Carl Hempel and Paul Oppenheim similarly proposed a highly influential account of the explanatory power of scientific theories in which explanation consists in the subsumption of particular events or phenomena under general laws or rules. Unlike Peirce, rather than treat the 'case' as the explanation for a particular phenomenon, they proposed that explanation consists in the conjunction of the relevant rule and the relevant case. Thus, they said that the explanation of an event lies in the conjunction of a series of relevant laws with a series of relevant antecedent conditions.[12] To use Peirce's language, the explanation of a result concerns both the case and the rule. Put abstractly, this amounts to the view, as Hempel and Oppenheim put it, that an *explanans* (X) explains an *explanandum* (Y) where Y is dependent upon X, conceived as a general law of nature.[13]

Hempel and Oppenheim's approach was deductive and nomological. They conceived science as a method of explaining phenomena by reference to natural laws. Nature operates in a law-like manner, and once we have identified the laws of nature, we can deduce the behaviour of nature in a relatively straight-forward manner. However, their theory encountered a basic problem: what is the nature of, and relationship between, these laws themselves? In a notorious footnote, Hempel and Oppenheim acknowledged that their account did not provide 'clear-cut criteria for the distinction of levels of explanation or for a comparison of generalised sentences as to their comprehensiveness'.[14] Their theory provided an account of the way in which Kepler's, or Boyle's, or Newton's theory explained particular events, but it did not provide an account of the nature and relationship between the three theories themselves.[15]

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10 For a discussion, see Uwe Wirth, 'Abductive Reasoning in Peirce's and Davidson's Account of Interpretation' (2005) 153(1/4) *Semiotica* 199, 203.

11 Eco, above n 1, 59.

12 Carl G Hempel and Paul Oppenheim, 'Studies in the Logic of Explanation' (1948) 15(2) *Philosophy of Science* 135.

13 'By the explanandum, we understand the sentence describing the phenomenon to be explained (not that phenomenon itself); by the explanans, the class of those sentences which are adduced to account for the phenomenon.' See ibid 136–7.

14 See ibid 159, n 28.

15 Wesley C Salmon, *Causality and Explanation* (Oxford University Press, 1998), 69.

Further, there is a problem with the proposition that scientific generalisations have a law-like character.[16] If the laws of nature are understood to be exceptionless generalisations, the difficulty, on one hand, is that not all exceptionless generalisations have explanatory power in the sense that we expect of a scientific theory, for a generalisation about a set of phenomena may indeed hold true, but it may do so only contingently.[17] On the other hand, sciences that study especially complex systems, such as meteorology, geology, biology, psychology and sociology, seem to produce generalisations that are not strictly exceptionless.

As a response to the latter set of difficulties, James Woodward and Christopher Hitchcock have proposed an account of explanatory power in which, as they put it, 'successful explanation has to do with the exhibition of patterns of counterfactual dependence describing how the system whose behaviour we wish to explain would change under various conditions'.[18] In other words, their proposal is that explanation is better conceived in this way: X explains Y if Y depends on X in the sense that if X did not pertain, then Y would not be the case. On this view, the fundamental criterion for the explanatory power of a theory concerns the ability to make inferences to counterfactual situations. The degree of understanding conveyed by an explanation is accordingly defined as 'the number and importance of counterfactual inferences that the explanatory information makes possible.'[19] The explanatory power of a generalisation depends upon its capacity, not only to explain a particular state of affairs, but to explain the state of affairs that pertains if the antecedent conditions are in some respect different.[20] Such an explanation is robust under intervention: X continues to explain a certain kind of phenomenon Y, even when certain conditions in Y are altered; ie X not only explains Y^1, but also Y^2, Y^3, Y^4, etc.[21]

Hitchcock and Woodward have claimed that this account also addresses the first problem in Hempel and Oppenheim's approach, which is that it fails to provide an account of explanatory depth, by which is meant a measure of the relative explanatory

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16 See James Woodward and Christopher Hitchcock, 'Explanatory Generalizations, Part I: A Counterfactual Account' (2003) 37(1) *Noûs* 1.

17 For example, it may be the case that all of the male teachers at a particular school happen to bald. Such a generalisation has no explanatory power in relation to the teachers' baldness, however, because being a teacher at the school does not explain why those teachers are bald.

18 Woodward and Hitchcock, above n 16, 2.

19 Petri Ylikoski and Jaakko Kuorikoski, 'Dissecting Explanatory Power' (2010) 148 *Philosophical Studies* 201, 205.

20 Woodward and Hitchcock, above n 16, 4.

21 Ylikoski and Kuorikoski put it this way: 'understanding ... is the ability to make inferences to counterfactual situations, the ability to answer contrastive *what-if-things-had-been-different questions* ('*what if*-questions') relating possible values of the *explanans* variables to possible values of the *explanandum* variable'. See Ylikoski and Kuorikoski, above n 19, 205.

value of a theory.[22] The problem can be put thus: two different theories may fully account for a particular phenomenon, but which explanation is the better one? Brad Weslake has recently proposed the following answer to this question: the deepest and best explanation is not simply the one that is invariant under intervention, but also the one that is 'employable in the widest range of possible explanations', a quality that he calls 'abstraction'.[23] As such, it is the generality of the explanation that determines its explanatory power in this respect.

In this connection, 'unificatory' accounts of explanatory power point to the capacity of theories to explain, not just a wide variety of specific cases, but also to provide a unified account of a range of different facts using a small number of fundamental assumptions.[24] As Michael Friedman put it, our understanding of the world increases to the extent to which we can explain diverse phenomena by an increasingly small number of independently acceptable assumptions.[25] Seeking to address certain difficulties in Friedman's theory,[26] Philip Kitcher later proposed a structurally similar unificatory account of explanatory power, in which scientists seek to explain phenomena by reference to an increasingly small number of 'patterns of argument', thereby minimising the number of types of premises that must be taken as underived and basic.[27]

Unificationists frequently draw attention to the way in which particular theories relate to one another. As Wesley Salmon has observed, the Newtonian synthesis in physics possessed explanatory power because it unified a variety of otherwise discrete laws and regularities (those identified in the theories of Kepler and Boyle, for example) under more general laws.[28] Viewed from the perspective of the Newtonian synthesis, the picture is one of unification; viewed from the perspective of Kepler and Boyle's theories, unification involves integration. Thus, the capacity of Newton's theory to unify Kepler and Boyle's theories not only contributed to the explanatory of power of Newton's theory, but also validated Kepler's and Boyle's theories insofar as they could be integrated within it. Moreover, once the Newtonian synthesis became established, new subsidiary theories were themselves thought to have explanatory power to the extent that they could be integrated within, and give support to, the existing synthesis.

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22 James Woodward and Christopher Hitchcock, 'Explanatory Generalizations, Part II: Plumbing Explanatory Depth' (2003) 37(2) *Noûs* 181, 183ff.

23 Brad Weslake, 'Explanatory Depth' (2010) 77 *Philosophy of Science* 273, 276.

24 Philip Kitcher, 'Explanatory Unification' (1981) 48 *Philosophy of Science* 507, 529.

25 Michael Friedman, 'Explanation and Scientific Understanding' (1974) 71(1) *The Journal of Philosophy* 5, 15–18.

26 Philip S Kitcher, 'Explanation, Conjunction and Unification' (1976) 73 *Journal of Philosophy* 207.

27 Kitcher, above n 24.

28 See Alexander Wendt, 'On Constitution and Causation in International Relations' (1998) 24(5) *Review of International Studies* 101, 110; Salmon, above n 15, chs 4 and 5. See also Phil Dowe, 'Causality and Explanation' (2000) 51 *British Journal for the Philosophy of Science* 165.

Integration, with unification, is thus another feature of the explanatory power of scientific theories, understood in relation to one another.[29]

Qualities such as unification, generality and abstraction are related to another pervasive but highly elusive quality of well-received scientific theories, namely their simplicity.[30] The elusiveness of simplicity lies in its different dimensions or aspects, as well as in the difficulty of providing an account of why it is a valued feature of scientific theories. As noted earlier, the value of simplicity has been accounted for in several ways — theological, metaphysical, aesthetic, analytical and psychological — and it lies beyond the scope of this article to adjudicate between them. However, simplicity is certainly pervasive: a long and distinguished list of philosophers and scientists have endorsed it or appealed to its relevance, including Aristotle, Aquinas, Occam, Kant, Galileo, Newton, Lavoisier and Einstein.[31] Simplicity would appear to be an intrinsic aspect of explanation, for explanation seeks to render the otherwise 'blooming buzzing confusion'[32] of brute factuality into some kind of comprehensibility or intelligibility. However, as Alan Baker explains, there is more than one kind of simplicity to consider. Ontological simplicity, often referred to as parsimony, concerns the number and complexity of the entities that are postulated for the purposes of a theory, whereas syntactic simplicity, often called elegance, concerns the number and complexity of the hypotheses or concepts that are used in an explanation.[33] For reasons to be discussed shortly, it is syntactical simplicity, or elegance, that is especially relevant to inquiries that ask 'constitutive' questions such as 'what is the nature of this thing?' or interpretive questions such as 'what is the meaning of this text?'

Explanatory power is thus theorised in several different ways, and each of these approaches represents it as consisting of several elements. Both the counter-factual and unificationist approaches provide their own accounts of both the generality and specificity of explanatory theories. The explanatory power of a theory can be assessed in terms of its capacity to provide finely-textured explanations at a high level of specificity (it is accurate and precise; it explains a lot of complex, concrete detail) as well as in terms of a theory's capacity to explain a wide array of phenomena at a high

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29 See Ylikoski and Kuorikoski, above n 19, 213–214.

30 Herbert Feigl once observed: 'The aim of scientific explanation throughout the ages has been *unification*, ie, the comprehending of a maximum of facts and regularities in terms of a *minimum* of theoretical concepts and assumptions'. See Herbert Feigl, 'The "Orthodox" View of Theories: Remarks in Defense as well as Critique' in Michael Radner and Stephen Winokur (eds), *Analyses of Theories and Methods of Physics and Psychology* (University of Minnesota Press, 1970) 3, 12 (second emphasis added), cited in Kitcher, above n 24, 508.

31 Alan Baker, 'Simplicity' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford: Center for the Study of Language and Information, Stanford University, 2004) <http://plato.stanford.edu/entries/simplicity/>.

32 William James, *The Principles of Psychology* (Harvard University Press, first published 1890, 1981ed) 462.

33 Alan Baker, 'Quantitative Parsimony and Explanatory Power' (2003) 54(2) *British Journal for the Philosophy of Science* 245, 247.

level of generality (it is abstract, well-integrated and contributes to or constitutes a well-unified general account of things). However, in putting it this way, it becomes clear that the various desiderata pull in different directions and that there is sometimes an unavoidable trade-off between them.[34] The specificity of a theory may be sacrificed for more generality, or vice versa; the simplicity of a theory may be sacrificed for precision; the capacity of a theory to unify several subordinate theories may even be traded off against the degree to which it is integrated with a theory that is superordinate to it. And just as there are significantly different ways in which the question of explanatory power has been addressed, so there are diverse views about how the different desiderata are best accommodated. Moreover, different theories explain different aspects of phenomena. It is not entirely clear, for example, that the more fundamental theory is necessarily the more explanatory.[35]

Although these philosophical accounts of explanatory power differ, several features are generally common to all of the accounts. First, the explanatory power of a theory is a function of its *simplicity*. As has been seen, simplicity can involve what is called *parsimony* (in the number and complexity of entities postulated by the theory) or alternatively *elegance* (in the number and complexity of concepts used by the theory). Simplicity in this sense is opposed to the *intricacy* of a theory. Theories possessing a high level of explanatory power are relatively simple rather than intricate. And yet, a theory often needs to be adequately intricate in order to provide a sufficiently detailed and precise account of the relevant phenomena. Second, the explanatory power of a theory is determined by the *range* and *complexity* of the things that it purports to explain. It is relatively more difficult for a theory to explain phenomena over a relatively wide range, as it is to explain a relatively complex set of phenomena in a detailed way. Third, the range and complexity of what a theory explains relate to the *generality* and *specificity* of its explanations of those things. General explanations explain a wide range of things; specific explanations explain things with a high level of detail and precision; and thus both specificity and generality contribute to the explanatory power of a theory. As a consequence, the explanatory power of a theory turns on the relationship between the *simplicity* or else *intricacy* of the theory, and the *specificity* and *generality* of its explanations of a *range* of phenomena of a certain *complexity*. Fourth, the explanatory power of a theory is augmented by its *consilience* with other theories (which themselves have their own explanatory power). This consilience can occur either through *integration* with coordinate or superordinate theories or a theory's capacity to *unify* the explanations provided by subordinate theories.

However, each of these elements is in tension. There is a trade-off between simplicity and intricacy, between range and complexity, between generality and specificity, as well as between integration and unification. This trade-off is partly

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34 Ylikoski and Kuorikoski, above n 19, 201–203.

35 Thus, Weslake argues that 'macro' explanations (for example, Boyles' Law) and 'micro' or 'fundamental' explanations (for example, particle physics) each explain particular states of affairs in a way that the other cannot. See Weslake, above n 23.

resolved by the metaphor of 'power' or 'capacity'. As scientifically defined, 'power' measures 'work' in proportion to 'time', and it is this proportionality between work and time that is especially relevant. A theory has a high level of explanatory power when it is relatively simple and yet explains a wide range of phenomena or phenomena of great complexity through the generality and/or specificity of its explanations or in its consilience with other theories. But what if this theory competes with another theory that is less simple (ie, more intricate) but which has a capacity to explain an even wider range of phenomena or phenomena of even greater complexity, through explanations that possess even greater generality, specificity or consilience? In such circumstances, it will be difficult to say that one theory has more explanatory power than another, for power is a proportionate measure. Again, one theory may have a special capacity to explain a wide range of phenomena with a high level generality, whereas another theory may have a special capacity to explain phenomena of great complexity with a high level of specificity. In such circumstances, it may likewise be difficult to decide between the relative explanatory power of the two theories. It is only when a theory has relatively more explanatory *power* than another theory — where the first theory explains, for example, a similar range and complexity of phenomena with fewer explanatory concepts than a second theory — that we readily conclude that the first theory is superior to the second. If this is not the case, then the only further criterion we have for adjudicating between the two theories has to do with their consilience with other theories. If in terms of specificity and generality, or simplicity and intricacy, it is not possible to decide between two theories, it remains possible that one theory is better integrated with super-ordinate or co-ordinate theories than the other, and if so, we will consider the former theory to be superior to the latter. On this argument, then, competing theories are routinely assessed and compared across all four paired qualities, namely their simplicity/intricacy, range/complexity, generality/specificity, and integration/unification. Only when our assessment of competing theories against these criteria continues to present intractable problems of comparison and weighing that we may be led to conclude that each theory is powerful in different respects and is useful for different explanatory purposes. For these reasons, explanatory power does not always give us bright lines or guarantee consensus, but thinking about theorisation and assessing competing theories in this way can certainly help us to be more discerning, rigorous and self-critical about how we go about it. Approaching research and scholarship in this way also helps us to understand our theoretical practices, because explanatory power seems to reflect something fundamental about human rationality. And if we are to aspire to rationality in our theorising about law, then we will seek to maximise the explanatory power of our legal theories.

III. Does explanatory power apply to the discipline of law?

It seems apparent, then, that explanatory power has an important role in the formation and assessment of theories within the sciences. However, there are several important objections to the application of explanatory power as a relevant and appropriate norm

of theory formation in the field of law and legal studies that must now be considered. The objections can be classified into four basic kinds, connected with the idea that law is social, normative, linguistic and complex.

Law is social. The first kind of objection acknowledges that explanatory power may be an appropriate norm of theory formation within the natural sciences, but asserts that it is not a standard that properly applies in disciplines within the social sciences or the humanities, such as law. Law is a form of purposive human action, it is said; it is a human artefact and a social construct. To try to 'explain' law is to try to impose upon it a kind of 'naturalistic' explanation, which is reductionist and inadequate. Law can only be adequately understood, it is argued, from an internal point of view, which understands purposive social behaviours such as the construction and operation of laws in a 'humanistic' way.

Law is normative. The second kind of objection presses the point that the study of law is not concerned simply with what is the fact of the matter, but is directed rather to the practical question of what ought to be done. Even if positive laws are things that can be described and explained, this does not tell us what the law ought to be, or even about how it ought to be interpreted. Law not only needs to be described, its application needs to be justified. 'Scientific' or 'naturalistic' explanations of law are inadequate, it is argued, for the practical purposes for which legal theorisation is undertaken.

Law is linguistic. The third kind of objection emphasises that law is an artefact of human thought, articulated and recorded in words, usually in the form of written texts. Law is therefore not something to be explained, but rather something to be interpreted. Moreover, it is argued that our acts of interpretation, because undertaken from our own set of preconceptions and concerns, are 'constitutive' of the texts that we seek to interpret. A constitutive act of this kind cannot be said to be explanatory of any 'thing' external to the act of explanation. The interpretation of legal texts is therefore properly 'hermeneutic', not explanatory.

Law is complex. The last kind of objection proceeds from a conception of law as a complex and contested social practice, engaged in by free human agents and which consists of many aspects. Even if it were possible to identify law as a 'thing' or 'phenomenon' to be explained, law as it actually exists and is actually practiced is too complex, and indeed incoherent, to be susceptible of rational explanation. At best, some very specific aspect of the law might be explained, but this will depend on the extent to which that aspect is indeed intelligible, coherent and lacking in vagueness or ambiguity. A descriptive explanation of law is not going to resolve fundamentally contested problems of unintelligibility, incoherence or indeterminacy in the law, it is argued.

Each of these objections involves important characteristics of law that must be taken fully into account. However, rather than meaning that explanatory power simply has no application to law, they are properly understood as suggesting some important

ways in which the use of the idea of explanatory power as a norm of theory formation and assessment within the discipline of law needs to be carefully defined and qualified. These adjustments to the way explanatory power is understood and applied in legal studies may best be explained by reference to each of the four kinds of objections, dealt with in order.

A. LAW IS SOCIAL

Because law is the result of purposive human action, it needs to be acknowledged that explanations that identify non-human, non-purposive 'causes' of law will not be able to explain the phenomenon of law as it is understood and practiced by those who administer and are subject to it. This was one of H L A Hart's most important contributions to the understanding of law within the analytical legal tradition, and it is an insight that is widely recognised.[36] However, this does not simply mean that explanation, and assessing theories by reference to their explanatory power, is something necessarily inappropriate to objects of inquiry that are social in character. As Charles Taylor has argued, even from a humanistic point of view it is possible to say that the 'explanation' of social action is the goal of the social sciences.[37]

In this connection, Alexander Wendt has helpfully distinguished between two different kinds of question that can be asked, and two corresponding types of explanation that can be offered, in *both* the natural and the social sciences.[38] One kind of question is directed to 'causal' relationships; the other asks what he calls 'constitutive' questions. The first kind of question is generally posed in the form of *how* questions, such as 'how does salt corrode iron?', 'how did Christianity displace paganism?' or 'how has the price of petroleum gone up so rapidly?' These kinds of questions are concerned with identifying the efficient causes of phenomena. The second type of question is generally posed in the form of *what* questions, such as 'what are comets made of?', 'what is it about Luxembourg that has enabled it to survive next to great powers like France and Germany?' or 'what is the nature of the European Union?' These types of questions are concerned with what kind of thing something is, and what are its constituent elements that make it so.

Both kinds of questions are routinely asked in both the natural and the social sciences. Thus, disciplines such as economics, sociology and political science, when seeking to formulate descriptive generalisations about human behaviour, often seek to identify certain causal relationships, as well as to answer certain kinds of constitutive questions. The same is likewise true within the discipline of law. Although much

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36 See, eg, Scott J Shapiro, 'What Is the Internal Point of View?' (2006–2007) 75 *Fordham Law Review* 1157.

37 Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25(1) *The Review of Metaphysics* 3.

38 Wendt, above n 28, 104–108. For a different taxonomy, see Jon Elster, *Explaining Technical Change: A Case Study in the Philosophy of Science* (Cambridge University Press, 1983) chs 1–3. For a critique, see Jason Glynos and David R Howarth, *Logics of Critical Explanation in Social and Political Theory* (Routledge, 2007) ch 3.

theorising in law is developed in response to constitutive questions such as 'what is law?', 'what kind of a constitution is this?' or 'what is the rule against perpetuities?', legal researchers also pursue causal questions such as 'how did the law relating to criminal procedure come to be different in these two countries?', or 'how did this constitution come into being?' The more fundamental difference between the descriptive social sciences and some aspects of the study of law is that in addition to addressing causal and constitutive questions such as these, the study of law is concerned with practical and prescriptive questions about what ought to be done. But even disciplines within the social sciences, such as politics and economics, have their normative sides as well.

Wendt points out that constitutive theories provide what he calls 'explanations'.[39] Constitutive theories offer an account of the properties and component parts of things that make them the kind of thing that they are. As Robert Nozick once put it, explanatory hypotheses are generally concerned with how things can be the case, how they fit together and what facts or principles give rise to them.[40] But because they do not explain things by reference to their causes, constitutive theories must explain them solely by reference to 'concepts'.[41] By identifying their constituent parts and applying certain categories to them, constitutive theories thus not only describe phenomena, they also explain them, classifying them and integrating them into a wider conceptual whole. For example, the constitutive question, 'what is the European Union?', has been answered in several different ways and from different points of view: as an international organisation according to some, as a consociational confederation, an emerging federation, or a supranational system of multilevel governance, by others.[42] Each theory seeks to explain the constitutive nature of the European Union by subsuming it under one concept or another. But notably, as Wendt also points out, conceptualisations of this kind appeal especially to unificatory and integrationist theories of explanatory power.[43] The objective of each theory is to identify the constituent elements and understand how they are organised in order to explain why a particular object of inquiry has the properties that it has, which makes it the kind of thing that it is.[44] By identifying their constituent parts and applying certain categories to them, constitutive theories explain phenomena by classifying them and integrating them into a wider conceptual framework as a way of 'making sense' of them.

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39 Wendt, above n 28, 108.

40 See Robert Nozick, *Philosophical Explanations* (Harvard University Press, 1981) 8–11.

41 Wendt, above n 28, 110, citing William Dray, '"Explaining What" in History' in Patrick Gardiner (ed), *Philosophy of History* (Prentice-Hall, 1964) 403.

42 See Nicholas Aroney, 'Federal Constitutionalism/European Constitutionalism in Comparative Perspective' in Gert-Jan Leenknegt (ed), *Getuigend Staatsrecht: Liber Amicorum A. K. Koekkoek* (Wolf Legal Publishing, 2005) 229.

43 Wendt, above n 28, 110, citing Steven Rappaport, 'Economic Models and Historical Explanation' (1995) 25 *Philosophy of the Social Sciences* 421.

44 Wendt, above n 28, 112.

Now, it is true that the philosophical accounts of explanatory power surveyed in the previous section are geared generally to the type of explanation that is typically offered by the natural rather than the social sciences. Explanations within the natural sciences are usually causal, they are frequently expressed in mathematical formulae, and they typically refer to and are tested against certain facts that can be measured in more or less quantitative terms. As Popper emphasised, theorisation within the natural sciences involves testable hypotheses and is usually concerned with providing causal explanations. Research within the social sciences aspires to similar standards and adopts roughly comparable practices, but the opportunity to construct experiments to test social science hypotheses is considerably limited.

Explanatory power nonetheless remains a fundamentally important norm of theory formation and assessment within the social sciences. One has only to think of some of the more powerful social theories that have shaped the field in the last century to see the point. Consider the elegance and explanatory ambition of Marxist theory — a profoundly simple (but not simplistic) way of understanding the world that purports to provide a vast integrating explanation of philosophy, history, economics, sociology, politics and law, comparable to the major integrating theories of the natural sciences, such as Newtonian or Einsteinian physics. Of course, the Marxist synthesis has been widely critiqued and generally rejected for its failure to account for many features of the phenomena that it aspired to explain, but that critique and rejection is itself testimony to the fact that theories within the social sciences are routinely assessed for their explanatory power, and a prime desideratum of explanatory power is the capacity of a theory to provide a finely-textured account of the relevant data that is robust under intervention. Other theories, often less ambitious, but apparently possessing greater explanatory power, have subsequently taken Marxism's place.[45] In the assessment of rival theories within the social sciences explanatory power is persistently a controlling desideratum.

B. LAW IS NORMATIVE

Law has both a normative and a factual side. Law is undoubtedly concerned with prescribing what ought to be done, and yet that which is prescribed by the law is something that can be identified as a fact. As a consequence, it is possible to seek to describe and understand the content of the law in a way that is distinct from the open-ended task of prescribing what the law ought to be. This task of description is not, however, value-free. It is an activity that is undertaken for intelligible reasons and in order to secure apprehended goods of various kinds, so that description is not entirely divorced from normative concerns.[46] Moreover, the law often incorporates moral

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45 Consider, for example, the case of rational choice theory, an important alternative to Marxist-inspired social theory. For a discussion, see James Samuel Coleman and Thomas J Fararo (eds), *Rational Choice Theory: Advocacy and Critique* (Sage, 1992).

46 Such motivating reasons may be intrinsic to the practice of description (ie, knowledge of the law is something good in itself) as well as extrinsic (ie, knowledge of the law is necessary in order for us to enjoy the benefits of the law, in terms of

standards as part of its content, which will have to be assayed by anyone seeking to identify or apply the content of the law. The law will not be understood without appreciating what it means normatively to those who make, administer and submit to it. In addition, the law is sometimes either vague or ambiguous, and in these cases a degree of constructive judgment is necessary in order to resolve the law's indeterminacy, and normative considerations will routinely be drawn upon to fill the gaps and make the law sufficiently determinate. However, none of these points means that law can simply be identified with morality, or that the task of identifying the content of the law is no different from an open-ended inquiry into what ought to be done. For good reason one of the prime characterising features of human law is its positive and relatively determinate nature. It is with the description and understanding of the law in this positive and determinate sense that this article is primarily — although not exclusively — concerned.

How, then, is explanatory power to be understood in this context? The first point is that the law in its facticity constitutes it as an 'object' that can be described, analysed and explained. As John Finnis, Neil MacCormick, Tom Campbell, Jeremy Waldron and even Roscoe Pound have each pointed out in different ways, there are good reasons why law has a positive, factual form that can be identified and described in a way that cordons off acts of judgment from unrestricted moral argument. Roscoe Pound articulated one of them when he said that justice according to law calls for the administration of justice 'according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receive like treatment'.[47] Jeremy Waldron referred to this rationale, and added two others, when he observed that '[t]here are reasons [why judges] regard themselves as (sometimes) governed by statutes or by constitutional texts; and there are reasons for their deferring to precedents. And in the last analysis, these are *moral* reasons — reasons of concern for established expectations, reasons of deference to democratic institutions, and reasons associated with integrity and the moral value of treating like cases alike.'[48] John Finnis put it slightly differently when he pointed out that the difference between specifically legal rationality and purely moral reasoning lies in the fact that legal rationality involves the deliberate construction of a set of artificial institutions and forms of reasoning (ie, political authorities, written constitutions, judicial decision-making, and so on) in order to pursue a set of moral purposes (ie, living together in a tolerably just society). These artificial institutions and forms of reasoning are adopted because, as Finnis put it, 'we have no other way of agreeing amongst ourselves over significant spans of time about precisely *how* to pursue our

what Lon Fuller called both its 'inner morality' and its 'external morality'). See Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1964) and compare John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) ch 1.

47 Roscoe Pound, 'Justice According to Law' (1913) 13(8) *Columbia Law Review* 696, 705.

48 Jeremy Waldron, 'Do Judges Reason Morally?' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 38, 53.

moral project *well*.'[49] But with the establishment of a set of political and legal institutions within a society, provided those institutions are not plainly or egregiously unjust, we rightly regard ourselves, our politicians and our judges to be bound by those institutions.[50] It is thus for good reason, Finnis observed, that the law involves the 'artificial ... rationality of laying down and following a set of positive norms identifiable as far as possible simply by their "sources" (ie, by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges.'[51] This is the 'truth', as Finnis puts it, in legal positivism.[52] Neil MacCormick, although he approached the question from a different jurisprudential perspective, agreed that the goal of our construction of 'legality' is to create 'certain social institutions which in at least certain phases are themselves closed to pure and raw moral debate' so that, '[o]nce legal norms ... have come to be settled, these are to be the currency and ground of argumentation in those institutions. Law and morality ... are to be kept apart, even though to some extent the latter is a necessary interpretive context for the former.'[53] For these kinds of reasons, theories that seek to explain the law in its determinate, positive character have an important role to play in the application of the law to particular cases.

Nonetheless, it remains the case that law ordinarily pursues certain moral ends, and may often do so by invoking moral standards, and so it may be impossible to understand law from the internal point of view without understanding those standards and purposes. Further, indeterminacy in law may necessitate recourse to moral principles in order to undertake the constructive judgments that are necessary to give the law a sufficiently determinate character so as to address some particular question that has been posed for resolution. In such cases, an explanation of the law in its facticity will not provide all of the necessary answers. Does this mean that explanatory power has no further application? Understood strictly as an 'explanation' of the fact of the matter, in such cases, the answer must be a qualified 'no'. However, in this connection it is important to recognise that even purely moral theories, as well as theories about how a particular body of law or legal text ought to be interpreted, or about how gaps in the law ought to be filled, are typically characterised by features that closely resemble the general characteristics of scientific theories that possess explanatory power. As Robert Nozick has observed, even purely moral theories aspire

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49 John Finnis, 'Natural Law and Legal Reasoning' (1990) 38 *Cleveland State Law Review* 1, 6 (emphasis in original).

50 For Finnis's account of how we ought to respond to injustice in the law, see Finnis, above n 46, ch 12.

51 Finnis, above n 49, 12. Such 'constitutive events' and 'sources' of law include constitutional 'rules' that 'define, constitute and regulate' legal institutions, as well as enactments by legislators and adjudication by courts. See Finnis, above n 46, 268–9.

52 John Finnis, 'The Truth in Legal Positivism' in Robert P George (ed), *The Autonomy of Law* (Clarendon Press, 1996) 195.

53 Neil MacCormick, 'The Ethics of Legalism' (1989) 2(2) *Ratio Juris* 184, 189.

to such things as cognitive simplicity, explanatory power, depth of theory and theoretical fruitfulness.[54] These points can be supported by illustrations from both moral and legal theory. Five examples will suffice.

Many would say that the singularly most influential work of moral philosophy of the twentieth century was John Rawls' *A Theory of Justice*.[55] Although Rawls' work is usually assessed primarily on the ground of the substantial account of political morality that it contains, the attractiveness of the theory has been just as much attributable to what might be called its simplicity, its generality, its specificity, and its integration with theories in other disciplines. Indeed, there is a real sense in which the theory has real explanatory power in terms of its capacity to clarify, organise and explain the kinds of moral beliefs and convictions adhered to by many of those living in modern liberal democracies. It is no coincidence that Rawls presented his theory as the result of a reasoning process aimed at a kind of 'reflective equilibrium', in which there is a coherence between one's general ethical intuitions and one's specific moral judgments. Rawls' central organising conceptions of the 'original position' and the 'veil of ignorance' were extraordinarily elegant ideas, which he sought to show had both wide-ranging applications and remarkably specific implications for the design of an ideal liberal-democratic political system. The theory was also powerful in its capacity to integrate several fields of inquiry into its ethical frame, especially economics, politics and law. All of these elements are characteristic of theories having considerable explanatory power and they help to explain the success and popularity of Rawls' work.

H L A Hart's *The Concept of Law*,[56] an example this time of a primarily descriptive theory, similarly offered a very elegant account of the concept of law, grounded upon a careful methodological distinction between understanding social institutions from an 'external' and an 'internal' point of view, an approach that made it possible to differentiate between social behaviours and social rules, among social rules between rules of etiquette and social obligations, and among obligations between moral and legal obligations. The distinction between the moral and the legal Hart attributed to the existence of a legal system, the three characteristic features of which were said to provide remedies for the three characteristic defects of a social system grounded solely on primary (moral) rules. These characteristic defects concerned what Hart identified as the problem of inefficient execution, the problem of stasis and the problem of uncertainty; and the corresponding remedies Hart identified with three special types of secondary (legal) rules: rules of change, rules of adjudication and the rule of recognition, the latter providing a body of law with its systematic character and identity. The elegance and economy of Hart's theory is evident. Its explanatory power lies in its capacity both to shed light on the specific details of particular legal systems and to offer a general account of the nature of law and social ordering applicable, in principle, to every form of human society. Indeed, Hart very plainly asserted that the

54 Nozick, above n 40, 324.

55 John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

56 Hart, above n 3.

persuasiveness of his theory rested largely on its 'explanatory power in elucidating the concepts that constitute the framework of legal thought.'[57] Moreover, Hart offered an analytical jurisprudence which doubled as a descriptive sociology that was seamlessly integrated with cognate epistemological, linguistic and ethical theories. The remarkable influence and reach of Hart's theory is due not least to its elegance and explanatory power across all of these dimensions.

A similar example is the natural law theory offered by John Finnis in his book *Natural Law and Natural Rights*.[58] Grounded, like Hart, on a specific epistemology and theory of society, Finnis presented an account of law in which it is understood as form of practical rather than theoretical reasoning, where such reasoning is necessarily founded upon certain indemonstrable and unavoidable first principles, consisting of seven basic values in terms of which all moral deliberation properly proceeds. These basic values, according to Finnis, are directed towards the determination of 'what is to be done' at both an individual and communal level, through eight directive principles of practical reasoning. Finnis proceeded to illustrate the meaning and operation of these basic goods and modes of practical reasoning, constructing an entire theory of the nature and purposes of law and legal regulation, extending to an account of the common good, justice, rights, authority, law and legal obligation. Like the theories of Rawls and Hart, Finnis's theory is elegant and powerful, in terms of both its specificity and its generality, its foundation upon a specific epistemology, and its integration with a wider metaphysics and social theory.

Finally, two examples from constitutional theory. The first, John Hart Ely's highly influential *Democracy and Distrust*,[59] proposes a theory of constitutional judicial review which seeks to resolve the tension between interpretivism and non-interpretivism in theories of constitutional adjudication by proposing that the American constitution is best understood as a document whose central purpose is to institute a set of democratic decision-making procedures and that the task of the courts is to interpret the Constitution so as to ensure that those procedures are given proper effect. The strength of Ely's argument is arguably threefold: the theory rests on an analysis of the text and structure of the Constitution; the theory has a real capacity to explain as well as justify the jurisprudence of the Warren Court; and the theory appeals to the widespread public acceptance of representative democracy as the guiding principle of American government. Notably, as Michael Dorf has pointed out, Ely's appeal, like that of Rawls, is 'coherentist' in the sense that it attempts to 'make the best sense' of the practice of constitutional law 'as a whole' — that is, its attractiveness turns on the explanatory power of the theory.[60]

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57 Ibid 79.

58 Finnis, above n 46.

59 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

60 Michael C Dorf, 'The Coherentism of Democracy and Distrust' (2005) 114 *Yale Law Journal* 1237, 1242.

A final example is Akhil Amar's *America's Constitution: A Biography*,[61] a book that undertakes a very close examination of the text, history and structure of the Constitution, and in so doing attempts to present a holistic account of American constitutional law, constitutional history and constitutional politics that explains how the parts fit into the whole. Amar's book is methodologically grounded upon a specific interpretive approach which he calls 'constitutional textualism', and it advances an explanatory thesis about the Constitution's inner logic centred on the document's commitment to popular sovereignty — a democratic theme marred by the Constitution's many concessions to slavery, but a defect gradually overcome through the course of time. At the same time, because the book is rich and detailed in its historical description, it has a complexity and untidiness that resists complete theorisation. It also leaves certain questions unanswered and calls for more research to uncover relevant evidence that might shed light on those questions. Amar has thus written in a way that seems to be conscious of the attractiveness of elegance, generality and unification, but which is also conscious of the trade-off between these desiderata and countervailing values such as complexity and specificity, and thus of the limits of descriptive and explanatory theorisation.

These examples — and the illustrations could be multiplied[62] — suggest that theorisation in ethics and law is shaped by desiderata very similar to those said to characterise theories possessing explanatory power in the natural and social sciences. The work of Rawls, Hart and Finnis show that this is the case in relation to theories of political morality and analytical legal theory, Ely's and Amar's work on the American Constitution suggest that it is also the case with respect to the interpretation of constitutional texts and bodies of constitutional law. Most of these theories are at least to some extent descriptive or explanatory of 'the law', or of the values that underlie the law, although in doing so they are also cognisant of the normative dimensions of law. Indeed, some of them are especially concerned to advance a moral theory about what ought to be instituted as law, rather than a description of what the law actually is. Certainly, then, the descriptive and the normative aspects are distinguishable, and when it comes to normative prescription, the attractiveness of a theory does not depend simply on its capacity to explain 'the law' as an object of inquiry, but rather upon its capacity to articulate and illuminate certain intuitions about a just social order and about the law's proper role within such a society. And even in the case of primarily prescriptive theories such as Rawls', there is an aspiration to construct a theory that critically clarifies, evaluates and systematises the underlying value-commitments and constitutional features that actually exist in contemporary liberal-democratic societies. Thus, all of these theories, whether pursuing primarily descriptive or prescriptive goals, display characteristics of simplicity-with-intricacy, specificity-with-generality, range-with-complexity and integration-unification with other theories. This suggests that these four paired qualities constitute very appropriate norms of theory-formation in law, whether a theory is primarily descriptive, prescriptive or somehow concerned with both. There is indeed good reason to think that the paired qualities are prime desiderata

61 Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005).

62 See the publications referred to in n 3 above.

in theory formation generally, because they seem to reflect something very fundamental about human rationality.

C. LAW IS LINGUISTIC

If law has both normative and factual dimensions, and if its facticity has to do with its determinate, positive character, then it needs also to be acknowledged that the law is characteristically expressed linguistically, usually in the form of written texts. To the extent that this is the case, it follows that our understanding of the law must be more a matter of the interpretation of literary texts than of the scientific description of physical objects. Our understanding of the law must in this respect be hermeneutic, not scientific. It also needs to be acknowledged that an interpreter who seeks to understand a legal text will bring to that interpretation something of what Martin Heidegger called a 'fore-structure of understanding' that shapes the act of interpretation, with the implication that every act of interpretation to some extent 'constructs' the meaning that is derived from a text.[63]

However, two points need to be noted about this. The first is that Heidegger's claim about the fore-structure of understanding pertains not only to the interpretation of literal texts, but also to our interpretation of all of the objects of our experience, including the natural things that are the objects of scientific investigation and theorisation.[64] If we have fore-structures of understanding, then these are presuppositional frameworks that shape theorisation in all disciplines, not just those concerned with written texts. Kuhn's well-known argument that 'normal science' is conducted in terms of organising paradigms which define the kinds of questions, methods and evidence that counts in the scientific endeavour points to a kind of fore-structure of understanding that shapes inquiry within the natural sciences.[65] Thus, if Heidegger's fore-structure of understanding undermines the possibility of 'explanation' in literary disciplines such as law, it also undermines its possibility in the natural sciences. Broadly the same kinds of epistemological problems emerge in both fields of inquiry, and must be addressed in roughly the same kind of way.

With the disciplines of the physical and mathematical sciences centrally in view, Imre Lakatos, while acknowledging with Kuhn and against Popper that there can be no access to any 'hard' empirical facts that might conclusively falsify a theory, at the same time concluded against Kuhn and with Popper that it remains possible to engage in a kind of rational judgment between theories. For Lakatos, a theory ought to displace its rivals when it satisfies three conditions: it has 'excess empirical content' over them, it accounts for their success by explaining all of their unrefuted content, and

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63 Cf Stanley Fish, *Is There a Text in This Class?* (Harvard University Press, 1980) ch 13.

64 Martin Heidegger, *Being and Time* (Blackwell, 1962) §32.

65 Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970).

at least some of its 'excess content' is empirically corroborated.[66] Here Lakatos seems very clearly to be asserting that, despite the existence of scientific 'paradigms' or even 'fore-structures of understanding' that shape and determine scientific investigation, it remains possible to compare and evaluate theories against the kinds of criteria that constitute the explanatory power of a theory.

But further, as Umberto Eco and Hans-Georg Gadamer have each argued, similar criteria apply to the assessment of interpretive theories within hermeneutic disciplines that involve the interpretation of literary, theological and legal texts. Indeed, although concerned with a somewhat differently configured set of questions, there is an interesting and important resonance between the philosophy of science promoted by Lakatos and the philosophical hermeneutics of Gadamer.[67] Both are acutely conscious of the roles that background assumptions and ways of seeing play in our cognition of any subject-matter, and yet both seek to articulate the grounds upon which, nonetheless, it may be possible for us to transcend our own horizons of understanding. This leads to the second point, which is that while we all approach texts, including legal texts, from within our own fore-structures of understanding, our reading of a text is, as Gadamer argued, an encounter with the horizon of its author, and if we read a text with 'openness', there is made possible a 'fusion of horizons', in which our own perspective is altered as a result of that encounter. It is significant that for Gadamer this openness turns on a 'readiness to allow something to be said to us', founded upon an acknowledgment of the finitude and fallibility of our own understanding, for it is only when we have this attitude that a 'word becomes binding' for us. Accordingly, said Gadamer, while the meaning of a text 'is concretized and fully realized only in interpretation', a genuinely interpretive activity will consider 'itself wholly bound by the meaning of the text', for, as he put it, '[n]either jurist nor theologian regards the work of application as making free with the text'.[68] Gadamer thus warned 'against overhastily assimilating the past to our own expectations of meaning'. Only if we heed this warning, he said, 'can we listen to a tradition in a way that permits it to make its own meaning heard', thereby 'open[ing] ourselves to the superior claim the text makes' and 'subordinating ourselves to the text's claim to dominate our minds'.[69]

Thus, while Gadamer certainly rejected the suggestion that interpretation is properly understood or pursued in terms of 'the objectifying methods of modern science',[70] his description of how we go about the hermeneutic task nonetheless resembles the account of 'explanation' that we find in the philosophy of science

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66 Lakatos, above n 7. Lakatos distinguished here between 'falsification' and 'acceptability' conditions of a theory, but the distinction may be overlooked for present purposes.

67 Anthony C. Thiselton, *The Hermeneutics of Doctrine* (Eerdmans, 2007) 168.

68 Hans-Georg Gadamer, *Truth and Method* (Continuum, 1989) 328.

69 Ibid 304, 310. It is beyond the scope of this article to discuss Gadamer's 'conservatism', on which see David Ingram, 'Jürgen Habermas and Hans-Georg Gadamer' in Robert Solomon and David Sherman (eds), *The Blackwell Guide to Continental Philosophy* (Blackwell, 2003) 219.

70 Gadamer, above n 68.

literature, especially as that literature has had to respond to the challenges that the sociology of knowledge has posed to scientific method. Thus, approaching a text with the presupposition of its meaningful coherence, Gadamer affirmed that we aim for an interpretation in which the specific details of a text are understood in harmony with the whole.[71] Recognising that a text can be approached from different vantage points, with the various concerns and questions that characterise different historical situations, we should seek to identify 'the most comprehensive account possible', as Charles Taylor later put it, one that is capable of integrating a wide variety of specific interpretations into the framework of a unified explanation.[72] Moreover, to do this, Gadamer affirmed, we need to seek to understand a text in the historical context in which it came into being. While a recovery of the actual *intentio auctoris* is not possible, nonetheless 'we try to transpose ourselves' into the author's perspective,[73] and we seek through a reflection on the words, structures and context of the author's text the meaning and purposes with which the text confronts us. As a consequence, as Taylor has noted, interpretations can indeed be ranked in terms of their 'accuracy, comprehensiveness [and] nondistortion', as well as their capacity to take in and make comprehensible as wide range of perspectives about the text as is possible.[74] It is to this ideal that interpretation-as-understanding aspires. And it is an ideal in which such characteristics as simplicity, specificity and generality have an important role as norms of theory-formation.[75]

D. LAW IS COMPLEX

Finally, it needs to be acknowledged that the positive law is complex, contested and possibly at times too incoherent to be susceptible of rational explanation. However,

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71 Ibid 291–4.

72 See Charles Taylor, 'Gadamer on the Human Sciences' in Robert J Dostal (ed), *The Cambridge Companion to Gadamer* (Cambridge University Press, 2002) 126, 135.

73 Gadamer, above n 68.

74 Taylor, above n 72, 135. Admittedly, these emphases in Gadamer's thought are not frequently found in the literature which discusses Gadamer's relevance to law. Most of these discussions fail to take into account Gadamer's notion of 'subordinating ourselves to the text's claim to dominate our minds' and similar aspects of his thought. They also tend to draw one-sided conclusions from Gadamer's discussion of the 'exemplary' character of legal hermeneutics by placing all of the focus upon his assertion that the application of the law by judges is a form of 'norm creation'. Gadamer's point is that legal hermeneutics illustrates something that is characteristic of *all* interpretation: that all interpretation has a constructive side. However, by parity of reasoning, Gadamer's claims about hermeneutics generally — especially that there can be a fusion of horizons and that a text *can* say something to the reader — applies to legal hermeneutics just as much as to other kinds of hermeneutics.

75 We see this illustrated in Gadamer's assessment of interpretations of both his own writings and those of Nietzsche, Heidegger and others. For example, Gadamer characterises Heidegger's interpretation of Nietzsche as 'extraordinarily penetrating and fitting'. See Hans-Georg Gadamer, 'Hermeneutics and Logocentrism' in Diane P Michelfelder and Richard E Palmer (eds), *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (State University of New York Press, 1989) 114, 115.

this does not mean that explanation is always simply impossible, just that a critical approach to theorisation in law will be conscious of the limitations of the possibility of coherent explanation, assessed on a case by case basis. It will be necessary at the outset of any inquiry to define its scope carefully and modestly, and to reflect critically on the extent to which any particular theory *fails* to explain certain things about the law. Thus, the scope of a theory needs to be defined precisely by reference to its specific subject matter (ie, what topic or sub-topic of law is being explained; what issue or issues are being addressed), as well as by reference to the various possible aspects of the law thus considered (ie, is the focus of attention on a legislative enactment, case-law, legal practice, etc). The trade-off between simplicity and intricacy, and between specificity and generality, applies to legal theorisation just as it does in other fields of inquiry. For example, an ambitious theory that seeks to explain enacted text, case-law and legal practice simultaneously may aspire to significant generality, but is likely to be weak in terms of its specificity. By contrast, a relatively modest theory which focuses on only one of these aspects, may be weaker in terms of its generality but will probably offer better prospects of a high level of specificity. Such an approach will probably leave some aspects of the law unexplained, and the remaining unintelligibility, incoherence or indeterminacy of law may, for practical purposes, have to be remedied through some kind of constructive judgment, requiring inescapable moral judgments to be made. But this still leaves an important role for explanatory power as a prime criterion of theoretical adequacy within the discipline of law and, in particular, within the fields of constitutional law and constitutional interpretation. In other words, explanatory power is a fundamental norm for both the formation and the *critical assessment* of legal theories.

IV. How does explanatory power apply in legal practice?

If explanatory power has a legitimate and important role to play in legal theorisation, what would a rigorous pursuit of explanatory power look like in practice? In the specific field of constitutional law, competing theories are very numerous. However, all such theories seem to aspire, at least to some extent, to the norms of theory formation that have been discussed so far — simplicity, specificity, generality, consilience, integration, and so on. Sometimes they do so explicitly;[76] more frequently, they do so implicitly.[77] But what difference would a deliberately rigorous pursuit of explanatory power make in practice? This part of the article seeks to answer this question by discussing two very influential theories of constitutional interpretation, namely those advanced by Philip Bobbitt and Ronald Dworkin, and by showing, with reference to the alternative approach adopted by Jules Coleman, how a rigorous pursuit

76 See, eg, some of the publications cited in n 3 above.

77 Because such norms are widely-acknowledged but their relationship to the idea of explanatory power is not frequently considered, this should come as little surprise.

of explanatory power differs in certain important respects from the approaches advanced by Bobbitt and Dworkin.

Philip Bobbitt is well-known for proposing a theory of constitutional interpretation which distinguishes six distinct modalities of constitutional interpretation respectively labelled 'textual', 'structural', 'historical', 'doctrinal', 'prudential' and 'ethical'.[78] Bobbitt wished to show that although particular judges may tend to favour some modalities over others, all six modalities are used from time to time in response to the particular issues raised in the various constitutional cases that come before the courts. Bobbitt also wished to advance the view that a judge is justified in using whatever combination of modalities seems pragmatically appropriate in the circumstances of each case. For him, no particular modality is entitled to priority; each is a discrete approach and there are no special relationships between them.

Reflecting on the modalities of argument, judges sometimes — but certainly not always[79] — resist simple classification of their approaches into one category or another.[80] The art of judgment is too complicated and varied to be reduced into a simple set of rules, procedures or guiding principles, it is sometimes said, and no particular modality is sufficient to address the complex questions of constitutional interpretation that arise in contested cases.[81] And so it might seem that all judges make use of each of the modalities as suits their purposes, much the way that Bobbitt says they do. However, this does not mean, simply, that Bobbitt's unstructured pragmatism sufficiently describes the practices and aspirations of those who interpret constitutions and similar founding legal documents. Close analysis of the reasoning in particular constitutional cases often discloses a much more structured conceptual relationship between particular modalities. The High Court of Australia's implied rights jurisprudence, for example, discloses a special relationship between arguments based on text, structure and history that is not shared by doctrinal, or by prudential and

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78 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).

79 Eg, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Vintage Books, 2005); Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1.

80 See, eg, *SGH Limited v Commissioner of Taxation (Cth)* (2002) 210 CLR 51, 67 [14] (Gleeson CJ, Gaudron, McHugh and Hayne JJ), 75 [40]–[44] (Gummow J).

81 Two studies that suggest the existence of this eclecticism are: Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26(1) *University of New South Wales Law Journal* 210. See also *New South Wales v Commonwealth* (2006) 229 CLR 1, 301–05 [736]–[738] (Callinan J). See, eg, Helen J Knowles, *The Tie Goes to Freedom: Justice Anthony M Kennedy on Liberty* (Rowman & Littlefield Publishers, 2009) 3; Selway, above n 81.

ethical arguments.[82] The jurisprudence also suggests that reasoning which attends most closely and rigorously to the modalities of text, structure and history leads to characteristically different conclusions compared with reasoning which places more emphasis upon alternatively doctrinal, prudential, ethical or comparative arguments.

Now it is true that all interpreters pay attention to text, structure and history, at least to some extent.[83] The difference lies in the way in which these three modalities of reasoning are used in connection with arguments based on prudence and ethics. This can perhaps be most easily explained by reference to Ronald Dworkin's theory of judicial decision-making. For Dworkin, the task of judgment involves both 'fit' and 'justification'.[84] A judicial decision, he says, must fit the authoritative sources of law within a legal system (ie, constitution, statute, precedent),[85] but it must also place the 'best interpretation' on those legal materials, which for Dworkin means the interpretation that best justifies the exercise of coercive force by the institutions of government, including the courts themselves. In this way, moral evaluation is integrated with the task of finding a solution that fits the authoritative legal materials, with the result that the preferred interpretation is that which comports best with both fit and justification. This necessarily means that the requirement of fit does not require judges to maximise the explanatory power of their interpretations, for that would mean giving the best account of all of the relevant legal materials down to their finest details. As Dworkin puts it, fit is only a 'rough threshold requirement', and once a judge has identified the range of possible interpretations that broadly fit the legal materials, the decisive task of finding the most justified interpretation takes over. The requirement of fit is a relatively moderate and largely preliminary one for Dworkin.[86]

This distinction between seeing the requirement of fit in either 'maximising' or more 'moderate' or 'minimal' terms helps to clarify what it would mean for explanatory power to function as a decisive desideratum in the formation and

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82 Nicholas Aroney, 'Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*' (2011) 30 *University of Queensland Law Journal* 145.

83 This is broadly suggested in Breyer, above n 79, 7-8. See also Michael W McConnell, 'Active Liberty: A Progressive Alternative to Textualism and Originalism?' (2006) 119 Harvard Law Review 2387, 2415.

84 Ronald Dworkin, *Law's Empire* (Fontana, 1986) 230–31, 255–8.

85 Doctrine (precedent) is thus associated with the text and structure of a constitution (or a statute) in a sense in which prudence and ethics are not. Nonetheless, there is a tension between doctrine and the textual and structural features of the constitution as a 'document'. For the tension, and a proposed resolution, see, Akhil Reed Amar, 'The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine' (2000) 114 *Harvard Law Review* 26. See also Steven G Calabresi (ed), *Originalism: A Quarter-Century of Debate* (Regnery Publishing, 2007) ch 9 ('Panel on Originalism and Precedent').

86 Michael McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1996–1997) 65 *Fordham Law Review* 1269, 1271–74.

assessment of constitutional interpretations. The explanatory power of an interpretation will be maximised as it successfully accounts for details in the relevant text and structure of a constitution, illuminated by its history, and by the normative, prudential and comparative judgments that actually shaped the drafting, enactment and progressive amendment of the document. This can be seen, for example, in the High Court's implied rights jurisprudence, for example, where different views of the proper roles of fit and justification have led to significantly different conclusions. In the early cases,[87] doctrine was not centrally relevant because the idea that the Constitution necessarily implies a right to freedom of political communication was strictly unprecedented.[88] The real weight of argument in those cases concerned the text, structure and history of the Constitution, combined with an ethical (and partly prudential) judgment about the desirability of a system of representative democracy in which civil and political rights such as free speech are protected by constitutional judicial review.[89] It was only when the implied freedom of political communication was applied in subsequent cases that doctrine became increasingly relevant.[90] However, in the cases where new implied rights were later proposed,[91] text, structure and history, as well as prudence and ethics, predictably became more important again.[92]

As such, the implied rights cases on one hand illustrate the way in which some judges, apparently wishing to come to conclusions that are thought justifiable (in Dworkin's sense), undertake analyses of text, structure and history at a level of generality sufficient to enable them to incorporate the prudential judgments and ethical values they think best warranted in the circumstances. On the other hand, the cases also show how closer and more careful analyses of text, structure and history, when rigorously pursued, tend to reinforce the findings of each other, and can help to disclose the existence of a more precisely defined set of prudential judgements, ethical goals and comparative models which actually motivated and inspired those involved in the making of the Constitution. Proceeding in this latter way tends to uncover, with more precision, the exact identity of the principles and values upon which the specific text and structure of the Constitution was demonstrably predicated and constructed. It

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87 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and, to a lesser extent, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

88 Notwithstanding, *Davis v Commonwealth* (1988) 166 CLR 79 and noting the existence of *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

89 I have attempted to show this in Nicholas Aroney, *Freedom of Speech in the Constitution* (Centre for Independent Studies, 1998).

90 See, eg, *Coleman v Power* (2004) 220 CLR 1, which treated *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as a binding precedent.

91 See, eg, *McGinty v Western Australia* (1996) 186 CLR 140; *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

92 For more detail see Nicholas Aroney, 'The Structure of Constitutional Revolutions' (1998) 21(3) *University of New South Wales Law Journal* 645 and Nicholas Aroney, 'Lost in Translation: From Political Communication to Legal Communication?' (2005) 28(3) *University of New South Wales Law Journal* 833.

also offers a basis for distinguishing between 'authentic' constitutional implications and those that rest upon ethical and prudential judgments that have an inadequate grounding in the text and structure of the Constitution.

Such an approach to distinguishing authentic and spurious constitutional implications rests on the view that our constitutional theories ought to offer the best possible explanations of all of the relevant legal materials, down to their finest textual details and extending to their most fundamental principles and comprehensive structural ideas. The goal, on such a view, is to maximise the fit or explanatory power of our constitutional theories in as exhaustive and inclusive a manner as possible. And to do this, as Jules Coleman has pointed out, our theories must meet the norms of theoretical adequacy that apply generally to all theories (such as simplicity, coherence and consilience) as well as the more particular norms that apply to theories that seek to advance an explanation of something (such as descriptive precision or predictive accuracy).[93] Further, as Coleman has pointed out, explanation in this sense is something quite separate from justification.[94] For if we try to merge the tasks of explanation and justification into one undertaking, as Dworkin does, we are not going to be able to do either very well. The explanatory adequacy of a theory that tries to come to a conclusion that is morally justified in open ended terms is going to be inferior to the explanatory adequacy of a theory that seeks only to explain the relevant legal materials. Nor would we think much of a theory of justice that uncritically incorporated certain facts about a particular system of law without rigorously evaluating that law for its substantive justice. For Coleman, the law under which we live might indeed be morally justified, and it may well be legitimate for our judges to enforce the law in the cases that come before them, but the substantive justice of what is applied turns on an inquiry that is quite separate from the task of identifying exactly what the law is.[95] Indeed, the law is very likely to embody certain moral principles that inform its meaning and which must be taken into consideration in any attempt to understand, explain and apply it. But the task of identifying those principles is not itself an act of justification but of explanation; and explanation, if done well, leaves no stone unturned. Coleman's approach is thus positivist in this sense, but inclusively so, for it affirms the 'embeddedness' of certain ethical principles within the law and understands the enforcement of the law to involve the application of those principles to particular contested cases.

By explaining the text and structure of a constitution in more detail, particularly by disclosing the historically decisive ethical goals and prudential judgments which gave rise to its text and structure, Coleman's preferred approach promises an interpretation that has more explanatory power than an approach which, following

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93 Jules L Coleman, *The Practice of Principle* (Oxford University Press, 2001) 3–4.

94 Ibid 5–6.

95 And if a judge comes to the conclusion that the enforcement of a particular law cannot be justified on any view of the proper role of a judge in a representative democracy, then a conscientious decision will have to be made whether to continue to hold office within the legal system.

Dworkin, settles for a relatively minimal fit and is more substantially pre-occupied with arriving at an interpretation that can be justified. For justification, in Dworkinian terms, depends in practice upon ethical and prudential judgments that are not rigorously disciplined by the need to show how those judgments demonstrably explain the text and structure of the constitution down to their finest details and in all of their complexity.

The explanatory adequacy of a theory of a particular body of law such as constitutional law seems to turn, then, on general standards that are common to all kinds of explanatory theories. Attending closely to the details and complexities of text, structure and history enables us to maximise both the specificity and generality of our explanatory interpretations; attending closely to the ethical goals, prudential judgments and comparative models that historically shaped the making of a constitution can help to disclose relatively elegant interpretations which provide explanations of a greater range of a constitution's features at a higher level of complexity than would otherwise be the case. The explanatory adequacy of a theory about a particular aspect of a constitution will thus be maximised in proportion to the elegance of the concepts that it uses, the range of the Constitution's features that it explains, the specificity and generality of its explanations, and the consilience of the theory with cognate theories that deal with related aspects of the Constitution. Similarly an even more ambitious theory about an entire constitution will maximise its explanatory power in proportion to the specificity and generality of its explanations, as well as the theory's consilience with wider theories that deal with aspects of the political or social context in which the Constitution operates. It is in the synthetic theorisation of all of these aspects of a constitution — and of all of these modalities of constitutional argument — that a particular constitutional interpretation possesses the greatest explanatory power.

V. Conclusions

When scholars and judges formulate legal theories — theories about what the law means or about how it ought to be interpreted and applied — and especially when they disagree about each other's theories, they routinely draw attention to matters that those alternative theories do not properly take into account and they argue that their own theories, as formulated, offer a superior account of those matters.[96] These matters typically have to do with features that the law is said to have, or ought to be considered to have, and they commonly include such things as the words used in specific texts, the structural relationships between those texts, the moral or political principles to which those texts are meant to give effect, the meaning ascribed to those texts in subsequent cases and commentaries, and so on. Scholars and judges in this way appeal to the various aspects of the law, and when they do so, they argue about which theory best explains these and other features of the body of law as a whole.

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96 I draw attention to several examples of this in Aroney, 'The High Court on Constitutional Law', above n 4.

Implicit in this practice of theory formation and assessment is an appeal to the explanatory power of our theories. Whether ultimately understood in nomological, counter-factual or unificationist terms, the explanatory power of a theory seems to be a function of the simplicity and intricacy of the theory itself, the range and complexity of the phenomena that the theory seeks to explain, the specificity and generality of the theory's explanations in relation to those phenomena, and the capacity of the theory to be integrated with other theories or to unify the explanations provided by them. Because there are internal tensions between these elements, a comparison of the explanatory power of competing theories is not always straightforward. Nonetheless, explanatory power seems to be a pervasive norm of theorisation in virtually all fields of intellectual inquiry and as such seems to reflect something fundamental about human rationality. If in the formation and assessment of our theories of law we aspire to be rational, there would seem to be good reason for us to aspire to maximise the explanatory power of our theories.

There are four basic objections that can be made against the proposition that explanatory power has any application to the formation and assessment of theories within the discipline of law. These objections have to do with the propositions that law is social, law is normative, law is linguistic, and law is complex. Each of these characteristics might suggest that the task of understanding the law cannot simply be a matter of explanation, analogous to the kind of explanations that are offered by the natural sciences. However, while these objections draw attention to very important qualities of law that must fully be taken into account, it remains possible and indeed fruitful to think about theorisation within the discipline of law as involving in certain important respects a kind of explanation in which the explanatory power of our theories is a prime desideratum.

In the context of constitutional interpretation, such an approach will seek to maximise the explanatory power of our theories through a rigorous inquiry into the text and structure of the Constitution, understood in the light of its history, and illuminated by the prudential judgments, ethical goals and comparative models that demonstrably shaped that text and structure. Put slightly differently: a theory of a constitution that has a high level of explanatory power will attend closely to every detail, will seek to situate those details within the Constitution's wider structural features, and will seek to explain those textual details and structural features by reference to the historically influential prudential judgments, ethical goals and comparative models that motivated those who drafted, enacted and amended the Constitution. Undoubtedly, no constitution is an entirely coherent document, so theories of the Constitution will not always be able to explain the full range of its specific features within the confines of an entirely elegant explanatory theory.[97] Moreover, because judges, like constitution-makers, are necessarily fallible and variable in their judgments, judicial doctrine is always likely to differ and there will probably always be a tension between what Akhil

[97] For a recent attempt to apply this approach to the Australian Constitution, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

Amar has called 'the doctrine' and 'the document'.[98] But this important tension aside, there remains an important relationship between text, structure and history such that when these three modalities of constitutional interpretation are pursued with as much rigour as the available evidence allows, they tend to shed light on the prudential judgments, ethical goals and comparative models[99] which actually shaped the Constitution's text and structure, thus reinforcing each other and helping us to maximise the explanatory power of our interpretations. There is thus good reason for lawyers, judges and scholars to seek to maximise the explanatory power of their interpretive theories; and this is particularly so for 'documentarians' who for 'rule of law' reasons are especially drawn to originalist, textualist and structuralist methods of constitutional interpretation, but who also consider, with the inclusive positivists, that the law normally pursues ethical goals and that the identification of what the law 'is' cannot altogether be separated from what the law aspires to be.

98 Amar, above n 85.

99 On the role of comparative law within this model, see Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26(2) *University of Queensland Law Journal* 317.