LEGITIMACY AND THE MISGUIDED QUEST FOR A REPRESENTATIVE CONSTITUTIONAL COURT

Dimitrios Kyritsis, Essex Law School, Colchester, UK*

d.kyritsis@essex.ac.uk

Abstract

This chapter casts doubt on the view, put forward in recent years by Robert Alexy among others, that the legitimacy of constitutional review rests (at least in part) on the fact that constitutional courts are representative institutions. It mounts a three-pronged challenge against Alexy's account. First, it proposes the following litmus test for accounts, such as Alexy's, which portray courts as representatives: they must offer a convincing explanation of the distinctive contribution that the courts' putative representative character makes to political legitimacy such that it justifies that they be given the power of constitutional review. Second, it criticizes Alexy's claim that courts are argumentative representatives in the sense that they represent (many) citizens *qua* rational agents through the way they reason their decisions. However, if the standard of reasoning that judicial decisions must meet is demanding, akin to correctness, then it is not representation that does the moral heavy lifting. And if it is understood as mere plausibility, then it is unclear why we would be bound by a decision solely because it satisfies it. Second, the chapter seeks to undercut the motivation for Alexy's account by arguing against the proposition -which he seems to presuppose- that the legitimacy of a democratic regime depends on its being willed (in the appropriate sense) by the people. In its place the chapter offers a different understanding of legitimacy, informed by the ideal of separation of powers, that provides that government ought to be shaped by different moral forces -not all of which refer back to the people's will. On this understanding, it is morally appropriate, all else being equal, for power to be assigned to a multiplicity of institutions, some representative, some not representative. The upshot of this understanding is that proponents of constitutional review do not have to defend it by fitting it into the representation straitjacket.

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1. Introduction

Your country's highest court (or its constitutional court, if it has one) has just decided that the national constitution does not guarantee a right to abortion that would conflict with (and override) any primary legislation excessively hindering or even banning this procedure.[1] You disagree vehemently with that decision. Are you nonetheless morally bound by it and on what grounds? For some theorists a big (though by no means the only) part of the answer to this question makes reference to the constitutional court's putative representative credentials. Arguably, to the extent that it is a representative institution, its decisions are in a morally relevant sense *ours* and hence *pro tanto* binding. This view -let's call it the representative-constitutional-court view (RCC)- contrasts sharply to what is probably the dominant justification of constitutional review, according to which constitutional courts are supposed to act as guardians of constitutional norms against an encroaching representative legislature.

In this chapter I want to take issue with RCC. I shall use as my foil the well-known version of it put forward by Robert Alexy, but my interest goes beyond Alexy. I want to offer a general strategy for thinking through the use of political representation in matters of constitutional design, which has at its heart the concept of political legitimacy. My assessment of RCC employs this strategy. Accordingly, I shall make three closely interconnected claims, one methodological and two substantive, all of which develop the theme of political legitimacy. On the methodological front, I shall suggest that the litmus test for evaluating RCC is whether the representative character it attributes to courts makes a distinctive contribution to the political legitimacy of the respective regime. Applying this method, I shall then advance my first substantive challenge against Alexy. I shall argue that Alexy fails to show that the putative representativeness that he attributes to courts makes judicial decisions *our* decisions. It is a

[1] *Dobbs v. Jackson Women's Health Organization,* No. 19-1392, 597 U.S. ___ (2022)

stretch to contend, as he does, that such an identification comes about as a result of a constitutional court representing citizens as rational agents.

I recognize, however, that this part of the argument is not without its difficulties. The main one arises from the fact that the concept of representation is very broad and at times ambiguous and seems to leave room for a broad range of different conceptions, including, arguably, those that are congenial to RCC. With this caveat, the second prong of my challenge comes into play. I claim that RCC is insufficiently motivated. Legitimacy is key to this part of the challenge, too. I argue that the extension of the concept of representation it proposes is driven by the wrong understanding of political legitimacy, which says, roughly, that all power must be made, directly or indirectly, by the people. I canvass a different understanding, whereby legitimacy requires that government ought to be shaped by different moral forces -not all of which have their source in the people's will. On this understanding, it is morally appropriate, all else being equal, for power to be assigned to a multiplicity of institutions, some representative, some not representative. The upshot of this understanding is that proponents of constitutional review do not have to defend it by fitting it into the representation straitjacket.

2. Legitimacy, the yardstick of constitutional theory

Before I proceed with the substantive claims of the paper, in this section I wish to explain the methodology I shall employ. So how ought we to evaluate RCC (and indeed any account of political representation)? One option would be to try to show that the conception of representation underpinning RCC is not faithful to the understanding of the concept that has been handed down to us from the history of theorizing and practicing representation. Call it what you want, says this critique, but don't call it representation, because we mean something

different by 'representation' around here.[2]

This is not only a matter of the correct use of language. The critique has a moral edge as well. Modern political discourse assigns the relationship between the representative and the people a key role for political legitimacy. Hence, if the critique is sound, then a defence of constitutional adjudication cannot rely on any positive moral connotations of seeing judges as representatives of the people; constitutional adjudication will have to stand on different moral ground. But note the order of explanation. It is a historical fact (which understanding of the concept is being or has been practiced around here), not a moral fact, that picks out the correct meaning of political representation. It just so happens that the historical fact has important moral implications. So, morality comes in at a logically subsequent stage.

Although I have some sympathy for this line of argument, I am not going to pursue it in this chapter. Clearing the ambiguities of the concept of representation and tidying up its nuances, tensions, and wrinkles is a risky undertaking. To begin with, the history of the concept is itself untidy and complex. Both the abstract ideal and the historical manifestations of representation have been the focal point of -politically charged- contests and struggles among competing understandings of what it means and requires. Relatedly, it is not clear what theoretical standard governs this exegetical undertaking. On the one hand, we are not seeking historical accuracy, otherwise we would have to rest content to report all the inconsistencies and conflicts in the discourse and practice of representation, but, on the other, we lack the vantage point from which we can dismiss some of the inconsistent and conflicting uses of the concept as mistakes.

[2] Notable examples of this approach are Manin 1997 and Urbinati 2008.

That vantage point, I propose, is political morality. Our aim should be to work out a conception of representation that is appealing in light of some broader moral principle such as political equality, democracy and the like. In previous work I have claimed that the particular prism through which we must assess theories about the proper constitutional allocation of power is political legitimacy (Kyritsis 2022; see also Hickey 2022): We must make a case for a certain allocation on the basis that it enhances the legitimacy of the relevant political order. That case will typically proceed from the characteristics of a political institution (e.g. its composition, decision-making process) and then seek to establish what I have elsewhere called a 'purposive interrelation' (Kyritsis 2017, 42-4) between those characteristics and the government task in question. In other words, it will show that, in light of the institution's characteristics, legitimacy recommends that it be assigned the task. Legitimacy is understood here as a moral, not sociological, concept. It is a moral warrant by virtue of which the decisions of a political regime are binding on those who live under it.[3] Needless to say, it is also a controversial concept, so there is little beyond this abstract formulation that everybody is likely to agree on. Even so, it gives our inquiry a certain shape. We are not engaged in ideal theory, looking for the most just institutional arrangement. Rather, taking into account the challenges and imperfections of actual political regimes we seek to determine how they can nonetheless earn such a moral warrant (if they can).

This is the methodology that I suggest we apply in assessing RCC. To be successful, it must do a good job of articulating the link between representation and legitimacy. It must offer a convincing account of the distinctive contribution that the courts' putative representative character makes to political legitimacy such that it justifies that they be given the power of

[3] In the philosophical literature on legitimacy a distinction is commonly drawn between the legitimacy of a regime, its ability to bind those subject to it, and its authority, its moral title to govern in a certain territory, whether or not those subject to it have an obligation to obey it. There are important continuities between the two concepts, but representativeness, which is our topic here, pertains more to legitimacy.

constitutional review. Put simply, it must show that this power is legitimate (at least in part) *by virtue of the courts' representative character*. This is a test that, as we shall see, RCC fails.

Note the difference with the aforementioned hermeneutic methodology. On my preferred approach, political morality enters stage from the get-go. It explicates how representation should be construed, at least in broad terms, and why and how it matters. Accordingly, past and present practices of representation become the targets of our legitimacy-inflected moral evaluation rather than fixed points that candidate conceptions must respect. Actual practices of representation are also instructive targets of moral evaluation, as they show, in their complexity and historical unfolding, how abstract moral principles can be realized and combined in institutional forms.[4] Furthermore, based on the moral evaluations that this approach recommends, we can make the sort of relative judgment that I argued above the hermeneutic approach would be hard pressed to make. We can side with one understanding of a constitutional concept as against others because it offers a better moral account of the way representation contributes to legitimacy.

It could be objected against the approach adopted here that, despite its emphasis on legitimacy rather than ideal justice, it still does not capture the correct relationship between moral principles and constitutional practice. In fact, so the objection goes, we are not trying to identify a conception of representation that matches an external moral standard, whether that be legitimacy or justice, but simply one that can make *some* moral sense of existing

[4] Institutional and political practice also plays a separate and much more critical role in my account. It helps us identify the institution of which we will ask what powers it should possess. Accordingly, it supplies the main parameters for our exercise in purposive interrelation. Thus, when I speak of courts, I have in mind the institution that is typically organized so as to give impartial judgment on specific disputes in accordance with pre-existing law. I readily acknowledge that some institutions that we call courts have characteristics that make them depart from that simple picture. To the extent that they do, my claim may apply less to them. Likewise, my claim leaves open that we may want to reform this kind of institution so as to beef up its representative character. Such a reform may be in tension with other roles that courts are typically assigned, but I shall not pursue this line of reasoning further.

constitutional practice. On this understanding, a successful conception aims at vindicating the practice in the sense that it identifies an even sub-optimal value that can truly be served by the practice, as we find it. Alexy (2005, 428) can be said to have such a limited ambition.[5] His starting point is the following provision of article 20 (1) (1) Basic Law of the Federal Republic of Germany: ‘‘all state authority proceeds from the people,’[6] Arguably, an account of representation that shows courts to be representative institutions has a better fit with practice insofar as it upholds the requirement of art. 20 (1) (1), as it applies to judicial authority. It is thus pro tanto superior (at least as an account of judicial authority under the German constitution and others similar to it) over accounts that are further removed from practice, even if the latter have an advantage at the level of moral theory.

As a general matter, this style of argument is plausible. However, we should be wary of relying too heavily on the typically very abstract and succinct constitutional text. You can interpret the provision of the German Basic Law mentioned above in a number of possible ways. Even interpretations that refrain from postulating that courts are representative institutions can fit it. For example, it may be suggested that all art. 20 (1) (1) requires is that state authority be exercised *in the name of the people* conceived of as a community of free and equal persons rather than in the name of, say, an absolute monarch. If judicial authority satisfies this criterion, it need not additionally be construed as representative in a thicker sense. Regardless of the merits of my suggestion, the provision under consideration cannot be taken in isolation. It must be seen in relation to other salient elements of the practice. If, as I will argue below, the picture of representation Alexy paints is defective, this may give us reason to go back to the practice and find alternative ways of combining and accounting for its elements.

[5] Möller (2012) calls this method ‘moral reconstruction’. It should be noted, however, that for both Alexy and Möller the value we ascribe to the practice must be genuine, not doctored.
[6] There are similar provisions in many other constitutions.

3. Representation, only not responsive

At its most basic, the representation relationship involves someone acting or speaking on behalf of someone else with warrant. Typically, the relationship is structured such that the representative will reliably reflect the interests and opinions of the person being represented. In turn, this is commonly understood to require an effective causal mechanism between the representative and the represented such as, for example, periodic elections ensuring that the representative *heeds* the interests and opinions of the represented. However, arguably there is more than this *responsive* type of representation. Recently Philip Pettit (2010, 428) has proposed a different type of representation which he calls *indicative*. Whereas responsive representation works by constraining the role of the representative so that she gives effect to or heeds in a suitable sense the interests and opinions (including opinions about their own interests) of those being represented, indicative representation works by assigning a representative function to a person or body whose views systematically mirror the views of those being represented. He writes that on the responsive model 'the preferences, attitudes, opinions, etc, of representees 'are the causal source of the attitudes displayed by the representer' (ibid). By contrast, on the indicative model, 'the attitudes displayed by the representer are non-causal signs of the attitudes held by the representee' (ibid).

Pettit mentions courts as one institution that could represent in this indicative manner but does not elaborate how they ought to be organized so as to achieve that. He discusses at length citizen's assemblies, which he thinks are meant to provide a cross-section of societal views by virtue of the fact that participants are chosen randomly from the general population. The thought is that, if they are organized properly, then the fact that the citizens' assembly makes a decision is indicative of the decision that would have been taken by the citizenry at

large without the need for participants in the assembly having to heed the views of anyone else.

Can something similar be said about constitutional courts? Obviously, constitutional judges are not expected, at least officially, to take into account citizens' interests and opinions.[7] Consequently, the responsive model seems ill-suited to motivate RCC. On the other hand, random selection does not determine who will be a constitutional judge, so there is no straightforward analogy with citizens' assemblies; we need a different explanation of how courts can act as indicative representatives. Such an explanation has indeed been offered by other authors.[8] Thus, Chris Eisgruber (2007) writes that the fact that US Supreme Court Justices are nominated by the President and confirmed by the Senate means that their decisions are not radically at odds with views widely held in US society. I am not going to evaluate this proposal because most constitutional systems do not follow this highly politicised mode of appointment, and also because this is not the only or the most significant consideration that Eisgruber marshals to justify constitutional review. Instead, I am going to focus on the account put forward by Robert Alexy. Alexy concedes that courts are not responsive representatives. However, he argues they can still be said to represent the people, albeit in a distinctive, *argumentative*, way. When their decisions are based on 'correct or sound' reasons, they appeal to the rational capacities of citizens. And if we assume that in a well-ordered constitutional system 'a sufficient number of members of the community are able and willing to exercise their rational capacities' (Alexy 2005, 580), that is, 'accept an argument on the ground that it is correct or sound' (ibid), then we can say that judges are indeed representatives. They are argumentative representatives. In fact, says Alexy, it is appropriate that the argumentative representation provided by courts should take precedence over the representation afforded by

[7] See contra Dixon 2023.
[8] The authors I examine below do not refer to the distinction between responsive and indicative representation - indeed their defence of RCC predates Pettit's article. I use the distinction because it helpfully frames what is taken by these authors to be distinctive of judicial representation.

democratically elected institutions. Starting from the premise that '[d]iscursive constitutionalism, as a whole, is an enterprise of institutionalizing reason and correctness' (ibid, 581), it would follow quite naturally that its goals are best advanced by a system that puts sound arguments ahead of responsiveness to the electorate.

Notice the difference between this account and Eisgruber's. Eisgruber claims that the US Supreme Court is representative, because by design the Justices have moral views that many people in American society hold. So, if I am conservative, I can be confident that there is someone fighting my corner on the bench. And likewise if I am liberal. Of course, it so happens that nowadays the conservatives are in the majority, so the decisions of the institution as a whole will more likely reflect conservative views. But arguably that is no different from a democratically elected legislature. I can still think that the legislature is a representative institution, even though the legislators that share my views are in the minority. By contrast, for Alexy what matters is the quality of the argumentation as opposed to the moral views of this or that judge or a majority of judges.

What would Alexy make of the example with which we started? Recall that we are looking for an explanation of our constitutional court's abortion decision which will show that its moral bindingness depends on whether judges have acted as argumentative representatives of the people. Recall also that for Alexy argumentative representatives speak for rational persons, those willing and able to exercise their rational capacities. What is the standard that courts' reasoning must meet in order for them to count as genuine representatives? At times Alexy seems to adopt a particularly strong understanding. As already mentioned, he writes that rational persons are those that accept an argument on the grounds that it is correct or sound. Presumably, they also do not accept an argument that is incorrect or unsound. Let's assume

that the arguments advanced by the court are not correct or sound. On the strong understanding, it would seem to follow that the abortion decision is not even an instance of genuine argumentative representation. The problem with this move is that it yields an overly strict criterion of representativeness. For one thing, many people would treat that decision as binding because they happen to believe that the court has got it right. Are we then to say that actually the decision does not even represent *them* because it is not correct? More generally, people who are otherwise willing and able to exercise their rational capacities will sometimes make mistakes in their reasoning. Does the court only represent them when they (and the court) have got it right, whereas it does not represent them when it has got it right but they have erred?

Alexy himself seems to back away from this move. Elsewhere he writes that it is sufficient that representative judicial decisions are 'backed by arguments that are recognized as good *or, at least, plausible*, by all those who accept the constitution' (Alexy 2005, 580, emphasis added). This qualification appears to invoke a weaker understanding of the standard to which argumentative representatives are to be held. It thus arguably avoids the problems already mentioned. It also chimes with the commonsensical thought that an argument can be rational though not fully correct. However, it would be beset with difficulties of its own. To examine these, it is necessary to get clearer on the meaning of 'at least plausible' arguments. How can an argument retain that status while still falling short of correctness?

One might be tempted to say that all it takes is that the argument conform with rules of formal rationality. When assessing the merit of government measures interfering with human rights, these rules are furnished, according to Alexy, by the laws of balancing. Alexy (2017, 20-22) distinguishes this formal dimension of rationality from the substantive dimension which comprises true moral principles. So, perhaps an argument is plausible provided it has applied

the laws of balancing, even if it has assigned, say, free speech an incorrect moral weight relative to personal reputation.

This suggestion must be rejected. A purely formal notion of rationality which would remain completely agnostic about true moral principles would be, in Alexy's words, 'empty' (Alexy 2017, 21).[9] Instead, our account of 'at least plausible' arguments must 'intrinsically [connect] the formal and the substantive dimension' (ibid) of rationality, such that even erroneous arguments must make a genuine attempt to get the substantive principles right in order to count as plausible. It is not clear how this can be done. Regardless, it is doubtful that plausibility furnishes an adequate criterion for representativeness. Let's suppose that the constitutional court's abortion decision passes the threshold of plausibility. It does not go without saying that you should regard it as yours, as representing you, just because it is plausible, despite being in your eyes horribly wrong. Furthermore, what if you simply refuse to be bound by the decision precisely because you do not think that it is correct or sound? Surely, it is a mistake to say that you are thereby not even a rational person.[10]

What has gone wrong? We have seen that, if the standard to which we hold the reasoning of courts is understood very weakly, as plausibility, then argumentative representation produces an anaemic constitutional result. We are not particularly moved by a decision, just because it is plausible. Conversely, if we beef up the standard and equate it with moral correctness, then, although this has obvious and significant constitutional purchase, what is doing the work is moral correctness, not representativeness. And that is not what we are after.

[9] I have argued against a similarly weak notion of reasonableness in public law based on the notion of 'rational requirements' (Broome 1999) in Kyritsis 2017, 169.

[10] Note that I do not mean to suggest that plausibility or something like it has no role to play in constitutional law. Neither am I claiming that it would be morally permissible for you to take yourself as not bound by a suitably plausible decision whenever it is incorrect or unsound. I am making the narrower claim that it is unconvincing to portray a plausible decision as *for that reason* representative.

We are not simply debating whether it matters morally that constitutional decisions are backed by correct or sound arguments. Of course it does. Alexy, though, is trying to show something more specific, namely that such arguments promote -are a vehicle of- representativeness. It is this proposition that is problematic. If my argument until now is sound, political representation cannot be understood simply to vindicate our rationality. In fact, my argument suggests a stronger conclusion, namely that political representation is meant to encompass much more of us as persons, our interests, our opinions, and our desires. However, these are all aspects of our personhood that argumentative representation brushes aside.

But maybe the stronger conclusion is premature. It could be objected that one cannot infer from argumentative representation's demise that representation should always strive to 'make present' citizens with their interests, opinions, and desires in the way just suggested. There may be value, so the argument goes, in having a more austere type of representation as well, which seeks to capture what citizens have in common rather than what pulls them apart.[11] If so, then the institutional forum that instantiates this type of representation should be one that gives expression to those moral demands, say, of freedom and equality that can be thought of as constitutional essentials of a legitimate political society. And it would not be implausible to think of the constitutional court doing just that when it interprets and enforces the constitution. On this view, Alexy is onto something that is morally significant. Where he goes astray is in thinking that what the constitutional court represents is the commonality of rational persons. What it does represent is citizens as free and equal.

[11] See Pereira Coutinho (this volume). This conception of representation should not be confused with the view, put forward by, among others, Wil Waluchow, whereby a constitutional court that enforces the demands of equality and freedom represents citizens by virtue of the fact that it gives effect to their authentic wishes, even against their expressed ones. For Waluchow this is because the court adheres to the abiding moral commitments of a political community, as these are enshrined in that community's constitution. See Waluchow 2007, 89ff. I have argued against this view in Kyritsis 2017, 132-5.

Here I cannot fully evaluate the proposal sketched in the preceding paragraph. Suffice it to point out that it misdescribes the moral import of the constitutional demands of equality and freedom. Compliance with these demands contributes directly to political legitimacy, because a legitimate polity is one that treats its citizens as free and equal, not indirectly, because these demands reflect *our* values and thus a body that gives effect to them speaks for *us.* So, again, on this view, representativeness seems not to be making any distinctive contribution to legitimacy. At best, it collapses into moral correctness.

4. My way or the highway?

But let's suppose that I am wrong, and that argumentative representation is indeed a bona fide type of political representation. Do we really need to go to such lengths to establish the representative character of constitutional courts in the first place? Well, Alexy thinks we do. He writes: 'The only way to reconcile constitutional review with democracy is to conceive of it … as representative of the people' (Alexy 2005, 578). So, the overall project is the reconciliation of constitutional review with democracy. This is a project I share. What I resist is the my-way-or-the-highway quality of Alexy's claim.

I shall begin by offering the following proposition, which I shall call the democratic thesis: Political equality demands that elected bodies like, primarily, the national legislature should have a consequential role in government.[12] It also demands that other state institutions

[12] Needless to say, political equality is not the only basis for the democratic thesis. I focus on it because it brings into sharp relief the counter-majoritarian difficulty with constitutional review and thus does a good job of motivating RCC. If the original problem with constitutional review is that it violates political equality because it gives the views of a few unelected judges superior voting weight over the views of ordinary citizens, then presumably we have reason to try to ameliorate the tension between constitutional review and political equality by construing courts as representative institutions. In addition, political equality furnishes a deontological basis for the democratic thesis which is immune to the kind of context-sensitive calculation that instrumentalist justifications of democracy notoriously necessitate. It thus allows us to test whether my claim holds up when the case for RCC is particularly strong. Finally, political equality is crucial for legitimacy (as well as justice), so appeal to it is in line with the methodology I adopt in this chapter.

respect that role. I presume that a proponent of RCC will not object to the democratic thesis. However, I submit that the democratic thesis does not entail a further one, namely that all law must be 'people's law', to use Richard Bellamy's (2014, 1027) apt expression. Let's call this the unitary legitimation thesis. What is meant by it is that at least all the general assignments of legal rights and duties (with the exception, perhaps, of the development of the common law in the shadow of statutory law) be traceable to a decision-making process with (direct or indirect) popular credentials. If you are persuaded by the unitary legitimation thesis and want to defend systems of constitutional review that give constitutional courts the power to cancel or neutralize some general assignment of legal right or duty endorsed by a democratic legislature, then it makes sense for you to try to bolster the courts' representative credentials.[13] Doing so may not provide the whole of the answer to the counter-majoritarian difficulty (for one thing, you would still need to explain why constitutional courts should win in their contest with another representative body), but it goes a long way.[14]

How can we stop short of the unitary legitimation thesis, if we accept the democratic thesis? Quite apart from its philosophical merits, the insistence that all law be 'people's law' is hard to square with some salient features of the legal orders that we are most familiar with.[15] There, we notice that political equality is only one of the many moral forces that shape institutional design. Institutional design is also shaped by considerations such as the rule of

[13] It might be suggested that the unitary legitimation thesis is easily satisfied whenever constitutional review is authorized by a constitution that has been drafted and/or ratified by the people or a popularly elected body. It falls outside the purview of this chapter to assess this suggestion. But it is important to contrast it to RCC, which is my sole focus here. RCC offers a different reconciliation of the unitary legitimation thesis and constitutional review, whereby it is judicial decision-making itself that has the requisite democratic credentials because it instantiates representativeness. RCC and the suggestion sketched above are not mutually exclusive. One could argue that the legitimacy of constitutional review turns *both* on the representativeness of constitutional adjudication *and* its proper constitutional authorization. I am grateful to Joel Colon-Rios who urged me to make this clarification.

[14] Conversely, it is at least arguable that the democratic objection to constitutional adjudication diminishes, the more we beef up its democratic pedigree. Bellamy (2014) has pursued this path in his work on the ECHR.

[15] Notice that my argument is not that the unitary legitimation thesis is unsound *because* it does not fit the legal orders with which we are familiar. Rather, it is that there is an attractive moral story that can be said about these legal orders, which vindicates their rejection of the 'people's law' view of legitimacy.

law, checks and balances, efficiency, stability. This pluralism of institutional considerations is part of the reason that governing is assigned to a multiplicity of institutions. Because we care about political equality, we design the joint project of governing so that it includes a strong input from institutions that embody it. Because we care about other moral principles, we admit into the joint project of governing contributions from institutions that are set up to foster those. Thus, we build hierarchical control into institutions from which we expect efficiency and expedience. Or we bestow independence on institutions that are supposed to instantiate impartiality. That is why in earlier work I suggested that the legal orders with which we are familiar are polyphonic (Kyritsis 2017, ch 2). They are polyphonic since an individual institution can only be expected to realize a more or less narrow set of political virtues. To a great extent the moral appeal of polyphonic legal orders lies precisely in that they seek to combine the distinctive political virtues of different institutions.

Of course, even with the best intentions we cannot avoid that one value must on occasion give way to another. This is not a merely pragmatic observation, though. The openness to countenance trade-offs between different values, including democracy, exhibits a certain attitude towards the problem of political legitimacy, a wariness, due to the awesome power of the state, to put all of one's eggs into one basket. We have a political ideal that, properly understood, captures this attitude in all its complexity: separation of powers. Very aptly, Waldron distinguishes three things that we want separation of powers to achieve, 'a qualitative separation of the different functions of government' (Waldron 2013, 434), so that they may be assigned to bodies that are well suited to perform them, the avoidance of 'excessive concentrations of political power in the hands of any one person, group, or agency' (ibid, 433), and the checking and balancing of one power-holder by others. By bringing the ideal of separation of powers to bear on the controversy over the representative character of

constitutional adjudication, we can better appreciate the difference between the democratic and the unitary legitimation thesis. The former is compatible with the idea that, in the name of checks and balances or in order to stave off excessive concentration of power, the institution that realizes political equality must sometimes yield to the institution that embodies independence from party politics. This is an idea that the latter thesis largely rejects. However, a legal order that subscribes to a 'people's law' criterion of legitimacy across the board is poorly equipped to address the manifold threats that separation of powers warns against. It thus risks being oppressively monophonic. Legitimacy abhors such a result.

For the same reason it will not do to say, as a proponent of the unitary legitimation thesis might be tempted to, that this thesis states a *pro tanto*, not an all things considered requirement.[16] On this construal, laws with popular credentials are always preferable, all else being equal. But because all else is sometimes not equal, it may be permissible to override such laws on occasion due to the presence of a weighty competing consideration. This construal of the unitary legitimation thesis misunderstands the lesson of the previous paragraph. Because of the grave risks associated with excessive concentrations of power, it is never enough simply to check that a law has democratic credentials. We must always keep an eye on the rest of the political order within which this law was enacted to make sure that this order as a whole adequately takes into account all the other considerations that pertain to legitimacy. Consequently, even in a system of parliamentary sovereignty it is not the case that the unitary legitimation thesis holds sway. Rather, the legitimacy of the system (assuming that it is indeed legitimate) depends on a judgment that the system as a whole sufficiently accommodates the other sources of legitimacy even absent a system of constitutional review.

[16] I am indebted to Pablo Magaña for suggesting this objection.

5. Conclusion

Well-designed representative institutions enhance the legitimacy of a political regime. This is the animating thought behind RCC, the view that constitutional courts, too, are meant to represent the people. But, as I have argued in this paper, RCC puts us on a wild goose chase. Legitimacy shows why. In fact, it delivers a double blow against RCC. On the one hand, I have suggested that it is unconvincing to cash out whatever legitimacy gains do accrue from constitutional adjudication in terms of representation. On the other, I have stressed that legitimacy demands much more from a political order than that it be representative of the people; well-designed representative institutions are not the only thing that can enhance legitimacy. Hence, there is no compelling reason to establish a connection between constitutional adjudication and representation. Quite the opposite, there may be good reason not to refer all state institutions to the same source of legitimacy.

Of course, here I have focused on only one, albeit prominent, version of RCC. There are others. But, if my claims are sound, then we have a yardstick for how to evaluate those, too. The concept of representation can perhaps accommodate lots of different types of representation. However, they are of no use to RCC, unless they provide a framework for understanding how the putative representative character of constitutional courts contributes to political legitimacy. That is a tall order.

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