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## Justifying constitutional review in the legitimacy register

A reply to Bello Hutt, Harel and Klatt

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# Justifying constitutional review in the legitimacy register

A reply to Bello Hutt, Harel and Klatt

Dimitrios Kyritsis

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## 1 Introduction

- 1 The writing of *Where Our Protection Lies* closed a cycle of theoretical investigation which aimed to bring a set of philosophical ideas about political legitimacy, collective action, practical reason and democratic representation to bear on constitutional law and more specifically the role and justifiability of constitutional adjudication. But theory does not stand still for long. No sooner did the book come out that another cycle began, as its claims are being put under scrutiny, some important implications discerned, and avenues for further research identified. This process is all the more constructive, when it is aided by the critical engagement of others. The three reviewers of this symposium have done just that, thoughtfully shedding new light on and rigorously challenging some central claims of the book. For that as well as for their generosity I am grateful.
- 2 I start with my response to Donald Bello Hutt's review, because this will allow me to frame the present dialectic and set the methodological parameters for the rest of my reply. Next, I address Alon Harel's review which offers a vision of constitutional review sharply contrasting to mine. It thus plays the role of antithesis. I conclude by examining Matthias Klatt's attempt at synthesis. Along the way I hope to make clear that underlying every step in this schema is the central conviction behind the entire book: Constitutional law is there to enhance the moral legitimacy of a political regime by structuring government so that it can reliably and systematically stay the course of justice. That is the standard against which we must evaluate systems of constitutional review.

## 2 Dialectic (Bello Hutt)

- <sup>3</sup> In his review Donald Bello Hutt raises probing questions about the methodology underpinning one of my main critical claims, my rejection of a certain style of scepticism towards constitutional review. He does so en route to outlining what he takes to be a competing conception of the relationship between courts and representative institutions such as a democratic legislature.
- <sup>4</sup> I should begin by saying that I particularly relish the opportunity to revisit my methodology. The book is as much about the substantive issue whether courts may or should have the power of constitutional review as it is about the methodological question how we should go about deciding this substantive issue and indeed any other issue of constitutional law. I elaborate my methodology in chapter one of the book, but for the most part do not return to it in subsequent chapters.
- <sup>5</sup> Chapter four, which is the target of Bello Hutt's critique, is one place where a methodological excursion would have perhaps helped. There I argue against the claim, put forward by Richard Bellamy and Jeremy Waldron among others, that constitutional review is morally unjustified because it violates political equality by giving the views of a few unelected officials superior voting weight compared to ordinary citizens. I seek to neutralise this critique by pointing out that political representation, as we know it from our political practices, involves a similar grant of power to elected representatives. Consequently, Bellamy and Waldron's critique suffers from overkill. It gives us as much reason to object to representative democracy as constitutional review.<sup>1</sup>
- <sup>6</sup> Bello Hutt contends that my argument fundamentally misunderstands what is involved in evaluating this or that political arrangement. It does not suffice to say that the arrangement does not match 'what happens in real-life'.<sup>2</sup> In addition, we must assess it against 'evaluative standards', which Bello Hutt calls 'regulative ideals', contrasting them to 'rationalisations of political practices'.<sup>3</sup> In his view, the fact that Bellamy and Waldron's view is at odds with prevailing institutional manifestations and understandings of political representation does little to discredit them, because it leaves it open that their view flows from a regulative ideal that is 'the best reflection of our practices'.<sup>4</sup>
- <sup>7</sup> I agree that rationalisations of practice do not have the requisite normative force. But my conception of political representation goes well beyond a mere reporting of patterns of practice. It is true that I start by identifying certain fixed points of the practices of political representation in the political systems with which we are familiar. But I go on to examine whether a moral story can be told that vindicates these practices. I say that by virtue of combining a constraint emanating from the wishes and opinions of constituents and an element of independent judgment, political representation, as we know it, is valuable: it balances the demands of popular support and moral innovation. This moral story bears strong resemblance to Nadia Urbinati's conception of representation as advocacy that Bello Hutt prefers. It accepts that while the wishes and opinions of the electorate are not infinitely malleable and thus pose genuine constraints on legislative duty, practices of political representation are structured in a way that allows that these wishes and opinions will be mediated by deliberation and the independent judgment of legislators. This has important implications for institutional design: Representativeness, thus understood, is what bestows authority on, say, democratically elected legislatures.

- <sup>8</sup> The type of political argument I employ in that part of the book is underpinned by something like Ronald Dworkin's interpretive method.<sup>5</sup> For Dworkin, interpreting a normative practice involves ascribing to it a point that fits and justifies what we commonly take to belong to the practice.<sup>6</sup> On this understanding, fit and justification are two separate (though interrelated) benchmarks for theoretical success; a conception that does not adequately 'fit' the practice is pro tanto inferior regardless of how it fares along the dimension of justification.<sup>7</sup> This is exactly the charge I level against Bellamy and Waldron, which is why my critique focuses primarily on the 'fit' of their view.
- <sup>9</sup> Bello Hutt might claim that the interpretive method is equally vulnerable to his objection. Why should we be shackled to an imperfect practice, albeit one for which a morally attractive story can be told, when we can identify a morally superior regulative ideal and then assess 'whether the practice under scrutiny is closer to or further from the ideal'?<sup>8</sup> This is a perfectly appropriate question to ask of any normative practice.<sup>9</sup> Even if a practice is worthwhile, we may still be better off abandoning it. In the book I consider whether Bellamy and Waldron would want to pursue this strategy.<sup>10</sup> I argue that, while it is in principle open to them, it comes at a high cost. A radical reform of our political practices in the name of political equality, as they understand it, will not only sweep away constitutional review but also much of representative government. Bellamy and Waldron may decide to bite the bullet, but it is a hard bullet to bite.
- <sup>10</sup> I anticipate the same general move earlier in the book. In chapter one I discuss the relationship between history and *moralised constitutional theory*, which is my label for the methodological outlook grounding the overall project. I argue that according to moralised constitutional theory the political record of a legal order partly determines the content of its constitutional law, much like fit partly determines interpretation. I then consider the objection that this creates a conservative bias blocking from view radical but morally superior constitutional options.<sup>11</sup> While I acknowledge the importance of utopian moral reflection, I insist that determining what the state may do, as constrained by the political record, performs a distinctive moral role: it furnishes a benchmark for the legitimate use of state force here and now. The same argument can be directed to Bello Hutt. We may have strong moral reason to reform our practices of political representation, but political legitimacy dictates that our moral reasoning hew more closely to what we have done and decided in the past. It is the latter exercise that animates constitutional law doctrine.

### 3 Antithesis (Harel)

- <sup>11</sup> Applying the method of moralised constitutional theory, the book advances a modest institutional recommendation, namely that in some jurisdictions and under certain (not necessarily exceptional) circumstances it may be legitimate for courts to have the power to review primary legislation for its conformity with the constitution but that it may not be in others or under different circumstances. This pits me against theorists like Alon Harel who maintain that constitutional review is always permissible and indeed morally obligatory because individuals have an across-the-board right to such a procedure. In the book I specifically engage with Harel's thesis that such a right can be derived from a more abstract moral right to a hearing.

- <sup>12</sup> In his review, Harel puts forward a different but equally intriguing proposal. He argues that constitutional review is the correct procedure for vindicating our fundamental rights such as the right to freedom of expression and freedom of religion by virtue of the fact that it expresses the correct attitude towards those rights. When it strikes down a law that violates rights as unconstitutional and therefore invalid, the court signals that the legislature strayed beyond its proper sphere of authority; it exercised a power that it never had. As Harel puts it, ‘a judicial decision which pronounces that prohibiting the burning of the flag is unconstitutional conveys unambiguously the message that the prohibition on burning the flag is a wrong’.<sup>12</sup> By contrast, the message is muddled when we entrust the protection of our rights to the legislature. Suppose the legislature refrains from prohibiting the burning of the flag. Since it must also act on ‘concerns about the public good’,<sup>13</sup> it is not clear whether the legislature’s omission is motivated by respect for the right to free speech or whether it is solely or mainly driven by ‘concerns for efficiency or utility’,<sup>14</sup> which happen to point in the same direction as respect for the right to free speech. It is also not clear whether the legislature believed that it ‘had indeed a power to prohibit the burning of the flag but it decided not to use its power’.<sup>15</sup>
- <sup>13</sup> What follows from this in terms of institutional design? Just as with the right to a hearing, this proposal envisages a non-instrumental relation between a moral idea and institutional design.<sup>16</sup> For Harel, because of the ‘expressive’ advantage of constitutional adjudication over legislation, constitutional review is justified, independently of whether courts are better than legislatures at reaching the correct result concerning the content of our rights. By the same token other participants in the joint project of governing, importantly legislatures themselves, owe judicial decisions enforcing the constitution against primary legislation a duty of deference.<sup>17</sup>
- <sup>14</sup> As a general matter, I have nothing against non-instrumental justifications of institutional design, though I would insist that such justifications must compete with – and may sometimes lose out to – instrumental ones. Furthermore, I do not want to deny that we should sometimes care about the expressive dimension of political decision-making. Can a story be told along expressive lines about constitutional rulings? In order fully to answer this question I would need to evaluate the substantive part of Harel’s proposal, the idea that there is something valuable in the state sending the message that it has no business treading on individual rights.<sup>18</sup> This broader inquiry will have to wait another occasion. Here, I only want to focus on the alleged implications of that idea for institutional design.
- <sup>15</sup> To begin with, Harel’s proposal does not seem to encompass systems of weak constitutional review, where courts can declare a statute incompatible with a fundamental right but not invalidate it. In this sense, it fails to ‘fit’ an important part of the practice. But the mismatch is not only descriptive. A deeper, normative issue lurks here. Plausibly, legal orders that have adopted weak constitutional review have not thereby abandoned their commitment to fundamental rights. If we are not willing to dismiss these legal orders as morally misguided or illegitimate, it is because we think the following two propositions are compatible: 1) a person or body is morally bound by a certain rule. 2) nobody else is authorised to enforce (or even monitor) compliance with the rule against that person or body. Proposition 2 has particular force when the person or body has democratic credentials. Of course, we may have all sorts of reason to mistrust a political arrangement that grants unchecked power to a person or body,

relying only on their inner moral compunction to refrain from wrongdoing. But they would not be the kind of reason that Harel is after. They are, as Dworkin puts it, outcome-driven, pertaining to the question whether our political institutions are set up so that they reliably and systematically govern well.

- 16 It might be objected to this line of reasoning that the expressive value of a constitutional ruling is preserved even if its authoritative impact is watered down. After all, the court does not (need to) mince its words when it declares that a piece of primary legislation is incompatible with human rights. But this suggestion would run up against another thesis Harel endorses, namely that a system of legislative protection of rights fails to pay rights their due because ‘in the absence of judicial review, the rights of individuals in a democracy are contingent on the judgements and inclinations of the majority’.<sup>19</sup> By contrast, as we have seen, Harel thinks what counts in favour of constitutional review is that it completely removes from majoritarian decision-making an issue that properly falls within the sphere of individual discretion. It seems the same cannot be said of weak constitutional review.
- 17 Harel could, of course, decide to bite the bullet and insist that his account only recommends strong constitutional review. However, I am sceptical that the expressive value of constitutional rulings, such that there is, can bear the weight for this institutional recommendation. Republicanism has taught us that we should be worried not only when we entrust our lives to the judgments and inclinations of the majority but, more generally, when we put ourselves at the mercy of another. This worry applies as much to judges as it does to legislators.<sup>20</sup> As a matter of fact, it is part of the essence of politics. The fact that judges couch their decisions in terms of the meaning of the constitution does not eliminate the element of personal judgment and hence the risks from heteronomy. After all, judges decide on the basis of what *they interpret the constitution to mean*. If you take seriously the republican concern of domination, it will be but little comfort that their interpretations express judgments about the limits of political power.<sup>21</sup> It will probably be of much more importance to you, first, to have a meaningful say in the decision and, second, to have assurances that the body with the authority to decide, whether it be a court or a legislature, will reliably get it right. It is the balance between these two kinds of consideration that calls the shots.

## 4 Synthesis (Klatt)

- 18 In this short reply it is impossible to do justice to Matthias Klatt’s wide-ranging review or to fully map my account onto his own rich theory of institutional cooperation. Especially the latter task requires an iterative process that incrementally brings our respective conceptual toolkits into closer conversation with each other. Klatt inaugurated this process in his review. Here I shall try to keep it up by raising a worry that the rapprochement of the two theories might run into a rather fundamental philosophical obstacle. Building on this worry I shall address some more specific areas of contention.
- 19 Klatt finds common ground between us in the idea that the moral justifiability of the overall system of constitutional review and of specific acts within this system is the outcome of balancing two types of moral consideration, which I call considerations of content and institutional design. This distinction is strikingly similar to Klatt’s distinction between material and formal principles. Like me, he contends that in order

to allocate institutional competences we must balance these two types of principle. In addition, he denies, as I do, that there are ‘unconditional preference relations’<sup>22</sup> between these principles.<sup>23</sup> So, are we talking about the same thing?

- 20 To answer this question, I must first stress that in Klatt’s hands balancing has a technical sense. He regards formal and material principles as optimization requirements. This means that their normative force is not all-or-nothing. Rather, we conform to them by optimizing them within the confines of what is feasible, where what is feasible is also a function of what other principles are at stake. When more than one principle is at stake, we must decide which one should take priority under the circumstances. In turn, this determination hangs on ‘the specific weights these principles have in a given case’.<sup>24</sup> We ask: Does the seriousness of the setback suffered by one principle outweigh the improvement caused to the other? If so, then the first principle takes precedence.
- 21 Prima facie, there is a marked difference between Klatt’s balancing method and the way considerations of content and institutional design are supposed to interact in my theory. I use the term ‘balancing’ loosely to mean simply that these two types of consideration are joint determinants of the moral justifiability of constitutional review.<sup>25</sup> But I do not hold the further view that we combine them by seeking to jointly realize them to the greatest extent possible. What, then, happens when they are in tension? What happens, for instance, when institutional design dictates that we give effect to a decision because it was made by the competent body, but that decision offers sub-optimal protection to one of our fundamental rights? For Klatt, my answer to these questions is in need of further elaboration and at times perplexing, so let me try in the following paragraphs to restate it more clearly.
- 22 It is worth recalling at this point what I take to be the general structure of the moral justification of systems of constitutional review. I argue that the guiding star of this justificatory exercise is the concept of political legitimacy. This means that we do not have a free-standing concern to promote democracy, say, or fundamental rights. Rather, we care about democracy and fundamental rights and all the other considerations of content and institutional design insofar as they matter for legitimacy. Hence, the issue is not simply how much fundamental rights protection will suffer if the court refrains from striking down the sub-optimal legislative decision of our example, but whether in doing so the court enhances or undermines the legitimacy of the overall political regime.<sup>26</sup>
- 23 Am I exaggerating the difference between the two methods? Klatt might insist that - assuming I am right about the connection between legitimacy and constitutional review- they can still be made compatible. He might say that when we work out the relative weights of formal and material principles, what we do is measure the contribution of each to political legitimacy in the circumstances of a specific case. After all, the balancing method furnishes a formal structure that needs to be filled with sound premises from moral theory. And if sound moral theory dictates that the point of constitutional law is to enhance legitimacy, then surely we should adjust the weights of the items we put on the scales accordingly. So, as far as the balancing theory is concerned there is nothing stopping us from formulating our inquiry not in terms of how detrimental to democracy an exercise of judicial power is but rather how seriously that setback affects the legitimacy of the political regime (given that democracy is one of the things that contribute to it).

- <sup>24</sup> Perhaps this manoeuvre would get around some of the difficulties. Still, I am not entirely convinced that what we do when we balance institutional design and content with an eye to enhancing legitimacy is best understood as optimization to begin with. For instance, in the book I am keen to emphasize that legitimacy makes political history morally relevant.<sup>27</sup> I cannot repeat my argument for this claim here. Suffice it to say that, by virtue of its dependence on political history, legitimacy sometimes recommends a policy or institutional arrangement because it is the one that our political community has settled upon (and certain other conditions are met). In such cases it strikes me as not pertinent to the issue of legitimacy to ask whether this policy or arrangement is the closest we can get to justice under the circumstances, which is what the balancing method seems to boil down to.
- <sup>25</sup> Mind you, when he speaks of balancing, Klatt specifically allows for the contingency of constitutional law. He subscribes to the special case thesis which sees constitutional reasoning as moral reasoning constrained by past political decisions.<sup>28</sup> But insofar as moral reasoning is still taken to be about optimizing principles of political morality, a residual difference remains. Indeed, on my view legitimacy might on occasion condemn optimization of a certain principle. In the book I explored a dimension of legitimacy that brings out this possibility. I wrote that, in order for a regime to be legitimate, it must be equipped with standing guarantees against the abuse of power. Such assurances are an important part of the package that the regime must be able to offer those subject to it in exchange for their allegiance. Otherwise the cost of submission to the regime becomes prohibitively high. This is not only because states will often pursue policies some of us object to. It is also because state power is so immense and the risks from its being abused so great that it ought never be bestowed on someone without robust limits. It would seem to follow from this that even some good ideas about how to promote this or that political value may on occasion have to be sacrificed, because if we gave our political institutions the power to implement them we would be loosening a desirable break on government overreach. A similar thought often motivates the desire to control the administrative state.
- <sup>26</sup> A related problem arises out of Klatt's view that the balancing of formal and material principles should be made on a case-by-case basis. He writes that 'once a system provides for judicial review at all, the full range of scrutiny is in principle available to the courts'.<sup>29</sup> How else can they determine the relative weights of competing principles in specific circumstances? My legitimacy-based account would shy away from such sweeping particularism. While sometimes the reasoning of the reviewing court will be context-specific, there are strong reasons, reasons of legitimacy, why sometimes it should not. One of those reasons is that a legitimate polity must be more or less stable. In order to pledge their allegiance to it, citizens need to be confident that the scheme of government it establishes will not drastically change mid-sea, shifting political power from one institution to another without notice.<sup>30</sup> I would argue that the need for stability recommends general and standing allocations of government power and thus lies in tension with Klatt's highly context-specific approach.
- <sup>27</sup> So far, I have tried to show that legitimacy can help determine the moral import of competing considerations of content and institutional design and have assumed that on the basis of this determination we can then judge their relative weight. This assumption has been challenged by those who question the commensurability of these two types of moral consideration.<sup>31</sup> How, they ask, can you trade off a blow to freedom

of speech against a gain in democracy? According to Klatt, an adequate account of the interplay between considerations of content and institutional design must be able to respond to this question. In the book I argue that the theoretical importance of incommensurability is vastly exaggerated. I contend that, although the comparison between content and institutional design may lead to some weak indeterminacy, it is not radically or strongly indeterminate.

- <sup>28</sup> I should stress here that it is of particular significance that the comparison takes place under the auspices of the overall principle of political legitimacy. Here is an example to illustrate the point. Some theorists have suggested that comprehensive aims like starting a family or choosing a profession are typically incommensurable.<sup>32</sup> How do you even begin to compare the career of an investment banker and that of a piano virtuoso? But the comparison could become a lot more tractable if the question is which career is more suitable for me and I am good with numbers but not particularly musical. Similarly, even if it is impossible to rank freedom of speech and democracy in the abstract, legitimacy brings with it a host of more specific demands and concerns that might help us assign these two principles relative priority within a given context.
- <sup>29</sup> Regardless of the merit of my arguments against incommensurability, Klatt offers me a different route. He proposes that I abandon the ‘combination model’, as he calls it, in favour of the ‘separation model’. According to the latter, we are only allowed to balance among formal principles, for example democracy and judicial independence. What we cannot do is what the combination model allows, namely balancing a formal and a material principle. I need to hear more about the separation model, but I am inclined to stick to my guns. I do not think that only formal principles matter for legitimacy, and I reject the proceduralist strategy of using reasonable disagreement to preempt recourse to material principles. So, the separation model runs counter to the conception of legitimacy underpinning my account.
- <sup>30</sup> Klatt worries that some things I say in the book belie my vehemence. For instance, he points to my invocation of Ronald Dworkin’s distinction between background and institutional rights.<sup>33</sup> I do not see how embracing this distinction commits me to the separation model. The distinction is not one between rights determined solely by considerations of content and those determined solely by considerations of institutional design. Institutional rights are those that we have as part of an authoritative structure. Depending on one’s conception of the principle governing permissible action within that structure, it is perfectly conceivable to hold that institutional rights are determined by a combination of considerations of content and institutional design –indeed, this is my view and Klatt’s. By contrast, background rights supply the standard against which we judge the decisions and practices of that authoritative structure and consequently are independent of considerations of institutional design which grant those decisions and practices normative weight.
- <sup>31</sup> With this we return to a key message of the book: In a by-and-large legitimate system of government the morally sub-optimal is sometimes morally binding: Our institutional rights fall short of our background rights. This is the price we pay in exchange for living in a legitimate polity, one whose main political institutions are arranged so that they can reliably and systematically stay the course of justice. When we put in place a system of constitutional review, we task courts to correct some of our moral mistakes. To do this, they cannot simply look at the formal allocation of state power. They must consider the meaning and urgency of our substantive rights. At the same time courts

are but one component of the system of government; their authority to correct our mistakes and hence to be guided by our background rights is accordingly limited.

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## NOTES

1. This argument is meant to blunt a threat against constitutional review, not to provide an argument for it. I do not subscribe to the view (which Bello Hutt ascribes to me) that since ‘independent judgement is always a feature of any institution, one should have no problem with accepting courts making decisions on behalf of the people’ (Bello Hutt 2019: 53). Granting a power to any official requires a justification. My account of representation (roughly) justifies having an elected legislature govern us. I employ a very different justification, one based on the value of judicial independence, to defend the permissibility of constitutional review.

2. Bello Hutt 2019: 43.

3. Bello Hutt 2019: 40.

4. Bello Hutt 2019: 43.

**5.** See generally Dworkin 1998: 49ff.

**6.** Dworkin's interpretive method is not dissimilar from Urbinati's: She, too, carefully examines the range of historical manifestations and influential understandings of political representation and seeks to 'cast them in their best moral light'. Of course, that is not to say that they also reach similar conclusions regarding the role of legislatures.

**7.** Furthermore, the requirement of fit does not reflect considerations of 'practical feasibility' which for Bello Hutt cannot be decisive. (Bello Hutt 2019: 45) Rather, it is based on a distinction between what counts as a genuine interpretation of a practice as opposed to a call for its reform.

**8.** Bello Hutt 2019: 45.

**9.** Here I am setting aside the crucial question how we identify the Archimedean point from which to criticize the practice.

**10.** Kyritsis 2017: 96-97.

**11.** Kyritsis 2017: 31-32.

**12.** Harel 2019: 16.

**13.** Harel 2019: 16.

**14.** Harel 2019: 16.

**15.** Harel 2019: 17.

**16.** An important difference between the two proposals is that, whereas the right to a hearing is meant to be a pre-political moral idea, the 'expressive' dimension of constitutional adjudication seems to only make sense in the context of politics, where a body has authority to make decisions that are binding on others.

**17.** In order to explicate 'legislative deference', the deference owed judicial decisions by the legislature, Harel employs my distinction between epistemic and robust deference. I introduce this distinction Kyritsis 2017: ch 7 in the course of offering an account of 'judicial deference', but, as I explain, it could apply more generally to any official who must give normative weight to the decision of another. That is because the distinction pertains to the 'how' or mode of deference as opposed to the 'why' or trigger of deference. Different reasons might trigger judicial and legislative deference, but, if I am right, both will assume one or the other mode.

**18.** We should bear in mind that constitutional rulings seldom make reference directly to our moral rights. Typically, they appeal to our constitutional rights. The relation between the two is not always straightforward. Importantly for Harel's purposes, we should expect that not all of our constitutional rights have the same expressive significance.

**19.** Harel 2019: 18.

**20.** Interestingly Harel inverses the traditional republican objection to judicial review. For republican theorists judicial review is problematic because it exposes us to domination by officials over whom we have no political control, whereas this is not the case with democratically elected legislators.

**21.** See relatedly Bello Hutt 2017: 20-21

**22.** Klatt 2017: 27

**23.** This is the position of proceduralists such as Waldron who argue that it is a 'category mistake' to balance content and institutional design; rather, because we disagree about content, we may only invoke considerations of institutional design to justify political action. I argue against proceduralism in Kyritsis 2017: 10-13.

**24.** Klatt 2017: 25

**25.** I offer some general critical comments on the notion of balancing in Kyritsis 2014: 400-2.

**26.** In this sense, legitimacy is the broadest moral concept within which more specific moral principles are nested. Klatt takes issue with the fact that I use the term 'overarching' to characterise separation of powers. He '[doubts] whether all factors relevant for the legitimacy of judicial review could be characterized as sub-aspects of the separation of powers' (Klatt 2019: 30). I do not deny that there are moral considerations that are relevant for legitimacy but do not fall

within separation of powers. But that is not incompatible with saying that separation of powers incorporates several subordinate considerations of institutional design. For instance, separation of powers comprises what I call a division of labour dimension, which encompasses democracy and efficiency. One way to give effect to separation of powers, then, is by allocating government power such that institutions instantiating the principle of democracy or the value of efficiency perform a consequential role. Relative to efficiency and democracy separation of powers is indeed overarching.

27. Kyritsis 2017: 22–27.

28. Klatt 2019: 28.

29. Klatt 2019: 32.

30. I qualify this claim in Kyritsis 2017: ch 9, where I offer the main elements of a theory of permissible constitutional change by courts.

31. See among others Allan 2006.

32. Raz 1986: 292. It must be noted that Raz does not think comprehensive aims are radically indeterminate.

33. Dworkin 1978: 93.

## ABSTRACTS

In this article I restate and sharpen key claims of my book *Where Our Protection Lies*, responding to the reviews written by Donald Bello Hutt, Alon Harel, and Matthias Klatt for this symposium. I first explicate the role that practice plays in my argument against critics of constitutional review and, more broadly, in my account of the value of democratic representation. This allows me to clarify and defend the general methodology I employ in the book, which I label moralised constitutional theory (MCT). Against Bello Hutt I argue that MCT does not merely rationalise existing practice; it heeds existing practice only to the extent that it can morally legitimate state power in the special way that constitutional law is meant to do. I then go on to evaluate Harel's suggestion that constitutional review evinces the proper attitude towards rights; it expresses the idea that certain activities are off limits to government regulation. By contrast, legislative protection of our rights puts at the majority's mercy. I contend that this suggestion has a problematic fit with contemporary constitutional practice. More importantly, it does not take into account that being subject to the authority of a judge also raises concerns about domination, and those concerns must be balanced against the expressive benefits of constitutional review, if there are any. Finally, I register a worry concerning the rapprochement that Klatt urges between our respective theories. Although both theories subscribe to the view that the content of our constitutional rights and duties is determined by the proper balance of moral considerations pertaining to the content of political decisions, on the one hand, and the features of the institutional structure that has produced them, on the other, I am sceptical that these considerations operate as optimisation requirements.

## INDEX

**Keywords:** Constitutional review, separation of powers, political legitimacy, democratic representation, republicanism, weak and strong review, balancing

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