CONSTITUTIONAL LAW AS LEGITIMACY-ENHANCER

Dimitrios Kyritsis*

1. Introduction

Constitutional lawyers are no strangers to moral principles. Concepts like the rule of law, democracy, and human rights figure prominently in constitutional texts and judicial decisions. And yet, the place of political morality in constitutional doctrine is contested and precarious. For many it is a key resource in resolving constitutional disputes, while others warn that it is unduly volatile and fraught with risks, though, perhaps, still relevant to the evaluation of extant constitutional law. In this chapter I side with the former camp. I argue for what I label *moralised constitutional theory* (MCT). MCT, as I understand it, does not merely say that political morality is *sometimes* a determinant of our constitutional law rights, duties, powers etc. Rather, it makes the bolder claim that in the by and large well-ordered political societies we are most familiar with constitutional law rights, duties, powers etc are *of necessity* partly grounded in moral principles.[1]

MCT is a broad church. For instance, according to one of its variants constitutional law is underpinned by the moral principle of equality.[2] According to another, constitutional law's touchstone is the rule of law.[3] It is important to stress that these theories do not simply say

* I would like to thank participants in the workshop on the methodology of constitutional theory at the University of Reading in 2017, at the Jurisprudence section of the 2020 SLS Conference at the University of Durham, and at a meeting of the Public Law Cluster of the University of Essex for their helpful comments. I am especially grateful to Ana Cannilla, David Dyzenhaus, Theodore Konstadinides, Frank Michelman, and Maurice Sunkin for invaluable feedback on previous drafts.

[1] I should add that the fact that they are so grounded does not entail that moral principles will necessarily figure expressly in the reasoning of constitutional judges or other officials, although it is highly likely that they will sometimes. Elsewhere I argue that such moral reasoning may be tempered or even on occasion completely pre-empted by doctrines of judicial deference, which are themselves based on higher order moral principles. See D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017) ch 7.

[2] TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford, Oxford University Press, 2013).

[3] D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press, 2006).

that equality and the rule of law are ideals to which constitutional law should properly aspire. The thought is, rather, that for a certain norm to be part of the constitution, it must flow from or conform to equality or the rule of law, correctly construed.

I propose a route that differs in important respects from the aforementioned options. I maintain that in its essence constitutional law enhances the legitimacy of a political regime in a distinctive way. Now, I am hardly the first to note a connection between law and the theory of legitimacy. Ronald Dworkin and Joseph Raz, to name two examples, have in their very different ways elaborated such a connection in their theories. Dworkin maintains that, for a political society to be legitimate, it must act with integrity.[4] That is, it must treat all citizens according to the same conception of justice that it had committed to in the past; by doing so it realises an ideal of equal concern and respect. Judges who interpret legal practice by identifying a set of principles of political morality that best explain and justify past political decisions, as Dworkin's theory of law proposes, are thereby upholding integrity and. Conversely, for Raz the law claims legitimate authority, so we can understand a lot about how it purports to operate in our practical reasoning by reflecting on the conditions of legitimate authority.[5] In particular, we can grasp the exclusionary force that it claims for its edicts.

What is distinctive about the approach I advocate here (apart from the fact that it makes a claim specifically about constitutional law rather than law in general) is that it singles out a dimension of legitimacy that is less pronounced in those other theories, if it figures at all. I label it the *assurance dimension of legitimacy* (or *assurance legitimacy,* for short). Assurance legitimacy calls for guarantees that government will reliably and systematically act in a morally justifiable way. In section 2 I spell out this dimension of legitimacy and argue that constitutional law is especially suited to furnish the guarantees it recommends. Constitutional law may have other roles as well, but this one, I suggest, is rather central and crucial. In section 3 I go on to draw out the methodological implications from accepting this understanding of the role (or point, as I will also sometimes say) of constitutional law. I contend that, in order

[4] R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 1998) ch 6.
[5] J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1988) ch 2-4.

to work out the right answer to a question of constitutional law, we ought to ask which answer contributes to the fulfilment of this role. In other words, we ought to determine which arrangement of constitutional rights and duties enhances the legitimacy of a political regime in the special fashion that the constitution is supposed to. This is a thoroughly moral inquiry, but one that directs us to pay attention and give effect to political decisions that have been made in the past, including the momentous decisions that defined the institutional fundamentals of the regime in question. MCT thereby bridges the moral force of the constitution and its contingent character as a political settlement.

In stressing the assurance-providing character of the constitution, the approach defended here seems to clip the moral aspiration that some would like to pin on constitutional law. It maintains that constitutional law should not be equated with the pursuit of perfect justice: rather, it is primarily there to ensure that this pursuit is subject to certain conditions regarding the proper use of the state's coercive force. In an important sense, then, it fixes more on the threats that come from the existence of the state and less on the full set of goods that it makes possible. I do not think that this 'modesty' is a cause for regret. For one thing, it seems to better resonate with political reality. Even in the by and large well-ordered political societies that we are familiar with, the state's orientation towards justice cannot be taken for granted. This makes taming political power by constitutional means all the more urgent. As I shall argue, when it is constrained by constitutional -and other- guardrails,[6] the state deserves our continuing -though often grudging- allegiance despite its missteps. In addition, constitutional law's 'modesty' is not only a recipe for broadly well-ordered but far from perfect political societies. Even the steadfast pursuit of justice -if we can ever be sure of such a thing- should not be untrammelled. For, state coercion triggers a set of moral concerns which are largely absent from the theory of justice. These are concerns that legitimacy characteristically addresses.

[6] S Levitsky and D Ziblatt, *How Democracies Die* (New York, Crown Publishing, 2018).

2. Moral Force and Settlement

As already mentioned, this chapter champions a moralised methodology for identifying the correct answers to questions of constitutional law. But how should we go about defending this (or any other) methodology? This, we might say, is a meta-methodological question. It asks what are the criteria for selecting a sound (or the most sound) methodology for constitutional law. One thing we can do is show that other tools that are on offer are inadequate. We evaluate competing legal methodologies such as semantics or history and conclude that they cannot furnish determinate or convincing answers to pressing doctrinal questions. Morality is the last method standing, so to speak. This is a line of argument characteristically pursued by Stuart Lakin.[7] Alternatively, like Trevor Allan, we can argue that MCT best fits the self-understanding and discourse of legal practitioners.[8] We survey the arguments that practitioners offer and find compelling and observe that they are typically underpinned by or drawn from political morality.

There is much to recommend either strategy, but in this chapter I follow a different -though to some extent complementary- route. I argue that MCT is sound because it helps us capture salient features of constitutional practice; in fact, it can capture features that critics of MCT claim it misses or distorts. These critics contend that MCT is caught in a paradox, because it must straddle two desiderata seemingly pulling in opposite directions. On the one hand, it must account for constitutional law's moral force, and on the other, for the fact that it embodies a political settlement.[9]

Needless to say, the first desideratum can more straightforwardly be satisfied by MCT. A big part of the reason, surely, why constitutional law is thought to have moral force -at least in the by and large well-ordered societies with which we are familiar- is that it enshrines or

[7] See for instance S Lakin, 'How to Make Sense of the HRA1998: The Ises and Oughts of the UK Constitution' (2010) 30 OJLS 399-417 and 'Why Common Law Constitutionalism is Correct (If It Is)', this volume.
[8] See TRS Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77 *Cambridge Law Journal* 269.
[9] These two desiderata bear some similarity with the two functions, 'regulatory' and 'justificatory', that the constitutions of liberal constitutional democracies perform according to Frank Michelman. See F Michelman, 'Political-Liberal Legitimacy and the Question of Restraint' (2019) 1 *Jus Cogens* 59, 60-1.

guarantees important principles of political morality such as representative democracy, the rule of law, and human rights. MCT operationalises and vindicates this connection. It contends that these principles are not idle words or rhetorical flourishes. Rather, they determine the content of the constitutional law, such that more specific constitutional norms must be shown to flow from or adhere to them. MCT can also explain why these principles pertain specifically to *constitutional* law: The thought is that, because of its fundamental character, constitutional law can effectively express a polity's commitment to these principles. Where the constitution enjoys hierarchical superiority over ordinary law, constitutional law does so by turning these principles into conditions of validity for all downstream state action. But arguably this commitment also finds a number of institutional expressions in jurisdictions without a formal constitution, where the doctrine of parliamentary supremacy is thought to preclude the imposition of such conditions on the validity of primary legislation.[10]

Of course, there are many constitutions that flout these principles outright, and it would seem that MCT has nothing to say about them. However, MCT's goal is not to be descriptively ecumenical but to determine the role and content of constitutional law in those jurisdictions where constitutionalism is not an empty promise, and, as Sartori puts it, that promise is for 'a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government".'[11]

At the same time, though, constitutions are creatures of historical contingency. They mark a special political achievement, the establishment for the first time or the more or less infrequent updating of the basic terms and commitments of political life in a particular society. This feature is captured by the second desideratum, and it is here that MCT is thought to run into problems. In fact, it may be argued that the more emphasis it places on fundamental moral principles, the more likely it is that it will lose sight of the settlement

[10] See for example J Laws, 'Law and Democracy' (1995) *Public Law* 72.

[11] G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 853, 855. For Sartori, we should of course still study constitutions that do not fulfil that promise, but without thinning down our definition of constitutionalism in order to include them within it; rather we should treat them as 'a loosening up of the concept' for the purpose of corrupting it or using it as a 'trap word'. Accordingly, he distinguishes constitutions properly so called from what he dubs nominal and fake ones (ibid 861ff).

aspect of constitutional law. In so doing it presumably becomes vulnerable to the twin charges of over-rigidity and disloyalty.

Let's start with the charge of over-rigidity. Typically, constitutional settlements are in part procured by compromise, as a result of which our commitment to one or the other moral principle may need to be watered down. Perhaps, we have had to curtail the constitutional protection of socio-economic equality or accept limits on the justiciability of executive action at times of emergency. But the applicability of moral principles cannot be similarly qualified or cast aside. Hence, if there is a tension between the moral principle that MCT designates as the guiding star of constitutional law and a specific constitutional provision, MCT would seem to recommend that the provision be discarded or interpretively neutralised so as to bring the content of constitutional law in that jurisdiction more in line with the precepts of, say, equality or the rule of law. Arguably, though, such 'rewriting' of the law flies in the face of the constitutional settlement.

Let's now turn to the second charge. The compromises that have gone into a constitutional settlement serve important purposes. For example, sometimes they are expressions of a political community's self-determination and, as such, deserve a high degree of respect. Other times they are the price for getting a certain part of society on board in the constitutional project. So, we have strong reasons to remain loyal to the content of the constitutional settlement. In the first case we want constitutional law to give effect to collective self-determination, and in the second we want it not to upset a hard-won and necessary political alignment. By contrast, the charge goes, MCT favours adherence to some sweeping moral principle over loyalty to the constitution, warts and all.

Those who press similar objections need not deny that we can employ moral principles to specify what is morally worthy about this or that constitutional settlement, identify 'the deeper justificatory rationale for the particular constitutional rules that a legal system has

adopted',[12] critique a constitutional settlement's failings or propose its reform. Nonetheless, these normative inquiries are in an important sense 'meta-constitutional'.[13] They kick in at an analytically later stage, only after the often morally defective object of our loyalty or disloyalty has been fixed in a non-moral way, say, by reference to its text or the history of its creation or amendment.

I accept that the charges of over-rigidity and disloyalty point to genuine theoretical and practical concerns: How can moral principles be made to apply more flexibly so as to capture the contingent character of the constitution? And how can MCT be true to the political moment that led to the constitution's creation? But I believe that MCT can accommodate these concerns and thus satisfy the desideratum of settlement. I am not going to delve into how the variants of MCT discussed above try to reconcile the dual character of constitutional law (though I shall have more to say about one of them in section 4). Rather, as already mentioned, I shall pursue a different path. I shall contend that the point of constitutional law is not ideal justice but political legitimacy. Legitimacy can explain why constitutional settlement matters morally such that, provided certain conditions are met, the law should be determined by that settlement, properly understood, and not ideal justice. I shall further claim that a legitimacy-oriented MCT is immune to the charges of over-rigidity and disloyalty.

Before I turn to these claims, I should address a preliminary and more radical criticism. It could be objected that what I propose is not much of a defence of MCT. Surely, the critic goes on, methodology is supposed to be analytically prior to and constrain our substantive theories. But here the order of explanation runs in the opposite direction: I derive my methodology from a substantive claim about constitutional law, the very thing that the correct methodology is supposed to guide us towards. Doesn't this make the argument circular? Presumably, the circularity is avoided, if you accept that accounts of constitutional

[12] P Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 *European Law Journal* 125, 127.
[13] R Kay, `Preconstitutional Rules' (1981) 42 *Ohio State Law Journal* 187.

phenomena should track the common understanding of those phenomena.[14] On this view, we assess the soundness of different substantive accounts by appeal to an independent standard, whether or not they match the beliefs about the phenomena held by the community. That should be 'a matter of fact', which in principle could be gleaned from 'empirical study, through opinion polls and the like'.[15]

However, we do not have to accept the understanding of the relationship between methodology and substance that this criticism assumes and the controversial theory of concepts on which it is based.[16] On the view I propose method and substance are interconnected; constitutional method is designed in light of our higher order premises about the nature of constitutional practice. We then employ it to make more concrete judgments about the content of the practice. This view is not meant to deliver a knock-down argument in favour of a certain constitutional method. Rather, the fittingness of the method is judged holistically, by the ability of the overall theory within which it is housed to give satisfactory answers to the theoretical and practical puzzles we encounter as we explore constitutional practice.

3. Legitimacy vs. justice

A. Legitimacy as assurance

Political legitimacy sets a moral standard for the proper exercise of state coercion, which I said a moment ago is more modest than justice; as common wisdom has it, a state does not need to be fully just to satisfy it.[17] This, however, begs the question: Why should

[14] Nick Barber outlines this view in N Barber, 'The Significance of the Common Understanding in Legal Theory', this volume: 'When we are considering the community's understanding …the claim is false if as a matter of fact – and it is a matter of fact – the account does not square with our common understanding'.
[15] ibid.
[16] For that theory of concepts, as applied to law, see for instance J Raz, 'Two Views on the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 249.
[17] See among others J Rawls, 'Legal Obligation and the Duty of Fair Play' in S Freeman (ed), *Rawls: Collected Papers* (Cambridge (MA), Harvard University Press, 1999) 117, 119, and J Rawls, 'Political Liberalism: A Reply to Habermas' (1995) 92 *Journal of Philosophy* 132, 175-6. In the former article Rawls speaks of the obligation to obey the law on the part of citizens rather than the right of government to coerce, but the distinction is not

constitutional law not be oriented towards the more demanding moral standard? Why is legitimacy good enough? This question becomes more pressing when we consider that for some theorists legitimacy itself has 'an essential connection with justice',[18] inasmuch as we often define what is legitimate by reference to how far we can tolerate divergences from what is just. An essential connection between legitimacy and justice would seem to reinforce the thought that the former is merely a pale shadow of the latter, lacking independent explanatory value.

I am unpersuaded by this line of argument. I side with Philip Pettit and others who claim that 'the concern with legitimacy is distinct from the concern with justice'.[19] Although it is true that legitimacy is intertwined with justice, it is also shaped by moral considerations that are special to it. As a general matter, these considerations have to do with the conditions under which an actual political regime has a moral warrant to bind those subject to it or exercise coercive force over them given its moral imperfection and the existence of pervasive and ineradicable disagreement about moral issues that it must contend with. I cannot explore these considerations in full. Rather, I will focus on a subset that are particularly pertinent to the moral role of constitutional law and explain in what way they differentiate legitimacy from justice. These considerations comprise what I call the assurance dimension of legitimacy, a dimension that standard theories of political legitimacy do not pay much attention to. Typically, standard theories of legitimacy contend that the justice or injustice of a given political society does not exhaust the question of its legitimacy in the sense that it cannot account for the *contingent* character of the moral bond between persons and that political society. They ask: What gives rise to a moral obligation to obey the law of *this particular society?* But, for the main part they take as their object the content of a legal order, as if at a snapshot, and do not especially heed the way it is being developed overtime. Rather, they focus on whether we have consented to being subjected to this legal order,[20] or whether we

important for my purposes. On the relationship between legitimacy and justice, with particular emphasis on Rawls see S Langvatn, 'Legitimate but Unjust; Just but Illegitimate: Rawls on Political Legitimacy' (2016) 42 *Philosophy and Social Criticism* 132.

[18] Rawls, 'Reply to Habermas' 175.

[19] P Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 *Current Legal Problems* 59.

[20] AJ Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739.

receive benefits from this legal order in return for which we owe it our allegiance,[21] or whether the legal order treats us with equal concern and respect.[22] But what gives us confidence that, when we give our consent, we do not sign a suicide pact, that the legal order to which we are bound will continue to provide the benefits or extend the same treatment in the future? Standard accounts of legitimacy have little to say about this, and yet it seems absolutely crucial. Surely, without such confidence it would be perfectly rational to withhold or hedge one's obedience, which, after all, is supposed to be for the long haul. Political societies are dynamic, capable of changing direction, and -unless they are suitably constrained- not necessarily for the better. In order, then, legitimately to exercise power over us, *they must also offer credible and reasonable assurances that their moral profile will not drastically deteriorate*.[23] This is the crux of assurance legitimacy.

The content and rationale of this dimension of legitimacy need some unpacking. Someone might argue that it sounds overly roundabout. Why should we focus on the existence of assurances? Why can't we simply say that what matters for legitimacy is whether our political society has got it right? In each case we would then have to ask: Does this or that state policy improve or worsen the moral profile of a political society?[24] However, that would be to take an overly narrow view of the issue. Legitimacy does not only operate at the retail level of specific political decisions. A system of government typically affords some persons or bodies *general* authority to decide on matters of state policy based on a judgment about the common good. The most characteristic example is the authority vested in the national legislature, but the same can be said about the other branches of government. This general authority is passed from one group of people to the next, each with its own distribution of ideologies, characters and motivations. Trust might attach to this or that office-holder, but it would be irrational for citizens to trust the institution as a whole across time, unless there are

[21] J Rawls, 'Legal Obligation'.
[22] Dworkin, *Law's Empire* ch 6.
[23] On the notion of a society's moral profile see M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288.
[24] Although I cannot spell out the notion of a moral profile here, I would venture the following qualification. Improvements should include cases where a policy is morally sub-optimal from the perspective of ideal justice, but, say, its coordination benefits (the fact that others are prepared to comply with it and widespread compliance is desirable) outweigh its moral defect.

standing and effective constraints on the exercise of its power. Such constraints help to organise government such that it will reliably and systematically act in a justifiable way in the long run.[25] Without them, citizens would be left at the mercy of unscrupulous and corrupt rulers who happen to wield political power.[26] In turn, the possibility that this might happen would make the stakes of their membership in political society prohibitively high. It would thus encourage attitudes that undermine allegiance to a regime, such as free-riding and a desire to ensure victory at all costs in order to stave off the grave peril that might attend defeat.

Given what I have said about assurance legitimacy, it should not come as a surprise that it has a special affinity with constitutional law. Constitutional law in the by and large well-ordered societies that we are familiar with is meant to structure the system of government, setting up its most important branches and their decision-making procedures so as to give effect to principles such as democracy and separation of powers, and building checks and balances mechanisms into these procedures. Moreover, as a general matter, constitutional norms enjoy a degree of fixity and insulation from the rough and tumble of ordinary politics. As a result, they can effectively establish ground rules and place outer limits on how far a political society may go.[27] So both in its content and through its endurance constitutional law is well placed to furnish the assurances that matter for legitimacy.[28] I am not saying, of course, that constitutional guarantees are panacea. Although constitutional law can characteristically enhance assurance legitimacy, it is not the only thing that does. Nor can it always make up for other deficiencies in the political system. As recent history amply confirms, once the other enhancers of assurance legitimacy fail, say, because the party system has been eroded or fallen prey to extremism, the constitution will typically not be able to put up a fight for long.

[25] Kyritsis, *Where Our Protection Lies* ch 1.
[26] Being at someone else's mercy is the condition that republican freedom is famously supposed to guard against. It is an interesting question whether there are connections between republicanism and the account I advocate. See relatedly P Pettit, 'Legitimacy and Justice', above n 16, and T Hickey, 'The Republican Core of the Case for Judicial Review' (2019) 17 ICON 288.
[27] I believe that this is to some extent independent of whether the constitution is written or unwritten, but I cannot argue this point here.
[28] For an extended argument to this effect see D Kyritsis, 'Williams and Rawls in Philadelphia' (2020) Res Publica.

Let me finish with a couple of remarks on the 'drastic deterioration' clause in the definition of assurance legitimacy I gave earlier. First, it would be unreasonable for a citizen to demand that their political society be disabled from *improving* its moral profile, just because that improvement would not be in his narrowly construed self-interest. That would be the case of the slave-owner in the antebellum South conditioning his allegiance to the federal government on the continued existence of slavery and of the constitutional mechanisms that entrenched it. But assurance legitimacy is there only to block undue setbacks to our interests, and the abolition of slavery is strongly mandated by justice. Second, it would also be unreasonable for a citizen to insist on assurances that the moral profile not deteriorate at all. As long as the possibility of suffering a particularly grave or flagrant injustice or being placed at a systemic political disadvantage has been minimised, citizens must be prepared to comply with any sub-optimal decisions falling below this threshold and only try to reverse them using the avenues of political contestation made available by the political system.[29] In fact, the availability of effective and sufficient avenues of contestation is itself an important element of assurance legitimacy.

Jacob Weinrib has argued that legitimacy cannot demand that the political system be reliably and systematically oriented towards justice and at the same time tolerate discounts on justice; if a regime satisfies this demand, then it cannot but be just.[30] But that is too quick. A regime's orientation towards justice can be reliable and systematic, even if on occasion it misfires. When legitimacy requires that we live with these mistakes, it is because we purchase something morally important with our reticence, namely a standing assurance that the risk of suffering a grave injustice at the hands of our government is relatively low. Precisely thanks to the regime's reliable and systematic pursuit of justice, its coming up short now and then need not undermine our overall trust in it.

[29] On this way of cashing out the upshot of legitimacy see Pettit, 'Legitimacy and Justice'.
[30] J Weinrib, 'Rights in Search of Protection' (2020) 40 *OJLS* 403.

To be sure, we do not always have to tolerate the failures of an otherwise reliably justice-oriented system of government. Although legitimacy 'imposes weaker constraints [than justice] on what can be done',[31] neither is it completely indifferent to the content of state policy. To identify which failures are beyond the pale as far as legitimacy is concerned, we must strike a balance between considerations mandating adherence to the outcomes of binding procedures (or considerations of institutional design, as we may call them) and considerations pertaining to the content of the decisions that have resulted from such procedures. Accordingly, constitutional law plays its role as legitimacy enhancer by incorporating this balance in the working of a constitutional order. Systems of constitutional review are an example of how this can be done.[32] We could say that they are morally justified insofar as they effectively and accurately police departures from the range of suboptimal or unjust but still legitimate outcomes (for want of a better term, let's call it the range of *acceptable decisions*). The striking down of primary legislation that falls outside that range could be seen as an institutional method for ensuring that the political system as a whole stays on the right side of legitimacy.

B. Assurance and disagreement

As the example of constitutional review shows, assurance legitimacy will sometimes require legal officials making moral judgments concerning, for instance, how seriously a statute infringes on a fundamental right, because the legitimacy of the primary legislation before them -and hence its having an effect on our rights and duties- partly depends on that very question. Judgments of this kind are notoriously contested, so conditioning the legitimacy of political action in this way introduces a degree of open-endedness in the constitutional order. It is much easier to ascertain whether a bill was supported by the constitutionally mandated majority of parliamentarians for it to become law than it is to agree on what counts as a violation of the right to private life.

[31] Rawls, 'Reply to Habermas' 175.

[32] It is not necessary for present purposes to take sides on whether constitutional review is universally or contingently required by legitimacy or merely permitted by it.

It could be countered that this implication defeats a key purpose of having constitutional processes for deciding contested issues of state policy. We want these processes to overcome our intractable substantive disagreements about, for example, whether homosexual couples have a right to adopt, not necessarily by making some of us change our minds but by reaching a resolution that everyone can accept. In Frank Michelman's words, what we aim to achieve is 'a deflection of divisive questions of substance (does this law or policy merit the respect or rather the contempt of a right-thinking person?) to a different question (is this law or policy constitutional?) for which the answer is to be publicly apparent, or at any rate is to be ascertainable by means that are an order of magnitude less open to divisive dispute than are the deflected substantive disagreements'.[33]

Some theorists claim that only a purely procedural standard of legitimacy can achieve this kind of deflection. For Jeremy Waldron, for example, this standard is satisfied by a majoritarian procedure that gives all citizens an equal vote.[34] Such a procedure need make no reference to the merits of the substantive issue being put to a vote. Rather than ask whether justice requires that homosexual couples have the right to adopt, we ask whether this issue was settled -for now and until we collectively revisit it- in a way that gives everyone's opinion the same weight. By so settling contentious matters a political society arguably displays an attitude of respect towards those who disagree with the enacted policy: It does not tell them that they were wrong but only that they lost in a fair contest. It thereby also deflects our substantive disagreement: Satisfaction of the procedural standard is presumably 'an order of magnitude less open to divisive dispute'.[35] This benefit, so the argument goes, is lost if we opt for the mixed standard of legitimacy proposed here, because that standard seems to refer us back to the substantive question dividing us, albeit as one consideration among many. Moreover, when a court strikes down a law as unconstitutional, it does so

[33] F Michelman, '"Constitution (Written or Unwritten)": Legitimacy and Legality in the Thought of John Rawls' (2018) 31 *Ratio Juris* 379, 384.
[34] J Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999) 113.
[35] The truth of this proposition has been questioned by those who claim that we disagree about what counts as a fair procedure as much as we disagree about the substantive issues that the fair procedures are supposed to settle. See T Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law and Philosophy* 513, 521-522; A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

(partly) on the basis of what it takes to be the correct understanding of the right to private life.

I find this argument unconvincing. Let me mention two reasons. First, since legitimacy dictates that we abide by decisions made by those who have moral authority to govern that fall within the acceptable range, the space of what we can all agree to abide by widens. You will abide by a decision, because you think it is the right one; I will abide by it, because I believe that, though mistaken, it is still acceptable. In this sense there is a significant degree of deflection after all: Prior to the decision, the issue dividing us was 'which is the right decision'. After the decision, the issue becomes whether this here is a acceptable decision that merits our allegiance. The latter issue seems significantly less divisive, precisely because among people who otherwise hold conflicting moral views there is bound to be a greater amount of overlap regarding what is acceptable.

Second, this critique rests on an over-demanding understanding of the deflection strategy. Undoubtedly the assurance function is bound up with a degree of legal certainty. Decision-making procedures subject to overly vague limitations are unlikely to gain citizens' trust in a political regime because of their perceived susceptibility to manipulation. Nonetheless, certainty is not the only thing that matters for assurance, and neither does assurance assign it absolute priority. Our allegiance to decision-making processes depends not only on the clarity of the decisions they produce but also on the extent to which they are the right decisions: our trust in them is likely to be undercut if there is a significant risk that they might lead to gravely unjust outcomes. Hence, it is at least plausible to argue that we should be prepared to accept some open-ended limitations on otherwise binding political processes, when doing so mitigates such a risk.[36] The disagreement that these limitations will inevitably give rise to among citizens and officials and the attendant lack of legal certainty might then be a price worth paying.

[36] Whether this is true may well be a contingent matter, varying from one jurisdiction to another.

This understanding of the deflection strategy goes hand in hand with a certain way of thinking about the place of disagreement in the theory of legitimacy. For proceduralists like Waldron, due to the fact of reasonable disagreement legitimacy must be a matter of pure procedural justice.[37] Legitimate is whichever decision has been arrived at by the correct procedure, because reasonable disagreement bars the invocation of the substantive merits of that decision as its ground. By contrast, on the understanding put forward here, getting it right is an independent standard to which procedures are also subject, whether citizens accept it or not. This does not mean that disagreement is irrelevant to legitimacy. Quite the opposite, as Bernard Williams has suggested, we suffer a loss in a valuable liberty when we are coerced to obey laws that we believe, correctly or mistakenly, to be unjust.[38] Had the law gone our way, we would be free to do something that we are now prohibited from doing. This is a burden that we often find ourselves having to shoulder given that we participate in a political society with others who think differently from us. Of course, we cannot demand that our political society not pass laws to which we object. Even so, there are things a legitimate polity must do to ease these 'strains of commitment'[39] on dissenters short of giving them veto power over individual laws. Consider democratic decision-making. It can enhance political legitimacy in no small part because, all else being equal, it gives those on the losing side an assurance that their political defeat is not entrenched; if trying to reverse it in the future is not pointless, it becomes more palatable to accept it now. It is thus no accident that majority rule is not a peripheral feature of the legitimate polities that we are most familiar with, but their defining procedure.[40] It is one of the key features of constitutional orders marked by persistent conflict and disagreement that can make them hospitable to winners and losers alike.

C. Constitutionalism of fear?

[37] J Rawls, *A Theory of Justice* (Cambridge MA, Belknap Press, 1971) 85.
[38] See B Williams, 'From Freedom to Liberty: The Construction of a Political Value' (2005) 30 *Philosophy and Public Affairs* 3.
[39] Rawls, *Theory of Justice* 153-160.
[40] See H Kelsen, *The Essence and Value of Democracy* (Plymouth, Rowman & Littlefield Publishers, 2013) 69.

So far I have sought to show that, for a state to be legitimate, it must assure those who disagree with state policy that they are purchasing a significant benefit with their continuing obedience, namely that their state's system of government is systematically oriented towards justice, although it may on occasion fail to be fully just. I now wish to consider a serious objection to this claim, which takes a number of different guises. Its nub is that, if taken to furnish the moral point of constitutional law, assurance legitimacy vitiates the moral ambition embodied in the constitution. Either it puts individual self-interest at the explanatory driver's seat rather than the 'better angels of our nature', or it tailors the content of the constitution to what we fear rather than what we aspire to. Thomas Hobbes's theory was likely guilty of both errors. For him persons join and continue to adhere to the social contract out of rational self-interest, and their aim is to avoid the threats to their self-preservation and security present in the state of nature.[41] The limits on state power imposed by the social contract are accordingly minimal.[42] Even a state with deeply unjust law can be effective in securing broad obedience and thus averting the debilitating insecurity associated with the state of nature.

Admittedly, there are some interesting continuities between the Hobbesian account and the one I am defending. Both focus on the importance for legitimacy of the ability of the state to *assure*. In one case the assurance is that others will comply with the laws of nature -thus making it rational to do so oneself.[43] In the other it is that political society will not descend into tyranny -thus lowering the stakes of one's participation in it. The two accounts are also structurally similar. They describe certain salient interests or concerns that persons have and then specify what political society should look like in order adequately to promote those interests or address those concerns.

That being said, the account proposed here does not suffer from the aforementioned defects that sting Hobbes'. First, it does not identify the good of a legitimate political society purely in terms of individual self-interest. As already mentioned, it assumes an independent standard of justice which institutional arrangements must reliably and systematically track

[41] T Hobbes, Leviathan (Oxford, Clarendon Press, 2012) ch 17.
[42] ibid ch 18.
[43] ibid ch 17.

and by which we can define whether something counts as an improvement or deterioration of a society's moral profile. Moreover, it is a standard, which, when state policy excessively deviates from it, strips it of its legitimacy. So, contrary to Hobbes, the account is not morally minimalist. As we shall see below, this difference has important ramifications.

Second, it is not committed to a Hobbesian understanding of human psychology. It is compatible with viewing persons who contemplate whether to pledge their allegiance to a polity as partially -and even overridingly- motivated by considerations of political justice. However, it stresses that there are certain risks that are inherent in or are compounded by one's participation in a political community; legitimacy crucially depends on mitigating those, too. For instance, these are risks stemming from the vast power of the coercive and bureaucratic machinery of the modern state and its susceptibility to being captured and mobilised towards factionalist ends.

It is true that the diagnosis I just offered foregrounds aspects of life in a political society that we have reason to be wary of. As a result some might be tempted to draw parallels between this brand of MCT and Judith Shklar's liberalism of fear.[44] Rather than 'celebrate the blessings of liberty,' Shklar invites us 'to consider the dangers of tyranny and war that threaten it'.[45] The latter inquiry is made especially pressing by the fact that 'some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so'.[46] Against this background, Shklar argues, liberalism should be defined in terms of its opposition to the evil of 'cruelty and the fear it inspires, and the very fear of fear itself'.[47] 'Systematic fear', she explains, 'is the condition that makes freedom impossible'.[48] Its prevention can be the foundation for normative prescriptions, 'a first principle…on which liberalism can be built'.[49]

[44] G S Kavka, 'Right Reason and Natural Law in Hobbes's Ethics' (1983) 66 *The Monist* 120.
[45] J Shklar, 'The Liberalism of Fear' in N Rosenblum (ed), *Liberalism and the Moral Life* (Cambridge MA, Harvard University Press, 1989) 21, 27.
[46] ibid 28.
[47] ibid 29.
[48] Ibid.
[49] ibid 30.

It is important to clarify, though, that my claim is not that fear is the touchstone of *liberalism*. Such a claim, without further qualification, would no doubt be vulnerable to the criticism that it takes an unduly truncated view of liberalism's moral sources and transformative potential. I make the narrower claim that fear of a certain kind is key to understanding the *point of constitutional law*. In fact, Shklar herself is sympathetic to the narrower claim, as she emphasises the importance of traditional constitutional guarantees (eg '[l]imited government and the control of unequally divided political power,'[50] 'a constant division and subdivision of political power'[51]). Furthermore, as I have stressed time and again, this understanding of constitutional law's point makes reference to an independent standard of justice, and although I have not said much about that standard here, nothing I did say excludes the possibility that it may be very capacious or at any rate more capacious than the liberalism of fear. Neither is my account necessarily underpinned by cynicism about politics or pessimism about the realisation of justice. Even those who look to the state to solve serious social problems and be the engine of reform and enlightenment should also see in it a source of threats. Constitutional law provides a means for curbing those. Surely, when it achieves its purpose, it also facilitates the quest for justice.

Despite these clarifications, it might be argued that my proposal is still morally myopic in its preoccupation with fear, in the sense that it is partial to the limited government strand of constitutionalism. It thus loses from sight the other major strand, whereby the point of constitutions is to *constitute a community* and enable collective self-government. Taken at face value, this objection ignores that the principle of collective self-government enters the account at several points. First, it is one of the considerations that can bestow assurance value and moral authority more broadly to a constitution-making process. A constitution whose creation involves popular participation commands respect, precisely because it instantiates a weighty political principle. Furthermore, more people can identify with it, in great part due to the fact that it is more likely to reflect their interests; this increases its stability and efficacy.

[50] ibid 28
[51] Ibid 30.

Second, when collective self-government informs ordinary political processes under the constitution, this can bolster the overall legitimacy of the political order. I have already intimated one reason for this in my discussion of disagreement in the previous section. It is important for the assurance legitimacy of a political society to provide avenues for meaningful and fair contestation of state policy, and democratic processes are well-suited for this purpose, as they give every citizen an opportunity to influence decisions, at least in principle.

You may think that what I have said so far misses the point. Beneficial though these facets of self-government may be, they fail to capture the character of the constitution as an expression of constituent power by a sovereign people. Two responses can be made to this claim. To begin with, there are legitimate constitutions that cannot be said to have been popularly authored or authorised. The account proposed here tries to cast a wider net so as to identify the various ways in which assurance can be procured. More importantly, it is helpful to distinguish to some extent the question of authorship from the question what exercises of constituent power have as their proper aim. Those who create a constitution undertake a special political responsibility; they do not engage in revolutionary gymnastics. Here I try to explain how this responsibility should be discharged (though, as noted in the previous paragraph, authorship also bears on that responsibility).

4. Two Moralised Methodologies for Constitutional Theory

In the previous section I highlighted the strong link between constitutional law and the assurance dimension of legitimacy. But I have yet to explain how this link affects the methodology of constitutional theory. That is the aim of this section. I shall begin by elaborating how an MCT oriented towards the assurance dimension of legitimacy accounts for the desiderata of moral force and settlement. I shall call this type of MCT the *assurance model*. This is the model I favour. I shall then go on to contrast the assurance model to a type of MCT that is guided by a very different understanding of the moral point of constitutional law. I shall call it the *epistemic model.* The epistemic model is exemplified in the work of TRS

Allan and others and offers an alternative vision of the relationship between the content of constitutional law and institutional history. I hope that the contrast will help clarify the assurance model's distinctive methodology as well as the way in which it seeks to reconcile the two desiderata.

A. Constitutions as the moral footprints of settlement

Recall that the desideratum of settlement seeks to capture the fact that the content of constitutional law is shaped by political acts and decisions such as those made by a constitutional assembly. Earlier we said that this feature of the constitution is commonly thought to be at odds with MCT: MCT allows the content of the constitution to be determined by normative standards that are not validated or invalidated by what happens; by contrast, the settlement aspect of constitutions means that they are sensitive precisely to what happens, that is, a political society's institutional history.

In the assurance model, I shall now argue, this tension is resolved. According to it, some aspects of institutional history in more or less legitimate political societies enjoy a special moral authority. What bestows them this authority is in large part the fact that they furnish the kind of assurance that bolsters legitimacy. This, as we have seen, they achieve under two main conditions, both of which have an essential moral component. First, they themselves embody political moments or processes whose outcomes are morally salient. Second, they structure the system of government such that it reliably and systematically acts in a morally justifiable way.

On this model MCT has a complex role to play in the determination of constitutional law rights and duties. For ease of exposition I shall distinguish two levels at which it will operate.

i.

At the most abstract level MCT will spell out the general conditions under which institutional history may acquire constitutional significance. What credentials must political moments,

processes, or practices (henceforth I shall refer to them collectively as *events*) possess in order to have the moral warrant to create or update a constitution?[52] What must a system of government look like in order to be reliably justice-oriented? MCT will provide answers to these questions. It will also develop a theory of how these two types of consideration combine to vest constitutional significance in an event. It will be the aim of such a theory to specify possible trade-offs between them, for example, what discounts on good government can be made up for by an event that carries high moral authority, say, a constitutional assembly.

But the most fundamental question that MCT will have to answer at this first level is why the decisions of a constitutional assembly or any other event should have any constitutional significance at all. Assurance legitimacy is key here. There are many possible systems of government -including the most just- that could be suitable for a political society, but assurance legitimacy can only be satisfied by one that is by and large adhered to. A system of government that is not efficacious in this sense does not provide the requisite assurance, because it cannot as a matter of fact organise and constrain public power. (This is definitely something Hobbes has taught us.) Still, efficacy is not sufficient for assurance legitimacy. Some political regimes, though efficacious, are not rightful. What is missing is that they are not supported by the two types of consideration sketched above. This is how the assurance model of MCT seeks to capture the moral essence of constitutional settlement. It is not the mere fact that there has been a settlement that creates constitutional law (conquests can settle, too), but the fact that a particular settlement justifiably speaks for and governs a political society.[53] Hence, it is no accident that constitutional assemblies typically have constitutional significance. Given their democratic pedigree they can rightfully claim to represent a political society's self-commitment and are capable of commanding broad public support.

[52] It might seem more difficult to speak of credentials in the case of a political society with an unwritten constitution. But an unwritten constitution also has sources, so the nature of the inquiry remains unchanged. For each source, say, ordinary statute or conventional practice among institutional actors, we must ask to what extent they enhance assurance legitimacy and can thus rightfully contribute to the content of the constitution.
[53] I am simplifying here. I do not wish to exclude the possibility that a settlement might start off with tainted credentials but overtime acquire the requisite salience to provide the framework for a legitimate polity.

ii.

MCT is not simply an exercise in political philosophy, however. Its ambition, ultimately, is to determine the content of constitutional law.[54] So, at a second level MCT seeks to interpret the constitutionally significant events in a particular jurisdiction and thereby specify the bulk of existing constitutional norms at any given time in that jurisdiction. Constitutionally significant events come in various shapes. Characteristically they culminate in a canonical text, but sometimes they do not. In the latter case a more fine-grained analysis is called for to read determinate constitutional norms off the event.[55] It is important to stress, however, that in either case we do not primarily aim at discovering the meaning of a text or the content of a practice or agreement but determining (some aspects of) its moral footprint. That is, we do not merely describe what individuals and groups believe or intend or accept or can effectively impose on others. Rather, we explicate what follows from all these things in terms of what the state may legitimately do. To do this, MCT will consult the moral credentials of political actors, the principles of good government and the trade-offs between these two considerations, as these have been elaborated at the previous level. It will ask whether those considerations, suitably combined, count in favour of such and such a decision or agreement shaping the constitutional law of our political society. It will also ask what moral footprint the decision or agreement is warranted to have in light of those considerations. Importantly, that footprint need not coincide fully with what those who authored the decision or agreement had in mind. Recall, what we are looking for is how such an event matters for legitimacy. The moral considerations that underpin judgments of legitimacy will select what is, is not and cannot be relevant for this purpose.

Thus understood, MCT has a vindicatory upshot. It gives us strong (though not necessarily overriding) moral reason to be bound by our political society's decisions and agreements. To be sure, not all of them will come out as binding. And those who do will not necessarily have

[54] In earlier work I have used the term 'doctrinal relevance' to signal this ambition. See Kyritsis, *Where Our Protection Lies* 7

[55] This is especially true of legal orders without a formal constitution, some of whose constitutional norms are grounded in conventional practices and are not codified. But it may also be true of orders that have a formal constitution, especially in cases where the formal amendment procedure laid down in the constitutional text is not the only avenue for changing constitutional norms. On this possibility see B Ackerman, *We The People Volume 1: Foundations* (Cambridge MA, Belknap Press, 1993) ch 10.

the sheen of perfect justice. But they command respect as elements of a successful though imperfect effort to set up a legitimate polity. I suggest that this way of thinking about MCT reconciles the desiderata of moral force and settlement, but at the same time it tempers our moral aspirations from constitutional law. It tells against reading into constitutional law the complete set of rights and duties that we would have under the best theory of justice. For, it views a legitimate polity as a political achievement that we share with others who might be unconvinced by such a theory. Constitutional law should track the decisions and agreements that record and sustain this achievement, even though on occasion they sacrificed perfect justice (within limits) for the sake of securing broad support of a constitutional order that works reasonably well for everyone.

You might think that there is an inconsistency between, on the one hand, honouring a political settlement, as I said the assurance model aims to do, and, on the other, allowing for the possibility that constitutional norms might diverge from, say, the intentions and beliefs of a constitution's authors. Surely, the argument goes, constitutional law must hew closely to them, because they are the ones that embody the settlement. This line of reasoning lies at the heart of originalist theories of constitutional interpretation. Their stated aim is to retrieve the meaning that constitutional provisions had for those who drafted them, because 'original meaning', as they call it, is thought to encapsulate the political agreement that the enactment of the constitution represents. Originalists contend that the original meaning may not fully live up to the dictates of political morality, but this does not make it any less binding. If, as the assurance model insists, we have good moral reason to uphold that momentous political agreement -at least until such time as we collectively revisit it-, we should not sanction modes of constitutional interpretation allowing an institutional actor -typically, in the originalist story, the judiciary- to rewrite it unilaterally. To do otherwise would arguably be to expose citizens to an unanticipated change in the system of government, precisely the type of change that assurance legitimacy condemns. A similar thought also drives some textualist theories of constitutional interpretation. Here, the text of the constitution takes the place of the authors' beliefs and intentions as the focal point of political settlement.

It goes beyond the scope of this chapter fully to evaluate this kind of claim. It seems to me that the truth of originalism or textualism is a substantive matter, unlikely to be settled at the level of methodology. All I want to do now is show why the opponents of originalism and textualism cannot be dismissed at that level either. To begin with, we cannot take it as a given that only considerations of text and intention can truly capture the content of a settlement. Ronald Dworkin, for one, has argued that fundamental rights guarantees of the sort contained in the US Constitution stand for a choice on the part of the constitution's authors to enshrine into law moral principles such as equality and freedom of speech.[56] If he is right, then appealing to those principles in constitutional reasoning is not an affront to the constitutional settlement but an affirmation of it. One may well disagree with Dworkin, but his position is not beyond the pale, conceptually speaking.

It would equally be too quick to say that incorporating morality into constitutional reasoning fails as an assurance. As was suggested above, a system that allows some institutional actors to resort to moral principles may in fact contribute to the system's overall assurance legitimacy despite the loss in legal certainty. It may be for instance that giving them this power introduces an element of checks and balances or enables the system to adapt to changing circumstances and improved moral insight. Again, this proposal will have to be judged on the merits, but it seems to me at least plausible. Many defences of constitutional review, for example, rest on it.

B. Assurance vs moral construction

I said above that on the assurance model MCT's task is to navigate our constitutional practices and figure out what difference, if any, they make for legitimacy. I also said that they can make a relevant moral difference by structuring government in a way that reasonably addresses citizens' concerns regarding their submission to the coercive power of the state. By contrast, on the epistemic model of theorists like TRS Allan the aim of constitutional theory is the 'moral construction of legal practice' with a view to spelling out principles of egalitarian justice that

[56] R Dworkin, *Freedom's Law: The Moral Reading of the US Constitution* (Oxford, Oxford University Press, 1999) 7.

will govern the resolution of cases before us as well as future cases.[57] Allan's model, too, recommends that we pay attention to what our constitutional order has decided in the past. He contends that moral construction '[seeks] harmony between moral principle, on the one hand, and practical manifestation of principle on the other'.[58] In order to achieve this kind of harmony, constitutional theory gives 'presumptive if provisional force to the assumptions embedded, on careful analysis'[59] within the practice. But here, unlike the assurance model, the reason for this backward-looking exercise is epistemic. For Allan 'the law is normally our best guide to decision and action'[60], 'because such practice is itself the principal forum for working out what justice requires in the context of current social conditions moral construction'.[61] Hence, legal practice becomes a key repository of a political community's 'collaborative quest for justice'.[62] Our previous efforts to identify and apply principles of egalitarian justice constitute 'a source of enlightenment from which we can seek moral guidance'.[63] We can learn from the moral distinctions officials drew in the past and reflect on the way they articulated the meaning of key moral concepts. Furthermore, by invoking our previous efforts at identifying the demands of justice we appeal to a tradition that we share with our fellow-citizens and that can therefore constitute a basis for our common political life.

However, the force of the past on this model is only presumptive. Given that the aim of our engagement with the past is epistemic, it does not make sense to assign any weight to legal practice, when we are confident that it contains a moral mistake. Doing so would take us further away from justice, not closer to it.[64] Accordingly, we are not disrespectful to the past when we disregard elements within it which we know are moral mistakes. Quite the opposite,

[57] Or, as Alan Brudner has put it, with whose theory Allan's moral construction shares important similarities: 'the aim of constitutional theory is to gain the public standpoint from which to sift from the constitutional jurisprudence of liberal-democratic courts principles of political justice for a liberal democracy'. See A Brudner, *Constitutional Goods* (Oxford, Oxford University Press, 2007) 12.
[58] Allan, 'Practice, Principle, Precedent' 270.
[59] ibid 271.
[60] ibid 279
[61] ibid.
[62] ibid.
[63] ibid.
[64] For this reason Allan criticises Dworkin's willingness to allow that morally sub-optimal decisions can sometimes shape the best interpretation of the law. See ibid 290ff.

only in this way do we truly vindicate the past, because we genuinely carry on the collective endeavour for justice that it embodies. In Allan's words:

> Our conscientious resistance to official demands we reject is only adherence to law as, in our best judgment, we discern its requirements. Purportedly wicked measures, adopted in breach of fundamental principle, are aberrations, calling for interpretative ingenuity and, if necessary, repudiation. But that repudiation is only an appeal to the requirements of practice, consistently followed. We are rejecting *misconstructions* of the law –departures from practice, correctly conceived – rather than genuine assertions of official authority.[65]

For Allan, then, constitutional theory seeks to arrive at true principles of political justice by purifying the contingent, understood as a political community's institutional and deliberative practice where these principles are latent, 'known, forgotten, half recalled'. Its ambition is to attain a 'perfection of the real',[66] and then apply the principles distilled in this process of perfection to determine the correct resolution of future cases. For this reason, it seems particularly vulnerable to the charge that it sacrifices the settlement aspect of constitutions for the sake of elevating their moral force.

The assurance model has the opposite aim: according to it, constitutional theory seeks to identify the moral force in the contingent, understood now as the enterprise of governing a diverse and populous society by means of law such that it can gain people's trust and justifiably command their allegiance, never veering far from the demands of justice but having the moral warrant to enforce even some of its mistakes. Thus, the assurance model furnishes the resources to temper the alleged over-rigidity of principles of justice. Sometimes, it says, we should not give one principle its full effect, but only in the name of other moral principles, those pertaining specifically to legitimacy, as I have described it.[67]

---

[65] ibid 274.

[66] Brudner, *Constitutional Goods* 1.

[67] On my account the moral force of practice is not typically presumptive. Either an institutional decision produces the assurance that legitimacy demands, or it doesn't. It makes little sense -except, sometimes, on pragmatic grounds- to adopt a defeasible presumption that it has the requisite moral effect.

A second contrast has to do with the way the two models conceive of the bond between participants in constitutional practice. For theorists like Allan the bond is constituted by 'mutual adherence to a shared tradition'.[68] Moreover, in part by virtue of this bond participants in constitutional practice have the moral obligation that they do to comply with the norms of the practice. Insofar as we interpret in good faith from the same stock of constitutional precedents we can rightly demand the cooperation of our fellow-participants despite the existence of 'sustained and vigorous moral disagreement'.[69] Presumably, that demand would be out of place unless we shared the same practice.

On the assurance model participation in the same interpretive practice does not suffice to sustain the allegiance of those who disagree with official -and coercively enforced- interpretations. We are more than fellow-travellers in a theoretical exploration, even one with the practically urgent goal of determining the meaning of justice. We constitute a political community in whose name dissenters may be coerced. State coercion raises the stakes. To demand our fellow-citizens' compliance with the law, we cannot simply appeal to their moral conscience. We must also offer them guarantees that, even when they are on the losing side, they will be adequately shielded from abuses of state power. These guarantees strengthen their bond to their political community. Conversely, without them the political community's legitimacy is seriously undercut.

5. Conclusion

If it is true that morality is necessarily a determinant of the content of constitutional law, as MCT contends, this has immense methodological significance. It affects how we go about reasoning through doctrinal issues and justifying our conclusions. But just as consequential is the answer MCT gives to the question *which part of morality* determines the content of

[68] Allan, 'Principle, Practice, Precedent' 272
[69] ibid 273.

constitutional law. In this chapter I have argued that MCT should be oriented towards political legitimacy, because the purpose of constitutional law is to bolster legitimacy by furnishing assurances that government will reliably and systematically act in a morally justifiable way. I have also argued that, when constitutional law is understood in this way, it makes sense to say that it stands for a morally binding settlement. Constitutional settlements are morally binding insofar as they advance constitutional law's moral purpose, the enhancement of legitimacy. But this does not mean that our constitutional past holds absolute sway over the present. Although it prizes settlement, this brand of MCT assigns judges and other officials of today an active role. According to it, the past's authority is mediated by the various moral considerations that pertain to political legitimacy, and it will often be the responsibility of those officials to weigh up such considerations in resolving constitutional disputes here and now.