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Are Constitutions Legitimate?

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Abstract

This paper argues that constitutionalism raises some serious concerns of moral legitimacy. Following a preliminary outline of the main features of constitutionalism, the paper presents some of the main moral concerns about the legitimacy of constitutions. It then considers in detail a number of arguments that purport to answer those concerns, arguing that they all fail to meet the challenge. The paper concludes with a brief outline of some of the moral implications of this failure and some suggestions for reform.

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Are Constitutions Legitimate?

Andrei Marmor

Liberalism may not have won the global victory that some commentators predicted, but constitutionalism certainly has. The vast majority of countries in the world, democratic and non-democratic alike, have written constitutions that are designed to entrench the basic legal structure of their regime. Most constitutions also enumerate a list of rights and general principles that purport to have a higher legal standing than ordinary law, and most countries entrust the interpretation of their constitution to a court of law. I will not try to speculate here about why this is the case. My aim is to scrutinize the idea of constitutionalism from a moral point of view, arguing that constitutionalism does not quite deserve the celebration that it has occasioned.

The argument proceeds as follows: after a preliminary outline of the main features of constitutionalism, I will present what I take to be the main moral concerns about its legitimacy. I will then consider a number of arguments that have been offered to answer those concerns, arguing that the arguments fail to meet the challenge. I will conclude with a few words about the moral implications of this failure and some suggestions for reform.[1]

1. The Constitutional Package.

Constitutionalism comes in different packages, varying along an important dimension that I will call 'robustness'. The main elements of robustness are comprised of the degree of the constitution's 'rigidity', the relative power of the courts in determining the constitution's content, and their power to prevail over the democratic legislature. I will explain all this in a moment. First, a terminological clarification.

The word 'constitution' is ambiguous. When we talk about the constitution of a legal order, or its constitutional law, we may refer to the basic structure of the legal system in question. Every legal system, as such, must have some rules or conventions that determine who makes the law in that system, and how; who gets to interpret and apply it to particular cases; what are the main organs of government and what their authority is; and so forth. In this sense of 'constitution', each and every legal system, as such, necessarily has a constitution. Most countries, however, have more than this; they have a *written constitution,* namely, a document (or, sometimes, a limited number of documents) that contains the canonical formulation of the country's constitution. In theory, the existence of a document that is referred to as "The Constitution" shouldn't necessarily make a difference. In practice, however, it typically does. The essential rationale of written constitutions is to remove certain important moral/political decisions from the ordinary business of lawmaking. In democratic regimes -- and for the rest of this essay, I will confine myself to a discussion of

[1] Allow me an apologetic note on bibliography: the literature on the critique of constitutionalism is vast, particularly in the US. Dozens of books and hundreds of articles cover many, if not all, of the issues I discuss here. I couldn't possibly do justice to all this literature, and I am sure that most of the arguments I raise here have been alluded to by somebody somewhere. My purpose here is to present a systematic, but not a an encyclopedic, treatment of the debate on the moral legitimacy of constitutionalism. I have tried to incorporate the relevant references, but the notes are not meant to be comprehensive.

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constitutionalism in democracies[2] – the essential point of written constitutions, accompanied with the legal power of judicial review, is to remove certain decisions from the ordinary democratic decision making processes, basically, to shield them from the majority rule. To be sure, this is not a necessary feature of written constitutions. In practice, however, almost all of them have this essential feature, to some extent.[3] Thus, from now on, I will refer to the idea of a constitution, or constitutionalism, in this second sense.

There are six main features of constitutions that are characteristic and morally significant. Let me list them here briefly.

1. Normative Supremacy. Constitutions purport to establish and regulate the basic structure of the legal system, and thus they are deemed normatively superior to all other forms of legislation. The constitution, as we say, is *the supreme law of the land*.[4] Generally it is assumed that unless the constitutional provisions prevail over ordinary legislation, there is no point in having a constitutional document at all. I will therefore assume that this is an essential feature of written constitutions.

2. Judicial Review. In order to implement the constitution's supremacy, legal systems typically entrust the application and interpretation of the constitutional document in the hands of the judiciary. Some constitutions establish a special constitutional court for this purpose, others leave it in the hands of the regular court system.[5] The essential point here is, however, that it is the judiciary that determines what the constitution means, and such decisions are taken to prevail over the decisions of the democratic law making institutions.[6]

3. Longevity. Constitutions, by their very nature, purport to be in force for a very long time, setting out the basic structure of the legal system for future generations. Ordinary statutes may happen to be in force for a very long time as well. But this is not an essential aspect of ordinary legislation. It is, however, an essential aspect of constitutions that they are meant to be lasting, that they are intended to apply to generations well beyond the generation in which they had been created.

4. Rigidity. The main technique by which constitutions can be guaranteed to be lasting for generations is their rigidity: Constitutions typically provide for their own methods of change or amendment, making it relatively much more difficult to amend than ordinary democratic legislation. The more difficult it is to amend the constitution, the more 'rigid' it is. Constitutions vary considerably on this dimension, but it is an essential aspect of

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[2] And I will confine myself to constitutions of countries, not sub-federal states or regions. Those raise very different moral-political issues.

[3] The main reason why the existence of a constitutional document makes such a difference consists in the fact that without such a canonical document, courts would find it very difficult to exercise their power of judicial review. Typically, this power is granted to the courts by the constitutional document. But even if it is not, the document makes it much easier for the courts to hold the legislature under their review power.

[4] The constitution's normative supremacy should not be confused with the idea that all law derives its legal validity from the constitution. This latter thesis, famously propounded by Hans Kelsen, is probably false in most legal systems. (see H Kelsen, *Introduction to the Problems of Legal Theory*, (Paulson & Paulson tras.), Oxford 2002, section 31.)

[5] Typically, this would mean, *de facto*, that the highest court of appeal in the country is basically its constitutional court. Whether this is the case, and to what extent, mainly depends on how easy it is to appeal constitutional cases to the country's highest court.

[6] A very interesting and suggestive exception is section 33 of the *Canadian Charter of Rights and Freedoms* which allows the legislature to overrule constitutional decisions of the supreme court (both preemptively or *ex post*), as long as it is done so very explicitly and renewed every five years. More on this in the last section.

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constitutions that they are relatively secure from formal change by the ordinary democratic processes. Without such relative rigidity, constitutions could not achieve their longevity.[7]

5. Two-pronged content. Most constitutions regulate two main domains: the basic structure of government with its divisions of political power, and the area of human and civil rights. In the first domain we normally find such issues as the establishment of the main legislative, executive and judicial branches of government and their respective legal powers; the division of power between the federal and local authorities, if there is such a division; the establishment and control of the armed forces; and so on. In the second domain, constitutions typically define a list of individual and sometimes group rights which are meant to be secure from encroachment by governmental authorities, including the legislature. There is nothing essential or necessary in this two pronged constitutional content, and the reasons for it are historical. The moral content and moral importance of a bill of rights is obvious. It is worth keeping in mind, however, that many aspects of the other, structural, prong of constitutions involve moral issues as well. Determining the structure of government, rules for enacting legislation, etc. is perhaps partly a matter of efficiency and coordination, but many aspects of it are not without moral significance. After all, we are not morally indifferent to the question of who makes the law and how it is done.[8] It is, however, mostly the bill of rights that I will focus on in this essay, simply because its moral content and moral importance is much more salient.

6. Generality and Abstraction. Many constitutional provisions, particularly in the domain of the bill of rights and similar matters of principle, purport to have very general application. They are meant to apply to all spheres of public life. This is one of the main reasons for the high level of abstraction in which constitutional provisions tend to be formulated.[9] The aspiration for longevity may be another reason for abstractly formulated principles. And of course, sometimes an abstract formulation is simply a result of compromise between competing conceptions of the relevant principle held by opposing groups of framers. Be this as it may, we should keep in mind that important constitutional provisions are often formulated in very abstract and general terms.

Constitutions vary considerably with respect to all of these six features, and many others, of course. Let me suggest, however, that from a moral point of view, there is dimension of *robustness* that is particularly significant. I will call a constitution robust if it is relatively rigid and allows for substantial power of judicial review. So the more rigid the constitution is, and the more power it entrusts with the judiciary, the more robust it is. Robustness is morally significant because it basically determines the extent to which constitutional decisions actually remove moral-political issues from the ordinary democratic processes: The more robust the constitution, the more it shields its relevant content from the regular democratic/majoritarian decision making procedures. Robustness is basically a legal feature of a constitutional regime. As such, it has both a formal and a practical aspect. A constitution which is formally, that is, legally, robust, may not be so robust in practice, and *vice versa*. The practice is partly determined by political and social realities.

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[7] As I have argued elsewhere, the content of the constitution is bound to change according to its interpretation by the courts. See my 'Constitutional Interpretation' in *Interpretation and Legal Theory, revised 2nd ed*, (Hart Publishing, 2005), chapter 9. Some implications of this will be discussed below.

[8] To be sure, I am not claiming that important moral content is unique to constitutions. A great deal of statutory law also regulates matters of great moral importance.

[9] Once again, constitutions vary considerably in this respect as well. Many constitutions contain very specific provisions even in the realm of rights and principles.

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Both of these elements of robustness are somewhat complex. Rigidity is closely tied to the element of longevity. It is partly because constitutions purport to be long lasting that they are designed to make it relatively difficult to amend. Rigidity is also linked to the idea of supremacy. The easier it is to amend the constitution by the regular democratic process, the less practically significant its supremacy is. Similarly, when we consider the power of judicial review, we must consider it in the relevant context that takes into account the other features of the constitutional regime. For example, the more abstractly formulated the constitutional provisions are, and the more numerous the rights and principles it enlists, the more power judges would typically have in determining the actual content of the constitution. And of course, the extent of the power of judicial review is considerably determined by the constitution's rigidity. The more difficult it is to amend the constitution, the more lasting the power of the judges in determining its content. Another important factor that determines the power of judicial review concerns the political independence of judges, mainly from the other branches of government, the executive and the legislative. The more independent the judges are, the more power they would normally have. However, it is not my assumption here that judges are the only actors in this play. Many other legal officials are also engaged in constitutional interpretation, and their actions and decisions may determine, to some extent, what the constitution actually is. (For simplicity's sake, however, I will largely ignore this complication.)

To sum up, the relative robustness of constitutions is a package deal. Only by looking at the whole package we can determine whether, and to what extent, a given constitutional regime is robust. I will assume here, however, that this is not a practically difficult judgment to make. By examining the main features of a constitutional regime, we should be able to determine, quite easily, whether it is a relatively robust package or not. For instance, I take it that the US Constitution is one of the most robust constitutional regimes in the world. The US Constitution is very difficult to amend, its supremacy over all other sources of law is absolute, and the US Supreme Court has considerable power (legal and political) to determine the content of the constitution, partly due to the fact that many of its provisions are highly abstract and allow for a very wide range of interpretative results.[10] Many constitutional regimes come close to this level of robustness, and some are much farther removed from it, sometimes so much so that they hardly deserve the title of a constitutional regime at all. Needless to say, from the vantage point of moral legitimacy, the more robust the constitutional regime, the more pressing the moral concerns it poses. Therefore, in the subsequent discussion, I will assume that we are dealing with a relatively robust constitution, more or less along the lines of the US model.

2. The Moral Concerns.

In order to understand the main concerns about the moral legitimacy of constitutions, we need to understand their basic moral-political rationales. And we also need to clarify a distinction between questions of legitimacy and other aspects of the potential value of legal-political institutions. Let me take up these two points in reverse order.

[10] Another aspect of the US constitutional regime that makes is relatively robust has to do with the fact that in the US there is no separate constitutional court. The highest court of appeal in the country is also the main constitutional court. Many countries have separated these two legal functions. There is something to be said in favor of such a separation, but I have no evidence to support my intuitions here.

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Institutions may have all sorts of valuable aspects, and they may instantiate those values to various degrees. Not all of the evaluative aspects of an institution bear on the question of its moral legitimacy. John Rawls may have had such a thought in mind when he stated at the beginning of *A Theory of Justice* that 'Justice is the first virtue of institutions, as truth is of systems of thought.'[11] I am not sure that we need to subscribe to Rawls' idea here about the absolute primacy of justice. But his analogy with the relations of truth to systems of thought, is telling. Theories may have all sorts of valuable aspects, such as practical usefulness, simplicity, or theoretical elegance. But of course, Rawls is quite right to claim that those values are crucially parasitic on the truth of the theory; if the theory happens to be false, then in spite of any other value it may have, we should discard the theory. Similarly, Rawls suggests, institutions may instantiate a wide variety of values. However, if the institution is unjust, it is illegitimate, and therefore, in spite of other values it may instantiate, we should abolish it. I do not purport to suggest here that the legitimacy of an institution is an all or nothing matter. Presumably, institutions can be more or less legitimate. I do want to suggest, however, that there is a certain primacy to questions about the legitimacy of institutions even if, as is often the case, there are other values the institution may have.

So what is it that determines the legitimacy of an institution? Rawls seems to suggest that it is justice; an institution is legitimate if it is just, and illegitimate if it is not. We can be less committed here by saying that an institution is legitimate if its main purpose, or rationale, is morally justified, and the justification is not defeated by countervailing moral considerations.[12] Since moral justification can come in degrees (something can be more or less justified), I am happy to assume that an institution can be more or less legitimate. However, the crucial point is that legitimacy is a primary moral criterion for appraising an institution, while there may be other values the institution instantiates that are only secondary and parasitic on its legitimacy. Let me give an example that is relevant to our concerns: Presumably, constitutions have certain educational values. The constitution is something that can be taught to the young, its moral content recited and celebrated in various educational contexts, etc. This is a potentially valuable aspect of written constitutions. But of course it is not something that can make a written constitution legitimate. The educational value of a constitution is entirely parasitic on the constitution's moral legitimacy. That is so, because the educational value of a constitution, important as it may be, is not one of the main purposes of a constitution, and cannot possibly *justify it as the kind of institution that it is*. If the constitution is legitimate then, of course, it is even better that it has this additional educational value. If it is illegitimate, then we should not have a constitution at all, and the educational value of it is something that we will just have to forgo, regrettable as it may be.[13]

One conclusion that follows is this: in order to be able to determine the legitimacy of an institution like a constitutional regime, we must first have a clear idea about its main point

[11] J Rawls, *A Theory of Justice* (Oxford, 1971) at p 3.

[12] I am using purpose or rationale in singular only for the sake of simplicity. Constitutions may have several rationales.

[13] Let me add two clarifications. First, there is another sense in which the educational value of a constitution is parasitic on its legitimacy: for something to have such value, it must be morally sound. There is no reason to celebrate and teach something that is actually wrong. But this is not the main point I want to make in the text. Second, it may be suggested that if an institution is not quite, but almost legitimate, its additional values may tilt the balance, as it were, and then these values may turn something that would otherwise not be legitimate into a legitimate institution. Perhaps so. But this would be an odd chance, and I think we may dismiss it.

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or purpose, its alleged rationale. And then we must ask ourselves whether that rationale is morally justified. So what is the main rationale of a written constitution? At a superficial level, the answer is clear enough: the main point of constitutions is to shield certain principles of government and moral/political rights from the ordinary democratic decision making processes, that is, by basically removing them from that ordinary decision making process. But what is the point of this? Why would we want to do that in the first place?

The basic answer must reside in the assumption that we have reasons *not to trust* the ordinary democratic process in those areas in which we seek constitutional entrenchment. We want to make sure that things don't go wrong in those areas, and the assumption must be that by following the regular democratic process, they may go terribly wrong. This is the basic idea of pre-commitment, often drawn from the famous Ulysses myth.[14] Ulysses had good reasons not to trust his judgment once his ship approaches the sirens. Thus he commands that he be tied to the ship's mast, and, crucially, commands his subordinates to *disregard his commands in the future*, when sirens' influence might curtail his judgment, knowing in advance that his judgment at that future time, under the influence of the sirens, is not to be trusted. The Ulysses strategy is basically the rationale of constitutionalism. Ulysses is the Framer of the constitution, and democratic procedures are the potential victims of the sirens. Their singing is delightful, but their influence deadly. Thus we decide, in advance, to tie ourselves to the mast and disregard our orders in the future. Constitutionalism is a pre-commitment to remove certain issues from the ordinary democratic procedures, precisely because we know in advance that the democratic procedure is not to be trusted when the sirens sing.

Furthermore, this rationale goes some way in explaining the special role of the courts in a constitutional regime. The constitutional entrenchment of rights and principles is required, according to this reasoning, because on such issues democratic procedure is not to be trusted. We want to protect some rights and principles from the vagaries of momentary, short sighted, political temptations and pressures. The assumption is that precisely because courts are not democratic institutions, they would be relatively free from such short sighted political temptations. Therefore, it makes a lot of sense to assign the implementation of the constitution to the courts.

There are two main moral problems with this rationale of constitutionalism. To follow the Ulysses analogy, the problems are these: first, what we have in the constitutional case is not Ulysses tying *himself* to the mast, but a Ulysses who ties others, his political successors, to the mast with him. Second, unlike Ulysses who knows that the sirens' singing is a deadly temptation, we may not quite know this in the constitutional case and we certainly do not agree about it. Even if we suspect that there are sirens out there, we tend to have serious and reasonable disagreements about who those sirens are and when their singing is deadly. The first is the inter-generational problem; the second is the problem of pluralism.

The inter-generational issue is central to the question of the legitimacy of constitutions. The enactment of a constitution purports to bind the current and future generations by imposing significant constraints on their ability to make laws and govern their lives according to the ordinary democratic decision making processes. Thus the question arises: why should the political leaders of one generation have the power to bind future generations to their conceptions of the good and the right? It is crucial to note that the moral significance of this question is not confined to old constitutions. Even if the constitution is new, it purports to bind future generations. It is this intention, or rationale of

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[14] See J Elster, *Ulysses Unbound*, (Cambridge, 2000), chapter 2.

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constitutions, to impose constitutional constraints for the distant future that is problematic, and thus it doesn't really matter how old the constitution is.

It may be objected that this formulation underestimates the significance of '*We the people*', that it ignores the fact that constitutions tend to embody widely shared principles and ideals, representing, as it were, the nation's *raison d'etat*. But this would make very little difference. Even if at the time of the constitution's enactment its principles and ideals are really shared across the board, the inter-generational issue remains: perhaps no one, even an entire generation, should have the power to make important moral decisions for future generations. At least not deliberately so. It is true, of course, that a great number of our current practices and collective decisions are bound to affect, for better and worse, the fortunes of future generations.[15] But these collective actions and decisions do not purport to have *authority* over future generations. They are not deliberately designed to legally bind future generations to our conceptions of the good and the just. Constitutions purport to do just that: bind future generations to certain conceptions of good government and just laws. Therefore, supporters of constitutionalism have to explain what makes it legitimate to make authoritatively binding decisions on important matters of morality and politics, that are guaranteed to be lasting for generations and difficult to change by ordinary democratic processes.

One might think that this challenge is not difficult to meet. Constitutional documents typically allow a considerable interpretative flexibility. They can be interpreted and applied by the courts in ways that meet the specific needs and moral conceptions of the society at the time of application. Thus, even if constitutions purport to bind future generations, this binding is not very strong; it allows enough flexibility in adjusting the constitutional interpretation to the specific needs and conceptions of each generation.

In response, let me mention two points: first, flexibility has its limits. The flexibility of interpretation always takes place against the background of the constitutional text and some general understandings about what the constitution means and the rights and principles it embodies. Constitutions inevitably create a culture of discourse, and determine certain permissible and impermissible moves, that constrain, to a significant extent, the kind of moral and political decisions that would be deemed as legitimate interpretations of the constitution at any given time. In other words, in spite of the considerable freedom judges may have in the interpretation of a constitutional text, it is often a very limited freedom, constrained both by the meaning of the constitutional text and, perhaps even more so, by previous precedents and an entire culture of constitutional interpretation.

Second, the more flexible the culture of constitutional interpretation is taken to be, the more power it grants to the courts in determining its content. In a clear sense, then, the more flexible the culture of constitutional interpretation, the more anti-democratic it is. Thus the less you have reason to worry about the inter-generational constraints, the more reason you have to worry about the anti-democratic role of the courts in determining matters of moral political importance in the constitutional domain. And this brings us to the second main worry about constitutional pre-commitment, the worry about pluralism.

The problem of pluralism is different, though related. The essential point is this: in order to justify constitutional entrenchment of some rights and principles, it is just not enough to know that ordinary democratic procedures are not to be trusted to yield correct results on these issues. It is also necessary to assume that (1) we can tell in advance *what those*

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[15] And, of course, some of them are morally very disturbing (e.g. huge national debt, irreparable damage to the environment, etc.)

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rights and principles are and (2) that we can be sufficiently confident that a judicial determination of the content of those rights and principles is going to yield *better results* than its democratic alternative. Both of these assumptions are problematic, to say the least. Mostly, however, as Jeremy Waldron points out, it is far from clear that we have a warranted conception of what 'better results' on such issues are.[16] Does it mean that we know what rights people should have and to what extent, and then we just expect the courts to figure it out better than the legislature would? The problem here is not necessarily, or primarily, an epistemic one. It is a moral concern about the need to respect value pluralism. In pluralistic societies, different segments of the population are deeply divided about matters of rights and moral principles; they are deeply divided over their conceptions of the good and the just. Crucially, respect for pluralism is premised on the idea that at least some significant portion of such deep disagreements is *reasonable*. Reasonable people can have genuine and deep disagreements about conceptions of the good and the just.[17] In other words, it is not so much that we don't know who the sirens are and when their singing is deadly, but that we have reasonable, and often quite deep, moral disagreements about all of this. Constitutional entrenchment of values, or conceptions of the right and the good, necessarily favors certain conceptions over others by essentially shielding some favored moral political conceptions from the democratic decision making process. It is very difficult to see how this shielding is compatible with respect for pluralism.

Or perhaps not? It seems plausible to reply that constitutions can entrench those values that are conducive to pluralism and purport to secure it. According to this argument, then, far from threatening value pluralism, constitutions can actually secure it by entrenching those principles of government and moral values that are necessary for pluralism to flourish. This seems like a powerful argument; its strength comes from the realization that the protection of certain rights and principles is indeed very conducive, perhaps essential, to the possibility of pluralism to flourish. After all, how can we maintain a pluralist society without a protection of freedom of speech, freedom of conscience and religion, a right to privacy, etc. ?

The argument, however, is deceptive. The objection to constitutionalism need not deny that pluralism requires the protection of certain rights and principles of government. In fact, it is an explicit, though I hope not controversial, assumption of this essay that pluralism can only flourish in a well functioning liberal democratic regime. The question here is why would it require anything more? Reasonable disagreements pertain to the questions about the scope of the rights people should have, and countless moral dilemmas about conflicts between rights, and between rights and other moral political concerns. The dispute about constitutionalism is an institutional one: it is about *who* gets to determine what those rights and principles are, and according to what kind of procedure. The objection from pluralism maintains that we tend to have deep and reasonable disagreements about the rights people should have and about the scope of those rights and that by removing those decisions from the ordinary democratic processes, we undermine the respect that is due to such reasonable disagreements. There are two concerns here. First, we must keep in mind that however abstract the rights and principles entrenched in a constitution, the entrenchment necessarily favors certain conceptions of the good and the just in ways that simply make it much more

[16] J Waldron, *Law & Disagreement* (Oxford, 1999), pp. 243-249, 268.

[17] This is one of the well known themes in Rawls' *Political Liberalism*; I tend to agree with Waldron, however, that reasonable disagreement extends to conceptions of the rights as well, not just conceptions of the good, as Rawls seems to have maintained.

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difficult for those who favor a different conception to change it. Constitutions necessarily favor a certain status quo, thus making certain social changes more difficult to achieve for some than for others. That is, at least relative to the base-line of a regular democratic process. Second, we must keep in mind that the debate about constitutionalism is basically a debate about institutions and procedures: it is common ground that pluralism requires, for example, the protection of free speech. The question is *who* gets to determine what free speech is, and how to delineate its limits. The objection to constitutionalism maintains that given deep and pervasive disagreements about such issues, there is no justification for removing them from the democratic processes.[18]

But now you may wonder why the democratic process should be privileged at all? Why is it the appropriate base-line? Needless to say, a comprehensive answer to this question would far exceed the scope of this essay. One essential point, however, should be made: at least from the vantage point of respect for value pluralism, a regular democratic process, that is, basically a majority vote, has this moral advantage: it is importantly egalitarian.[19] A majority vote expresses equal concern and respect for the views of all those concerned. Ideally, each and every member of the democratic decision making process is accorded an equal right to participate in the decision, and his or her vote counts equally to the votes of all the others in the process. This is the main sense in which we may assume that respect for pluralism is instantiated by a democratic process: it treats everybody equally.

3. The Main Arguments.

None of this was meant to be conclusive. In this section I consider several arguments that purport to justify the legitimacy of written constitutions. I begin with arguments that are relatively easy to answer, and proceed to the more promising ones.

1. The argument from stability. We need a constitutional regime, some people say, because it ensures long lasting stability and predictability of the regime and the basic principles of its legal system. Note that this argument does not rely on the pre-commitment rationale of constitutions. The argument is premised on two main assumptions: first, it relies on the great importance and value of the stability and predictability of a legal system. Second, the argument assumes that constitutions are instrumentally essential for achieving adequate stability and predictability of the regime and its legal order. A nice aspect of this argument is that it goes some way in meeting the inter-generational objection. The more we should value the long lasting stability of a legal order, the better case we have for the longevity of constitutions and their inter-generational application. After all, this argument would hold, it is precisely because we value stability across generations that we would want to have a constitution in the first place. So why worry about its inter-generational application?
Rebuttal: First, though the argument from stability would seem to make some sense with respect to the structural prong of constitutional entrenchment, it would have very limited application to the domain of rights and moral principles. There are some good reasons to value stability in such areas as who makes the law and how it is done; how legal authority is

[18] I take it that this is Jeremy Waldron's view. See note 16, above.
[19] I have defended this position in my 'Authority, Equality, and Democracy', *18 Ratio Juris*, (2005), 315-345.

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structured and what is the governmental division of labor; and similar aspects of an orderly regime. But these concerns hardly apply to matters of principle and moral issues. In such matters, it is mostly truth that we value, not stability. People ought to have the rights that they ought to have, not those that they have had for a long time. Stability is just not a very important value in the realm of basic rights and moral principles.

Secondly, the argument from stability crucially relies on an empirical assumption that is very questionable: It is far from clear that constitutions actually guarantee a greater level of stability than non-constitutional regimes. There does not seem to be any evidence that would support such a conclusion.[20]

2. The argument from opportunity. This argument assumes that constitutions entrench values and principles that are widely held anyway. The explanation for their constitutional entrenchment is historical: in the history of a nation there are sometimes unique opportunities to enshrine in a constitutional document moral principles of great importance. Such historical opportunities should be seized, this argument contends, since the values they entrench are fundamental and reflect a deep level of consensus. If an opportunity to legalize such important matters of principle arises, it is justified to make use of the opportunity.

Rebuttal: This argument trades on a crucial ambiguity. Either the constitutional entrenchment makes little practical difference, or it does make a significant difference. If the argument assumes that the constitutional entrenchment makes little practical difference because the nation widely shares those evaluative judgments anyway, then it becomes very unclear what is the point of their constitutional entrenchment.[21] If, on the other hand, constitutional entrenchment makes a practical difference with respect to the rights and principles that it entrenches, then the justification for such a difference cannot reside in the fact that there was an opportunity to make it. Generally speaking, pointing to an historical opportunity can only answer a question about Why *now*? but not a question about Why *at all*?

Sometimes the argument from opportunity is compounded by the further claim that in those unique historical moments, the Framers of the constitution are rightly held to have possessed superior moral knowledge, and thus we should defer to their relative moral-political wisdom and expertise. As I have argued elsewhere in greater detail, this type or reasoning rests on two mistakes: first, it relies on the mystification of great moments in history, a mystification that is very unlikely to meet any critical scrutiny. Secondly, and more importantly, the argument is mistaken because it assumes the possibility of expertise in

[20] England has had a pretty stable regime for the last few centuries without a written constitution. New Zealand does not seem to be in any danger of instability because it does not have a written constitutional regime. At the same time, we know that there are countless instances of political instability in countries that have admirable constitutions.

[21] Perhaps one can point to the familiar idea of the role of constitutions as a 'civic religion'; the idea is that constitutions tend to provide a focal point of civic identity and social cohesion. A trite saying has it that constitutionalism is our civic religion with the constitution as its holy scripture. The problem is not with the sociological insight here, which may well be more true and more interesting than it sounds, but with its normative significance; it is difficult to extract a moral-political argument from this piece of folk sociology. Perhaps we should stick to constitutional atheism: It is far from clear that healthy democracies ought to have a civic religion. (Nor is it clear that constitutions have a significant role to play in actually creating the conditions for its emergence.) In any case, to the extent that constitutions are conducive to the maintenance of some social cohesion and civic identity, that might be an added benefit of constitutionalism (akin to its potential educational value), but not a moral justification of its legitimacy.

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matters of basic moral judgments. It is very doubtful that there is any possibility of expertise on such matters.[22]

3. The argument from practice. A great many aspects of a legal system are conventional. Social conventions determine, to a great extent, what the law is, what counts as law in a given community, how it is to be enacted or modified, etc. Law is, profoundly, a conventional practice. Conventions, by themselves, do not vindicate a practice of following them. Some conventions may be wrong and ought not to be followed. However, if the conventional practice is within the bounds of moral permissibility, it would seem that people have reasons to follow the conventions just because they are the conventions that are being followed by others in their community. Similarly, Raz claims,

> '*As long as they remain within the boundaries set by moral principles*, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there.'
>
> '[P]ractice-based law is self-vindicating. The constitution of a country is a legitimate constitution because it is the constitution it has.'[23]

Rebuttal: The argument from practice is valid in a very limited sense. In fact, there are two important limits here. First, like the argument from stability, this argument makes some sense with regard to the structural aspects of a constitution, but not its bill of rights. The kind of issues that are determined within the structural prong of constitutions are typically determined by social conventions in those legal systems that don't have a written constitution. In such matters as what counts as law and how law is to be made or changed, I tend to agree with Raz that practices can be self-vindicating, that 'their validity derives from nothing more than the fact that they are there.' But this kind of reasoning cannot vindicate the constitutional entrenchment of important matters of moral rights and principles. Unless, of course, one assumes that such entrenchment is 'within the boundaries set by moral principles', but then, of course, one has just assumed the very point that needs to be proved. We cannot simply assume that Ulysses was morally justified in tying us to his mast; whether he was justified or not, is precisely the moral question that we raised here.

Furthermore, I indicated that I *tend* to agree with Raz that conventional practices can be self-validating, because this needs to be qualified. True, conventions create reasons for action because they are practiced, and as long as the convention is not morally impermissible, the reasons for action it creates are valid reasons. The fact that we could have had a different, perhaps even better convention under the circumstances, does not normally entail that there is anything wrong with following the convention that we do have. Similarly, I presume that Raz wishes to claim that, as long as the constitution we have is not immoral, the fact that we happen to have it is a good reason to abide by it. But we have to be more careful here. Our reasons for following a social convention are not entirely derivable from the fact that the convention is practiced, though they certainly depend on it. Conventions evolve either in order to solve a pre-existing social problem, they evolve as a response to some antecedent social need, or else they partly constitute their own values by creating a conventional practice that is worth engaging in.[24] Either way, there must be something

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[22] See my *Interpretation and Legal Theory, revised 2nd ed*, (Hart Publishing, 2005), at pp. 137-138, 146.

[23] J Raz, 'On the Authority and Interpretation of Constitutions..', in L Alexander (ed.), *Constitutionalism: Philosophical Foundations*, (Cambridge, 1998), 152, at 173.

[24] For a much more detailed account of the nature of social conventions see my 'On Convention' *107 Synthese*, (1996), pp. 349-371, and *Positive Law & Objective Values*, (Oxford 2001), chapters 1 & 2.

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valuable in the practice of following the convention for it to give rise to reasons for action, beyond the fact that the convention is there and just happens to be followed. Similarly, the fact that the constitution is there and happens to be followed cannot be the complete reason for following it. It must serve some values, either by solving some problems which were there to be solved, or by creating valuable practices worth engaging in, or both. To conclude, the argument from practice has some merit, and it can justify some, limited aspects of constitutionalism, but it leaves the main moral questions about constitutionalism unanswered. Whether those answers can be provided by other arguments remains to be seen.

4. The argument from the inherent limits of majority rule. Here (at long last you may think) we reached an argument for constitutionalism that purports to justify directly its main rationale as pre-commitment device. Constitutionalism, as we have seen, is deliberately designed to be anti-majoritarian; the whole idea of a written constitution is to remove certain issues from the ordinary democratic decision making processes. A natural move here would be to justify this by pointing to the inherent moral limits of a regular democratic decision making process. As far as I can see, there are two main lines of thought here. One is the familiar point that regular democratic processes cannot adequately protect vulnerable minorities. The second point is more subtle, maintaining that a democratic process has its inherent moral limits that go all the way down to the very justification of democracy itself. Let me answer the first point, and then move on to develop the second.

a. protection of minorities

The protection of potentially vulnerable and persistent minorities is certainly an important concern, but it is not clear that robust constitutionalism is a particularly good way to deal with it. Basically, there are two ways to try to secure the protection of minorities, and the question boils down to an empirical one about which system is likely to yield better results (in terms of fairness, I presume).[25] One way of protecting minorities is by entrusting their protection to a constitutional court, on the basis of a bill of rights that the court is expected to apply. Another way to deal with it is by designing the regular democratic processes in such a way as to maximize the relative bargaining power of minorities, thus making it difficult for the dominant majority to reach decisions without at least partly heeding to the interests of the minority.[26] Which structure works better is basically an empirical issue.

As far as we can speculate about this, however, I think that reason sides with the non-constitutional option. Judges have no particular incentive to go out of their way in protecting vulnerable (often very unpopular) minorities. True, judges are less vulnerable than politicians to pressures of popular sentiment, but that does not give them any particular incentive to shift in the other way. It all depends on their good will, or moral conscience, if you like. (It may be worth keeping in mind that judges tend to come from the ranks of

[25] Note that we are talking here about *persistent* and *vulnerable* minorities. Anyone can find himself in the minority on some issue or other, but this is not particularly problematic. Our moral concerns pertain to minorities that are particularly weak or vulnerable and tend to persist as minorities for a considerable period of time.

[26] One clear example is the election system: Proportional representation tends to protect minorities much better than non-proportional representation. Other examples concern districting, the role and structure of political parties in the political landscape, etc. See, for example, A Lijphart, *Patterns of Democracy, Government Forms and Performance in 36 Countries,* (Yale, 1999), and D Horowitz, *Ethnic Groups in Conflict,* (U of California Press, 1985; 2nd ed. 2000).

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successful elites, not from the social circles of disempowered minorities.) Relying on good will and moral wisdom of a few individuals is not necessarily a stable mechanism for the protection of vulnerable minorities.[27] Sometimes it works, and many times it doesn't. Structural constraints, built into the regular democratic process, on the ability of the dominant majority to ignore the interests of the minority would seem to work much better.

But now you may wonder how can such structural constraints be implemented without constitutional entrenchment? There are two related questions here: how can we move to a system of representation that is more conducive to minorities' rights, and what would make that system stable in the long run? After all, the majority would not seem to have any incentive to shift to a system that constrains its power, and if it did, the new system may not be stable enough. The majority would always have the incentive to strengthen, rather than weaken, its own power.

I think that there are two replies to these concerns. First, it should be kept in mind that the problem of how to move, initially, to a system that is more conducive to minorities' rights, also applies, and for the very same reasons, to the question of how constitutions get to be adopted. In both cases the majority gives up part of its power in order to secure a better democratic regime. In both cases, those who have the power must be convinced to give up part of it. There are, presumably, two main reasons for the powerful majority to concede part of its power: sometimes is it simply a *bona fide* attempt to construct a fair system of government; other times, it resides in the fact that political actors operate under a partial veil of ignorance: those who form the majority today know that they might find themselves in the minority in the future. Political actors would normally have an interest to secure a system of fair play when they cannot be sure in advance what is the role that they might play in that game in the future.[28] And then, once you have a system in play that makes it difficult for the majority to ignore the interests of the minority, the system is likely to maintain its stability, just because it is difficult to change without the minority's consent.

Second, even if I am wrong about this and these concerns justify constitutional entrenchment, they would only justify it in the very limited domain of the structure of the democratic process, not the realm of substantive rights and moral principles.[29]

Let me explore the second line of thought. In fact, there are two very different arguments here, so let me deal with them separately.

b. The instrumental argument. This argument starts with the premise that there is nothing *intrinsically just* in a democratic decision making process. Democracy is justified only to the extent that it leads to good government, to good decisions; its value is basically instrumental. Therefore, there is nothing inherently, or intrinsically, wrong with an authoritative decision that is non-democratic. If a non-democratic system works better, that is, in terms of the

[27] This formulation is admittedly too strong. Of course there are some constraints on judicial decision making in constitutional cases, mostly those that derive from precedents and constitutional tradition. But it should be kept in mind that those precedents and traditions are created by the judiciary, that is, by the same institution that is supposed to be constrained by it.

[28] See, for example, E Garrett, 'The Purposes of Framework Legislation', *14 Journal of Contemporary Legal Issues,* (2005), 717.

[29] This is basically the main intuition, I think, that drives J H Ely's 'procedural' conception of judicial review. What he sees as legitimate in the US constitutional review is the protection of the democratic process, not 'substantive' rights. See his *Democracy and Distrust,* (Harvard, 1980). It is a difficult question, that I need not address here, whether Ely's position is a feasible constitutional interpretative strategy. Many have raised doubts about this, and I suspect rightly so.

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likelihood of yielding just results, then we cannot have a moral objection to that system. Why prefer a system that is less just (in its end-results) to one that is more?[30] Now, assuming that this is a sound argument, proponents of constitutionalism can add the requisite moves to complete the defense of constitutionalism: all we need is to substantiate the assumption that democracy works well in certain contexts, but that it is likely to fail when the sirens sing. And then, of course, we have to add the assumption that when the sirens sing, it is better to leave the decisions to a constitutional court. Courts are more likely to reach the just decisions in such cases than the legislature. Ergo, constitutionalism can be justified on instrumental grounds.

Rebuttal: The main problem with the instrumental argument is that it is likely to fail on its own terms, and for two main reasons. First, the argument must assume that in the ordinary business of law making, democracy basically works, that it is instrumentally justified. Otherwise, everything should be removed from the democratic process, not just constitutionally entrenched matters. So there must be some explanation of why democracy is likely to yield adequate results in the ordinary (viz, non-constitutional) context. For example, one might rely on the epistemic value of democratic procedures, maintaining that such procedures are relatively reliable in generating the kind of knowledge that is needed for just decisions, more reliable than some other procedure.[31] Or one can maintain that democracy is relatively reliable in aggregating overall preferences, or such. Either way, the assumption has to be that in the ordinary business of law making democracy works. The challenge for the instrumental argument, then, is to justify the difference: What makes it the case that democracy works in some cases and not others? Let us assume that on some instrumental grounds, this question can be answered. The problem is that there is no guarantee that the differences in the *reliability* of democratic procedures would match the distinction between constitutional and non-constitutional matters. In fact, some familiar examples would seem to point to the opposite conclusion. For instance, we know that democratic procedures tend to be very unreliable in times of national emergency, when the country feels seriously threatened by outside forces. It is precisely in those moments of national emergency, however, that constitutional protections tend to be set aside, and the executive branch gets most of the say in political decisions. Or, more generally, consider the reliability of democratic procedures in those areas that require considerable expertise on matters of fact. Democracy is not particularly well equipped to yield correct results in such matters. But those are typically not constitutional cases either. To be sure, I am not assuming that there is some natural distinction between constitutional and non-constitutional issues. The claim here is that constitutions tend to entrench matters of moral political principle, not a decision making process that is designed to be more reliable in domains that require expertise.

Furthermore, we should keep in mind that the reliability of a democratic procedure is profoundly context dependent, and the context is fluid, varies according to specific circumstances and across time and place. How can we know so much in advance, often decades if not centuries in advance, what would be the circumstances that are likely to undermine the reliability of a democratic procedure? Note that instrumentalism initially rules out a principled answer to this question; perhaps, as a matter of moral principle, one could come up with an answer about why certain issues ought not to be decided democratically.

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[30] See, for example, R Arneson, 'Democracy is not Intrinsically Just', in *Justice and Democracy*, ed. by K Dowding, and R E. Goodin, & C Pateman (Cambridge University Press, 2004), pp. 40-58.

[31] See D Estlund, 'Beyond Fairness and Deliberation: the Epistemic Dimension of Democratic Authority', in Bohman & Rehg (eds.), *Deliberative Democracy*, (MIT, 1999), 173-204.

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But this is not the instrumentalist's line; instrumentalism has confined itself to an empirical approach here. It must base the unreliability of democratic procedures on their likelihood of yielding just results. But then again, it is just difficult to see how we can determine well in advance what types of cases would make democratic decisions unreliable. Surely that depends on specific circumstances.

The second reason for the failure of the instrumental argument consists in reasons that have to do with relative institutional competence. Instrumentalists must assume that courts are more likely to reach better decisions on important moral issues than the legislature. But this assumption is not quite warranted. It is true, of course, that courts have certain advantages in this respect. For example, they must listen to arguments put forward to them by the parties concerned, courts have to justify their decisions, publicly, by reasoned arguments, and so forth. So there are some institutional elements in the way courts reach their decisions that are conducive to sound moral deliberation. On the other hand, there are some serious problems as well. To being with, courts are typically under serious political pressure to cast their arguments in legal terms, justifying their decisions by legalistic means, that is, even if it is the case, as in most constitutional issues, that the decision is, actually, straightforwardly a moral or political one. This legalistic pretence, that courts would find very difficult to avoid, is not particularly conducive to sound moral deliberation. Second, courts typically operate in an adversary fashion, whereby parties to a specific dispute argue their case in front of them. Moral and political issues of great importance, however, ought to take into account a much wider range of issues and interests, that may not be adequately represented in an adversary procedure. Finally, it should be kept in mind that judges are no experts in moral deliberation. Constitutional judges may be kings, but they are not philosopher kings. Nothing in the legal education and legal expertise that judges acquire prepares them better to conduct sound moral deliberation than legislators or other (reasonably educated) members of the community.

One has to admit that such issues about institutional competence are not likely to be conclusive either way. But at least we should be cautious. Legislation often looks like a messy business, and then people tend to look up to the courts, admiring their civility and deliberative procedures. It is too easy and very misleading to jump to the conclusion that courts are therefore more likely to reach better moral decisions than the legislature. We should keep in mind that judges in constitutional cases are often just as divided about the conclusion as the general public.[32] At the very least, we should suspect the instrumental argument in this respect, and assume that it is inconclusive.

c. The intrinsic value argument. This second argument begins with the opposite assumption. It is premised on the intrinsic value of a democratic decision making process, but it also points to the inherent moral limits of this value. Assume, for example, that the justification of democracy is premised on the value of equal distribution of political power. But now the question arises: What should count as *political* power that ought to be distributed equally? Surely not just about any decision people can make; not even any decision that would affect the lives of many others.[33] For something like the argument from equality to work (or any similar argument based on fairness, for that matter), we need to articulate a certain

[32] A point often stressed by J Waldron. See note 16 above.

[33] As an example, consider this: JK Rowlings' decision whether to write another episode in her Harry Potter series affects the lives of millions. Surely, that is not the kind of decision that ought to be subject to democratic process.

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conception of what counts as a political decision, one that people ought to have an equal share in its making. But this only entails that the value of democracy must have its inherent limits in the scope of its application, it can only apply to certain areas and not others. And this, the argument contends, is precisely what we do when we remove certain decisions from the ordinary democratic process; we just delineate, as we must, the sphere in which the value of equal distribution of political power applies.

Rebuttal: Constitutions do not alleviate the need to make authoritative decisions on matters of public controversy. They just shift the decision making authority from the many to the few; i.e. to those few individuals who make up the constitutional or the supreme court. In order to justify constitutionalism, it is just not enough to justify the *exclusion* of certain matters from the democratic process. One must also justify their *inclusion* in the decision making authority of the courts. It is very difficult to see how such a justification would be forthcoming on the basis of considerations of fairness. What principle of fairness could possibly justify the unique authority of the courts to make those public decisions that should be removed from the democratic process? Fairness, to be sure, has a great deal to suggest about the authority of courts to decide private disputes and resolution of conflicts between individuals. Fairness may also support the legitimacy of courts' decisions on matters of applying the law to particular cases, resolving issues of legal interpretation, and so forth. But this is not what is at stake here. What we seek is an argument to show that there are matters of general public concern, potentially controversial and morally important, that the courts, and not the legislature, should resolve, because such issues should not be subject to democratic authority. I am not aware of any considerations of fairness that could possibly support such a conclusion.

5. The argument from deep-consensus. This argument maintains that constitutions purport to entrench matters of moral and political principles that reflect a deep level of consensus in the community. The whole point of constitutional entrenchment, as we have noted from the start, is to protect deeply held values from the vagaries of momentary, short sighted, political temptations. Therefore, the argument contends, it is quite justified to remove the protection of these deeply held values from the regular democratic process and entrust them with the court. Now, a crucial aspect of this argument from consensus is the distinction it draws between matters of moral opinion, that are superficial and potentially controversial, and some deeper level of moral commitment that is widely shared in the community. As Wil Waluchow has recently put it: 'the role of judges is not to bow to the inauthentic wishes of the majority and enforce their misguided moral opinions and evaluative dissonance,…. Their job is to respect and enforce the true commitments of the community's constitutional morality in reflective equilibrium.'[34]

The need for this distinction between moral opinions and deep moral commitments is pretty clear: in pluralistic societies, people do not seem to agree on a great deal of their moral judgments about the conception of the good and the just. Moral disagreements are copious. But, this argument contends, there is a deeper level of moral commitments, widely shared in the community, and it is this deeper level of consensus that we must bring to the forefront in constitutional cases. In fact, the point is more subtle than this. As Waluchow emphasizes, there is no need to assume that at this deeper level moral consensus is in any way explicit. And there is certainly no consensus on details. The assumption is that there is

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[34] W Waluchow, *A Common Law Theory of Judicial Review: The Living Tree,* forthcoming by CUP.

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enough shared moral commitment at the deep level to generate a more articulate constitutional morality by some process of reasoning or 'reflective equilibrium'.

The argument from consensus needs to establish a further point. Even if there is such a deep level of consensus about the constitutional morality of the community, it must also be shown that the judiciary is more likely than the democratic legislature to apply those values correctly. If there is a distinction between authentic values and inauthentic, often misguided, moral opinion, the thesis must be that judges are more likely to reach their constitutional decisions on the basis of the correct authentic values, than the legislature or any other democratic institution. Are there any reasons to support that assumption? Presumably, the reason is this: Democratic legislation is a representative and bargaining process. Legislators represent the (self-perceived) interests of their constituencies. Those interests are often at odds with the interests of other constituencies, and the process of legislation is basically one of bargaining and compromise. Legislation is a deal between parties that have some interests in common and many others that are at odds. Such a bargaining process is very unlikely to be based on the underlying, authentic, moral values of the community as a whole. More likely, it will reflect a tentative and often skewed compromise between superficial interests and opinions. Judicial decisions, on the other hand, are not based on representation and are not reached by a process of bargaining.[35] Judges have no constituencies to represent, and no bargains to make. They are free to base their decisions on the moral values that are deeply shared by the community as whole. Furthermore, as Waluchow emphasizes, judicial decisions in constitutional cases have this crucial advantage, that he calls the 'bottom-up' approach: Constitutional interpretation proceeds on a case by case basis. Constitutional law develops in a common law fashion, from concrete decisions on particular issues to gradually greater generality, and not the other way around, from general, and thus potentially controversial principles, to concrete rules and decisions.

As Waluchow sees it, the idea about the deep level of consensus on which constitutionalism rests basically answers the concerns about pluralism; and the common law approach that is characteristic of constitutional law answers the concern about the inter-generational problem . As Waluchow puts it:

> Far from being based on the unwarranted assumption that we can have, in advance, all the right answers to the controversial issues of political morality which might arise under Charter challenges to government action, and that we are warranted in imposing these answers on those by whom we are succeeded, the common law conception stems …. from the *exact opposite* sentiment: from a recognition that we do not have all the answers, and that we are well advised to designing our political and legal institutions deliberately in ways which are sensitive to this feature of our predicament.

This is a complex argument, so let me summarize it.

1. Beneath the surface of disagreement in moral opinion, there is a deep level of consensus on fundamental moral values or, at least, sufficient consensus to generate some principles that would reflect such a deep consensus. Constitutions purport to entrench those deep values.

[35] Thos who know something about the workings of the US supreme court may raise their eyebrows here; at least in the US, a great deal of decision making in the supreme court is certainly based on subtle bargaining between the nine justices.

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2. The constitutional entrenchment of these deep values is needed in order to protect them from the vagaries of momentary populist sentiments and potentially inauthentic or misguided opinions.

3. At least compared with the legislature, the judiciary is better equipped to discover[36] what those deep values are, and apply them to concrete moral dilemmas in constitutional cases.

4. This discovery and application of deep values is a 'bottom-up', case by case process, and one which need not presuppose that we know all the truths about values in advance, as it were. On such a case by case basis, constitutional decisions are adapted to the particular circumstances and the relevant social needs that are present at the time of the relevant decision.

5. Therefore, constitutionalism (a) does not undermine respect for pluralism, and (b) does not involve the kind of inter-generational binding mechanism that the pre-commitment argument assumes.

Rebuttal: Every step in this argument is questionable. However, I will focus on two main myths that the argument relies on: something like Rousseau's myth about the 'general will', and the Blackstone myth about the wisdom of common law. Waluchow does not cite Rousseau in his book, but his spirit is all over the argument. Beneath the superficial level of individuals' particular will, there is a deeper, more authentic, communal moral self that addresses itself to the common good. This common good, or 'general will', abstracts from the concrete moral opinion, from the self-interested superficial self, and can only be revealed collectively, by a process that is deliberately designed to be non-aggregative. It is a process that must be oriented towards the common good, towards the underlying authentic communal self. Rousseau thought that democracy, properly constrained, is the appropriate process to generate the general will. Constitutionalists like Waluchow and Dworkin (at least as Waluchow understands him[37]) believe that it is exactly the other way around: democracy is inevitably and hopelessly skewed towards the particular and the inauthentic. Only a non-democratic process, a process that is not designed to aggregate particular wills or moral opinions, can possibly allow the 'general will', or the underlying 'constitutional morality', to triumph.

Needless to say, this is not the place to offer a critique of Rousseau's conception of the 'general will' or of similar theories about the common good.[38] My purpose in pointing

[36] I do not wish to put any weight on the term 'discovery' here. Waluchow advocates something like a Rawlsian Reflective Equilibrium method, Dworkin relies on his theory of 'constructive interpretation', and yet others may have different ideas in mind. Whatever method one has in mind, should not affect the arguments in the text. With one notable exception: the so called 'originalism' in constitutional interpretation would not be compatible with Waluchow's argument. But on this we are in complete agreement. On the question of why originalism makes no sense in constitutional interpretation I have elaborated in my 'Constitutional Interpretation'.

[37] Not without good reasons. Dworkin's arguments in *Law's Empire* (about the value of integrity and the importance of seeing political decisions as if the community speaks with one voice), certainly support Waluchow's interpretation of Dworkin. More generally, their constitutional theories are very similar.

[38] Notably, contemporary theories that espouse such an emphasis on the common good, the so called 'deliberative democracy' theories, hold the opposite view: they rely on the value of broad, inclusive, and

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this out is much more limited. First, that one should realize what would it take, philosophically speaking, to subscribe to the argument from deep consensus: Nothing short of a comprehensive philosophical defence of the 'general will', or some similar conception of the common good. Second, and more importantly, one should realise that Waluchow's argument does not really address the argument from pluralism, it simply assumes it away, as it were. Those who object to constitutionalism on grounds of respect for pluralism, like Waldron (and myself, in this case) rely on the observation that in pluralistic societies, people are deeply divided over their conception of the just and the good. And, crucially, that these deep moral controversies are, within certain limits, reasonable and therefore worthy of respect. The argument from deep consensus contends that this is not really the case. There are two ways to understand this claim. One is basically a factual matter; it is simply the contention that pluralism is based on a false premise. Moral disagreements, according to this claim, just do not run as deep as pluralism would have it. Alternatively, the claim could be that even if moral disagreements are deep, they are not worthy of the kind of respect pluralism assumes, since they are not sufficiently authentic; they do not manifest the true moral values that people living in a political society ought to share.

I will not try defend pluralism here.[39] Suffice it to point out one relevant aspect of it: pluralism does not maintain that every moral issue is deeply and reasonably controversial. Even in the face of deep and pervasive disagreement, there are many moral values that we all share or, at least, it would be unreasonable not to share. The objection to constitutionalism is based on the idea that these shared values are just too general and abstract to settle particular moral and political controversies that tend to arise in constitutional cases. Consider, for instance, the controversy over the permissibility of abortions. To put the point in a very simplified form: Some people claim that abortion is (or is like) murder and thus ought to be prohibited. Others vehemently deny this. Admittedly, those who deny that abortion is like murder would concede that *if* abortion is like murder, it should be prohibited. So there is something that both camps agree upon; we all share the view that murder is a serious wrong and ought to be prohibited. But this general agreement cannot possibly settle the controversy over the permissibility of abortions. Those who believe that abortion is just like the murder of an adult human being, base their belief on a religious, or some other world-view, that is deeply opposed to the world view of 'pro-choice' liberals. It is not just some superficial disagreement that can be brushed aside as inauthentic. For devout Catholics, for example, there is little else that is as authentic and profound as their religious beliefs. And for some atheists there is little else that is more authentic than their opposition to such beliefs. So the problem is not that there is nothing about values that we can really agree upon. The problem is that there are many issues of deep moral conviction that we do disagree about, that many of those disagreements are reasonable and ought to be respected, and that most controversies that tend to reach the constitutional courts are about the values and moral views that we are deeply divided over, not about those that we all share.

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egalitarian public deliberation as the kind of process that is likely to yield decisions that constitute, or are in line with, the common good. See, for example, J Cohen, 'Deliberation and Democratic Legitimacy' in J. Bohman and W. Rehg (eds,), *Deliberative Democracy*, (MIT, 1999), 67.

[39] In my 'Constitutional Interpretation' I have argued at some length that rights discourse is particularly deceptive in this context. Basically, the argument is that rights in pluralistic societies are such that it is relatively easy to agree on the rights we should have, but that this consensus is very deceptive. The underlying reasons for having rights and their appropriate ramifications are almost inevitably controversial.

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The argument from consensus, at least as Waluchow develops it, relies on another myth, the myth about the wisdom of common law. Let us assume, for the sake of the argument, that there is a deep level of consensus, call it the constitutional morality of the community, that should sometimes prevail over results of democratic procedures. Why should we think that a constitutional or supreme court is the appropriate institution to work out the content of the constitutional morality of the community and apply its principles correctly? Even if we grant that the democratic legislatures are ill equipped, institutionally, to apply our constitutional morality correctly, it does not entail that judges would necessarily do a better job in this respect. We need some positive argument to convince us that this is the case. Now it is here that the wisdom of common law comes to our aid: as opposed to the legislature that must typically enact general rules, courts develop the law on a case by case basis. Hence courts can focus on the particular moral subtleties of the case at hand, develop the constitutional law piecemeal, more humbly, as Waluchow claims, thus more truthfully.

One interesting implication of this common law approach to constitutionalism is that it renders the constitutional *text* much less important than usually assumed. In part, this is a matter of constitutional tradition that may vary from place to place. I will not press this issue here further. I do want to put some pressure, however, on the main assumption that common law is generally progressive and morally reliable. I think that it is neither.

My point is not going to be that common law is, overall, a bad system. Far from it. The argument I want to make is that common law has some inherent problems, and that those problems are considerably augmented in the constitutional context. Let me mention, briefly, three familiar problems with common law adjudication: it is typically insular, self-perpetuating, and lacks adequate feed-back mechanism. Common law tends to be relatively insular precisely because it is locked into a decision making process that focuses on particular cases, in an adversary procedure that does not necessarily allow the courts to see the entire social or moral problem in its full range of complexities. In deciding particular cases, judges are forced to focus on the particular features of the case at hand (at least to some extent), and they are constrained by the arguments and the factual evidence that parties to the litigation bring forth. Sometimes this is quite enough to enable a good decision to emerge, but often it isn't. Secondly, common law adjudication is based on the binding force of precedent. Judges rely on their previous decisions, typically extending their scope piecemeal. This is basically a self-perpetuating mechanism. Its danger consists in the fact that just as it enables the expansion of truthful insights, it is equally bound to expand the effect of errors.[40]

Finally, and most importantly, a closed common law system has very little opportunities to correct itself by relying on feed-back mechanisms. The main feed-back judges have is in the form of additional cases that are brought before them. But then they are already locked into their previous set of precedents, so typically this is not much of a feed-back. (In fact, it is even worse: precedents in an area of law tend to channel the kind of cases that would initially reach higher courts. Potential litigants usually don't have the money to waste on hopeless litigation.) In contrast, legislatures have a much more developed feed-back mechanism at their disposal. Interest groups, grassroot organizations, governmental agencies, election results, and the courts of course, are there to provide the legislature with input about the potential or actual effects of their legislation. The great advantage of non-constitutional common law is that it is not a closed system: At any point in time, the legislature can intervene and correct the course, sometimes shift it entirely, by statutory law.

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[40] See J Raz, *Ethics in the Public Domain* (Oxford, 1994), chapter 12.

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But in constitutional cases, this option is not quite available. The only way to shift course is by constitutional amendment. And that is often much too costly and difficult to achieve.

In non-constitutional cases, common law and statutory law complement each other. The law develops in an ongoing process of negotiation between the judiciary and the legislature, where each institution can correct the other. The problem of constitutional common law in a robust constitutional system is precisely the lack of this mutual adjustment process. It is a closed system whereby the courts get the final say in constitutional matters and their decisions are very difficult to change by an amendment process. Furthermore, because amendments are relatively difficult to make, constitutional decisions tend to be very long lasting. I see nothing particularly humble in this process, and nothing much to reassure us that constitutional common law is sufficiently sensitive to the recognition of our moral fallibility, as Waluchow maintains. For all its familiar shortcomings, democratic legislation has this considerable advantage: the decisions reached by a democratic process can be changed by the same democratic process. And if the decision is particularly controversial, it is not likely to last for too long. Those who lost today may gain the upper hand tomorrow. In a pluralistic society, this is as it should be.

You may think that all of this is just speculation. After all, we have a long history of constitutional judicial review, and this history can show us…., well, what exactly? That the constitutional courts tend to be more progressive than the legislatures? That courts have generally done an admirable job in protecting the rights we should have? Or perhaps that the courts tend to hold firm against public opinion and protect vulnerable and unpopular minorities? Such lessons from long and complex history are very difficult to learn. The image of history is in the eyes of the beholder. And our sight is blurred anyway, since it is very difficult to know what the relevant counterfactuals would be. Perhaps without judicial review, legislatures would have erred even more; or perhaps it is the other way around, and bearing full responsibility for their actions, legislatures would have done (even) better. It is very difficult to know.

4. Some conclusions.

If my arguments are correct, robust constitutionalism faces some serious problems of legitimacy. What are the moral, political, implications of this? There are two main domains to which this question is pertinent: the domain of constitutional interpretation, and the domain of constitutional design. I would like to conclude with a few words on each.

This is not the place to articulate a conception of constitutional interpretation. I have done some of that elsewhere.[41] The question I would like to address here is whether the legitimacy problem should have any particular bearing on the question of how judges ought to interpret the constitutional document. In fact, I would only like to answer one tempting line of thought: it might be tempting to think that if the very legitimacy of a robust constitution is in doubt, judges should exercise considerable restraint in their constitutional interpretation. In other words, one might think that the doubts cast on the legitimacy of constitutions implies an argument against judicial activism in the constitutional domain. I don't think that it does.

Constitutional issues are mostly (or, at least, very often) moral issues. A sound constitutional decision has to be morally sound. In constitutional cases, judges have the power to make a significant moral difference. The doubts we raised about constitutionalism

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[41] See my 'Constitutional Interpretation'.

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entail that judges should not have that kind of power. But it does *not* entail that if judges do have the power, then they should refrain from making the moral decision that is warranted under the circumstances. Consider the following example: suppose that decisions about hiring new faculty ought be done in a deliberative, inclusive, quasi-democratic process that includes the entire faculty. As it happens, however, in school X, such decisions are made only by the dean. (Assume that this is given, there is no way in which the dean or anybody else can change this.) Now consider the following dilemma that the dean faces: there are two candidates for one hiring slot; one of the candidates is academically (and in all other relevant respects) better than the other. Or so the dean has good reasons to believe. She also has good reasons to believe that the faculty would have chosen the other, inferior, candidate. How should the dean decide?[42] The argument under consideration would have us conclude that since the dean's authority to make such decisions is morally questionable, she should bow to the presumed wishes of the faculty and reach a decision that is, on the merits of the case, inferior. But I can see no good reason to substantiate such a conclusion. If it is given that the dean is the only one who has the authority to make the decision, doubtful as this authority may be, the right conclusion is that the dean should reach the best possible decision on the merits of the case. Otherwise, we just compile one error on top of the other: We will have a bad process and bad results. If the bad process cannot be changed, at least we should aspire to get the best possible results. Admittedly, the analogy with judicial review is not entirely accurate. In some constitutional cases judges have the option of actually rolling the decision back into the democratic playfield. If that is an option, I see no argument against it.[43]

Let me now conclude with a few words about constitutional design. Here the conclusion is more straightforward: if there is a serious concern about the legitimacy of robust constitutionalism, we should aspire to make constitutional regimes less robust. To be sure, I am not suggesting that we ought to have written constitutions. But if we do have them, then at least we should have them in a less robust package. There are various ways of doing this, some may be better than others. Something like the 'notwithstanding clause' of article 33 in Canadian Charter seems to be a particularly attractive way of softening the robustness of constitutions. Basically, article 33 enables the legislature to over-ride constitutional decisions of the courts, but it only enables them to do that with a political price attached: the legislature must make it very explicit that it is doing just that, over-riding a constitutional decision of the court, and it must renew the decision periodically.[44] This legal arrangement goes a considerable way in responding to the kinds of concerns about the legitimacy of constitutions that we raised here. First, it certainly mitigates, quite substantially, the inter-generational concerns. As long as the final say in constitutional matters is kept with the democratically elected legislature, the biding effect of the constitution is substantially

[42] For the purposes of the example, we should ignore practical or institutional constraints that may be involved in such decisions.

[43] I need to qualify this: I do not wish to claim that this argument applies without qualifications to federal systems, where the court's decision amounts to allowing the states (or regions) to make the decision democratically within their jurisdiction. This is a much more complicated matter, involving difficult questions about the appropriate division of democratic processes between federal and local authorities.

[44] The specific formulation of Article 33 raises interpretative issues, mostly about its scope, that we need not discuss here. I am not suggesting that the particular formulation of Article 33 is ideal. To this date, Article 33 has not been invoked by the Canadian legislature at the federal level. I would not find this particularly discouraging. Legal sanctions don't always have to be applied in order to change the behavior of the relevant agents.

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reduced; Ulysses is tied to the mast, but he can be untied by the democratic process at any given time. True, there is a price attached to untying Ulysses, but the price does not substantially undermine democratic authority. For similar reasons, though perhaps to a lesser extent, the 'notwithstanding clause' also mitigates our concerns about pluralism. To what extent? I am afraid that this is a very difficult question to answer. Partly, it depends on the specific circumstances of the society in question, its political culture, and particular aspects of the regime that we cannot speculate about in the abstract.[45]

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[45] I am indebted to Scott Altman, Richard Bronaugh, Marshall Cohen, Chaim Gans, Elizabeth Garrett, Alon Harel, and Wil Waluchow, for helpful comments on earlier drafts.

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