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[A Neurophilosophy of Power and Constitutionalism](#)

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This post is the beginning of a new short-term series by Prof Nayef Al-Rodhan titled “Neurophilosophy of Governance, Power and Transformative Innovations.” This series provides neurophilosophical perspectives and multi-disciplinary analyses on topics related to power and political institutions, as well as on a series of contemporary transformative technologies and their disruptive nature. The goal is to inspire innovative intellectual reflections and to advance novel policy considerations.

A [poll](#) conducted by the PEW Research Centre in 2018 revealed that a majority of Americans (55%) considered the US Supreme Court should base its rulings on current, present-day interpretations of the Constitution, while 41% considered that such ruling should be based on what the Constitution meant when ‘originally written’. This contrasted with the responses from just two years earlier, when in October 2016, about 46% said the Court should base its rulings on what the document means in current times, and an identical share of 46% said the rulings should be based on what the Constitution meant originally.

Such shifts in public perceptions occur regularly and reflect demographic changes and ideological divisions. More importantly, they reflect an underlying preoccupation with ensuring that the Constitution and the law ensure the most *just* outcome.



Supreme Court building,
Washington, DC, USA. **Source:**
Daderot

Neurophilosophy provides some interesting insights into the debate on constitutionalism, and the main theories about its interpretation.

WHY DO WE CARE ABOUT JUSTICE AT ALL? NEUROSCIENCE, MORALITY AND JUSTICE

Undergirding the subject of constitutionalism is the fundamental question about human nature, justice and institutions of governance.

Of all living creatures, humans are unique in their preoccupation with creating institutions that enforce social norms. Humans have a deep interest in justice, morality and fairness, and these concerns are embedded in the brain in ways that contemporary neuroscience is starting to unveil. Asking where morality and the preoccupation with justice are located in the brain is, however, misguided, as there is not such a thing as a single place in the brain where the brain decides what is right and wrong. Instead, multiple brain systems and neurochemicals are involved in the wider constellation of morality-related acts and judgments.

[Converging evidence](#) from functional neuroimaging studies indicates that the brain regions concerned with moral decisions are the same regions that are implicated in social decision-making. More specifically, this involves interconnected regions such as the ventromedial prefrontal cortex (vmPFC), the orbitofrontal cortex (OFC), amygdala (areas concerned with reward learning), as well as the temporoparietal junction (TPJ) (which has a role, among others, in mental state understanding), anterior cingulate cortex (ACC), dorsolateral prefrontal cortex (dlPFC) and others. Therefore, various 'social' regions and [brain circuits](#) associated with emotions, problem-solving, understanding others, and decision-making, are recruited in the process of making moral and 'just' decisions. For example, the **medial prefrontal cortex regulates the way we interpret and understand the thoughts of ourselves** and others, and the vmPCF is involved in adherence to social norms and values, and has a [major role in the mediation of the emotions](#) during moral processing (for example, a [study](#) showed that lesions in the vmPFC indicated higher, abnormal even, patterns of utilitarian responses to difficult moral dilemmas). The OFC is implicated in representations of reward and punishment and the ACC, among others, is implicated in error detection.



Humans have a deep interest in justice, morality and fairness. **Source:** Emmanuel Huybrechts

The neural underpinnings of everything that has to do with considerations of fairness and justice, overlap with brain circuits that regulate a host of other behavioral processes. Therefore, whatever we think of [the "moral brain" does not exist as such](#), in the sense that it is not identifiable as a separate portion of the brain, but is intertwined with and requires engagement of emotional and cognitive processes. Nor does this mean, of course, that individual interests in justice or in pursuing moral acts

are always the same for all individuals. Both genetic factors and environmental conditions and processes may [strengthen specific neural circuits](#) and so there will be individual differences in what matters more to some people. Regardless, the pivotal takeaway is that our deep interest in justice is connected to emotions and other multiple brain circuits.

NEUROPHILOSOPHY AND CONSTITUTIONALISM

Emerging findings from neuroscience are now increasingly heeded by legal practitioners, particularly in areas such as criminal responsibility, profiling of offenders, and for better understanding concepts such as ‘risk-taking’ or lying and deception in courts. In 2011, for instance, a report prepared by the Royal Society in its Brain Waves series, [Neuroscience and the Law](#), was dedicated to the interdisciplinary dialogue between neuroscience and law. Less discussed in this context, however, is the theory of constitutionalism and how neurophilosophy can provide a guide on approaching the various interpretations of constitutionalism.

In a minimalist sense, [constitutionalism](#) refers to the complex of ideas and norms that legally limit the power of the government. The materialization of this principle rests with the adoption of Constitutions, as an elaboration of rules, norms and values that structure and define the limits of a government’s power (although, defined in this way, all states are constitutional states because anything that exists as a state in the international system has some form of constitution).

The history of the term is, however, more complex. A typical liberal reading posits that Constitutions are expected to limit abuses of power, and impose checks on discretionary practices and excesses. However, the foundation of the theory of constitutionalism can be traced back historically to thinkers associated with monarchial absolutism just as well. Here, a parallel is often drawn between Thomas Hobbes and John Locke, who defended different understandings of constitutionalism: constitutionally unlimited sovereignty vs sovereignty carefully limited by a social contract. [Other thinkers such as John Austin](#) considered, like Hobbes, the idea of limited sovereignty to be inconsistent. How could government be self-limiting if law itself is the creation of the government? If all law is supposed to be the command of a self-biding sovereign, it means that the sovereign must command him or herself, which is an incoherent concept because no one can command himself (see also John Dewey’s [essay](#)).

While such fundamental questions lie at the core of the theory of constitutionalism, the most common usage of the term today – and which will be used as a reference for the remainder of this article – is that of constitutionalism as a theory for the constraint on power. It should be underlined, however, that the *ism* attached to the term makes the idea of constitutionalism particularly powerful, denoting, as Jeremy Waldon notices, that it is more than a word to refer in a basic form to the study of constitutions. [Constitutionalism](#), like *liberalism* or *socialism*, has acquired a sort of ideology status, imbuing a normative connotation in the term: constitutionalism thus goes further than the mere adherence to constitutional principles. In [Dictionary of Political Thought](#), Roger Scruton defines it as “the advocacy of constitutional government, i.e. of government channeled through and limited by a constitution”.

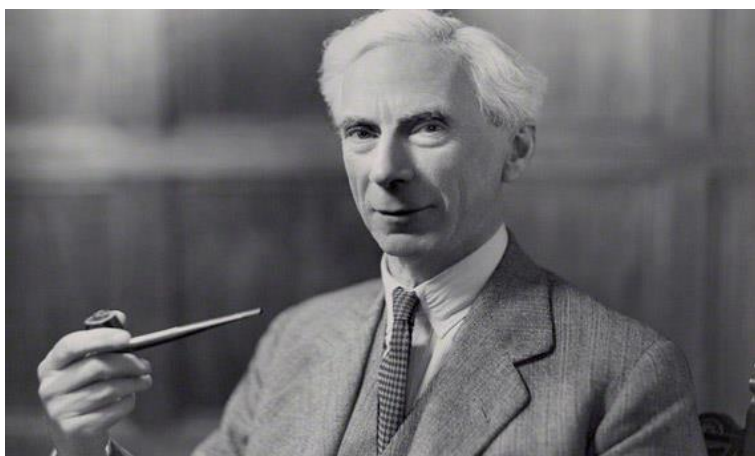
The United States is an obvious example of constitutional reverence and in contemporary American politics, “no commitment enjoys as much widespread public support as belief in the [sanctity of the federal Constitution](#)”. However, two main divergent views have emerged on how to interpret the text (the two approaches do not only exist or apply to the US, of course).

Originalism is the theory that the Constitution must be interpreted according to the original understandings and/or the intentions of those writing it. *Living constitutionalism*, by contrast, is an approach that sees a constitution as a ‘living’, evolving entity, developing with new social

circumstances and in response to transformations in moral and political beliefs. For example, for a living constitutionalist, the meaning of a provision such as that of section 3(1) in the [German Basic Law](#), stating that “All persons shall be equal before the law” consists in the general moral principle it endorses, not in the particular interpretation of what those principles might have been or meant at the time (the basic law was originally ratified in May 1949). Living constitutionalism runs into strong criticism from originalists, who claim that the process of interpretation can render it meaningless, or amounting to ‘[constitutional creation](#) or construction masquerading as interpretation’. To this, living constitutionalists respond that such interpretation is by no means arbitrary or unconstrained and that interpreting a constitution’s abstract provisions is not very different from the process by which judges develop abstract notions such as ‘reasonable use of force’. This debate remains a lively and open-ended one, with equally different and fluctuating popular responses too – as the poll mentioned above shows.

From a [neurophilosophical perspective](#), constitutionalism – and the attendant question of the best, most just approach to interpreting the constitution – is connected to human nature in profound ways (as mentioned above, we take here the generic definition of constitutionalism as a way of instituting constraints on power).

Firstly, **power is one of the key motivators of human nature**, and constitutionalism is critical to limit the excesses of human nature, and of absolute and unchecked power. I previously theorized on five powerful motivators of human nature, which I called the “[Neuro P5](#)”: *power, profit, pleasure, permanency and pride*. Many philosophers have cautioned about the pernicious effects of unlimited power. Back in 1938, [Bertrand Russell](#) wrote: “love of power, like lust, is such a strong motive that it influences men’s actions more than they think it should”, and that “the psychological conditions for the taming of power are in some ways the most difficult”. Contemporary neuroscience has demonstrated this in scientific terms, showing how [power](#) is neurochemically represented in the brain through a release of dopamine, the same neurochemical involved in the reward circuitry and largely associated with generating the feeling of pleasure, and the motivation to repeat those actions that are conducive to dopamine releases. In other words, power-seeking is akin to other addictive processes, producing ‘cravings’ at the neurocellular level and generating a high much like other drugs. Power, including political power, therefore, will lead to an increase in dopamine levels, which will make those in positions of power to do anything to maintain or enhance their powers.



The British philosopher and mathematician, Bertrand Russell. **Credit:** *National Portrait Gallery*

Indeed, there is nothing in human nature to indicate that, given the possibility to accrue more power, a leader would ‘responsibly’ or voluntarily choose against it. However, it is not only autocratic leadership that makes constitutionalism critical from a neurophilosophical perspective, but also

human nature, generally speaking. Given the malleability and fragility of human nature, the very existence of constitutional government is critical to survival and human flourishing.

With insights from neuroscience, I previously described human nature as [‘emotional, amoral and egoistic’](#). The emotional regions of the human brain are profoundly involved in cognitive processes, including in what appears to be ‘rational’ decision-making. Because emotionality features deeply in our lives, we are easily swayed by those who appeal to our emotions, and will do anything to ensure our survival when confronted with adversity and fear – including engaging in “*preemptive aggression*”. Furthermore, neuroscientific evidence to date suggests (contrary to what political philosophy posited previously) that we are neither innately moral nor immoral. Instead, we are born *amoral*, and our moral compass will develop and fluctuate in the course of our existence, strongly influenced by our environment and the circumstances of our lives (including political contexts). That does not mean we are entirely blank slates; while we have no innate notion of good or bad, we are wired in one minimal way, which is to seek our survival and to pursue those actions that maximize our chances of survival. In other words, we are [predisposed tabula rasa](#), being conditioned in one basic way: to seek survival of the self, which is a basic form of egoism.

The emotional, amoral and egoistic traits of human nature make us highly malleable to circumstances and it is only through governance structures that minimize the conditions of insecurity, fear, deprivation, inequality, that the most ‘moral’ and altruistic features of our nature can emerge. **Any sustainable governance model must balance the ever-present tension between the three attributes of human nature, namely: emotionality, amorality and egoism with the corresponding nine dignity needs.** What I mean by dignity is not merely the absence of humiliation but a more comprehensive set of nine dignity needs: *reason, security, human rights, accountability, transparency, justice, opportunity, innovation and inclusiveness*. This is true and valid for every level or type of governance, from local, to national and international. Constitutionalism contributes to this goal at the level of national governance, by providing the legal and acceptable framework for good national governance.

Secondly, **a neurophilosophical approach on how to interpret the constitution (originalism vs living constitutionalism) suggests that, in fact, no one definitive approach must be chosen a priori.** That is because what is authentically ‘moral’, ‘just’ or ‘fair’ to individuals is not uniformly the same in content across humanity. Going back to the neuroscientific observations made in the introduction of this article, while all human beings care about justice, the neuronal mechanisms involved in considerations of justice or fairness are tightly connected to other behavioral and emotional processes – which of course differ and are linked to personal experiences, political and geo-cultural contexts. It is important to recognize that in matters such as how to interpret the constitution, from a neurophilosophical viewpoint, there is not one approach that is more legitimate than other. What is important is to ensure that whichever approach is chosen, it is in no way an assault on human dignity and the nine dignity needs mentioned earlier (and in other previous [posts](#)).

Constitutionalism, as a general theory about the limits of power and the prerogatives of government, cannot be separated from the neurophilosophy of human nature. As an inherent human creation, constitutionalism is a reflection of human nature – and of human limitations. Ultimately, **constitutionalism exists as a result of a deeper human interest in justice and in having frameworks where excesses and abuses can be curtailed.**

Going forward, the classic notion of constitutionalism as we know it will be complemented by another emerging concept: [digital constitutionalism](#). In the digital era, the domain of rights, as well as of violations and abuses of power, transcend the territorial ambit of states. Digital constitutionalism is now mostly an appealing theoretical and academic concept urging for the adaptation of the values of

constitutionalism to the digital society. While the process of developing binding legal texts for the digital world is far more complicated, it is perhaps not far-fetched to believe the future will be defined by a quest to limit abuses of power in the digital sphere too – as was done through the state-centric pursuit of constitutionalism.

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