

9

Constitutional Interpretation

1. TWO BASIC QUESTIONS

IN MOST CONSTITUTIONAL democracies, the interpretation of the constitution involves the power of the judiciary (typically the supreme or constitutional court) to determine issues of profound moral and political importance, on the basis of very limited textual guidance, resulting in legal decisions that may last for decades and are practically almost impossible to change by regular democratic processes. This unique legal power raises two main normative questions: One is about the moral legitimacy of the institution itself, and the other is about the ways in which it ought to be practiced. Both of these questions are actually more complex, of course, and the answers to them are bound to be related. It is one of the arguments of this chapter that the ways in which constitutional interpretation ought to be carried out must be sensitive to the main concerns about the moral legitimacy of a constitutional regime. First, however, we need a clearer picture of the issues.

Most democratic¹ countries have a 'written constitution', that is, a document (or a limited number of documents) enacted in some special way, containing the canonical formulation of that country's constitution. Other democracies, though by now very few,² have no such canonical document, and their constitution is basically customary. Thus, if by 'constitution' we mean the basic political structure of the legal system, its basic law making and law applying institutions, then every legal system has a constitution. Every legal system must have, by necessity, certain rules or conventions which determine the ways in which law is made in that system and ways in which it is applied to particular cases. In stable legal systems we would also find rules and conventions determining the structure of sovereignty, the various organs of government, and the kinds of authority they have.

¹ Most non-democratic countries have written constitutions as well. This chapter is confined, however, to a discussion of constitutional democracies. Another restriction on the scope of this essay is that it is confined to constitutions of sovereign states. I will not discuss sub-state or regional constitutions nor should it be assumed that the arguments presented here would straightforwardly apply to such cases.

² These are, or perhaps just used to be, the UK, New Zealand and, until recently, Israel. (Israel does have some basic laws which are quasi-constitutional, and a few years ago the Israeli supreme court has ruled that it has the power of constitutional judicial review.) Even the UK, however, is not entirely free of judicial review due to its submission to the European Convention on Human Rights and some other quasi-constitutional constraints the courts have recently recognized.

142 *Constitutional Interpretation*

Nevertheless, a written constitution does make a crucial difference because it establishes a practice of judicial review. A written constitution typically enables a higher court, like the supreme court or a special constitutional court, to interpret the constitutional document and impose its interpretation on all other branches of government, including the legislature. I am not claiming that this power of judicial review is a necessary feature of legal systems with a written constitution.³ Far from it. As a matter of historical development, however, with which we need not be concerned here, it has become the reality that in legal systems with written constitutions some higher court has the power of judicial review.

There are five main features of constitutional documents worth noting here.

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

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

3. *Rigidity.* The main technique by which constitutions can be guaranteed to be lasting for generations is their rigidity: Constitutions typically provide for their own methods of change or amendment, making it relatively much more difficult to amend than ordinary democratic legislation. The more difficult it is to amend the constitution, the more 'rigid' it is. Constitutions vary considerably on this dimension, but it is an essential aspect of constitutions that they are relatively secure from formal change by the ordinary democratic processes.⁵ Without such relative rigidity, constitutions could not achieve their longevity. None of this means, however, that constitutions do not change in other ways. As we shall see in detail below, the main way in which constitutions change is by judicial interpretation. Whether they recognize it as such or not, judges have the power to change the constitution, and they often do so. The question of whether this is an inevitable aspect of constitutional interpretation, or not, is an issue I will discuss in some detail below.

³ A written constitution is, however, practically necessary for judicial review. Without such a canonical document, it would be very difficult for a court to impose restrictions on the legislature's authority.

⁴ The constitution's normative supremacy should not be confused with the idea that all law derives its legal validity from the constitution. This latter thesis, famously propounded by Hans Kelsen, is probably false in most legal systems.

⁵ The US constitution is probably one of the most rigid constitutions in the Western world. At the other extreme, there are, for example, the constitution of India, which has already been amended hundreds of times, and the Swiss constitution, which is quite frequently amended by popular referenda.

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

5. *Generality and Abstraction.* Many constitutional provisions, particularly in the domain of the bill of rights and similar matters of principle, purport to have very general application. They are meant to apply to all spheres of public life. This is one of the main reasons for the high level of abstraction in which constitutional provisions tend to be formulated.⁶ The aspiration for longevity may be another reason for abstractly formulated principles. And of course, sometimes an abstract formulation is simply a result of compromise between competing conceptions of the relevant principle held by opposing parties of framers. Be this as it may, this need for generality and abstraction comes with a price: the more general and abstract the formulation of a constitutional provision, the less clear it is what the provision actually means, or requires.

These five features of written constitutions explain the uniquely problematic nature of constitutional interpretation. On the one hand, those who are entrusted with the authoritative interpretation of the constitution are granted considerable legal power, their decisions are often morally very significant, potentially long lasting, and, most importantly, with few exceptions, they have the final say on the matter.⁷ On the other hand, these constitutional decisions are typically based on the interpretation of very general and abstract provisions, often enacted a very long time ago, by people who lived in a different generation. This tension between

⁶ Once again, constitutions vary considerably in this respect as well. Many constitutions contain very specific provisions even in the realm of rights and principles. (I would venture to guess that a high level of specificity tends to occur in those cases where the constitution allows for amendment by a relatively straightforward process of referendum.)

⁷ A very interesting and suggestive example is section 33 of the *Canadian Charter of Rights and Freedoms* which allows the legislature to overrule constitutional decisions of the supreme court (both preemptively or *ex post*), as long as it is done so very explicitly and renewed every five years.

144 *Constitutional Interpretation*

the scope of the power and the paucity of constraints informs the main concerns of constitutional interpretation.

One note of caution before we proceed. It would be a mistake to assume that there are no 'easy cases' in constitutional law. Not every provision of a written constitution is particularly abstract or problematic, nor is the whole constitution confined to such high-minded issues as basic rights or important moral or political principles. Many constitutional provisions can simply be understood, and applied, without any need for interpretation. It is certainly true that there are likely to be many more 'hard cases' in constitutional law than in the ordinary business of statutory regulation, but this is just a matter of proportion. There is nothing in the nature of constitutions which would preclude the existence of 'easy cases'.

With this rough outline of the uniqueness of constitutional interpretation, we can now formulate the main questions. So let us concentrate on a paradigmatic model, more or less along the lines of the US constitutional practice: we assume that there is a written constitutional document which is deemed the supreme law of the land, we assume that it has been enacted (and perhaps subsequently amended) some generations ago, we assume that there is a supreme court which is entrusted with the legal interpretation of the document and that this legal power includes the power of judicial review. I mentioned that there are two main normative questions that need to be addressed: Is a written constitution morally legitimate, and how should judges go about in their interpretation of the constitution?⁸ Both questions are more complex. The first question is actually twofold: there is a question about the moral legitimacy of the constitution, and there is a separate question about the moral legitimacy of judicial review. Let me consider these questions in turn.

PART ONE: MORAL LEGITIMACY

2. THE MORAL LEGITIMACY OF THE CONSTITUTION

Constitutions are often described as pre-commitment devices. Like Ulysses who tied himself to the mast, the constitution is seen as a device of self-imposed commitments and restrictions, guarding against temptations which may lead one off the track in the future.⁹ But this Ulysses metaphor is very misleading. The most challenging moral question about the legitimacy of constitutions arises precisely because it is not like Ulysses who ties *himself* to the mast, but rather like a Ulysses

⁸ It would be a mistake to assume that only judges are in the business of constitutional interpretation. Surely, many other political actors, like legislators, lawyers, lobbyists, political activists etc, are also engaged in the interpretation of the constitution and their views may often have a considerable impact on how the constitution is understood in a given society. Nevertheless, for simplicity's sake, I will concentrate on the courts, assuming that it is the courts' authoritative interpretation which is the most important one.

⁹ See Jon Elster's, *Ulysses Unbound*, (2000); Elster himself has some doubts about the application of the precommitment idea to constitutions. Cf Waldron (1999).

The Moral Legitimacy of the Constitution 145

who ties *others* to the mast with him. In other words, the inter-generational issue is central to the question about the very legitimacy of constitutions. The enactment of a constitution purports to bind the current and future generations by imposing significant constraints on their ability to make laws and govern their lives according to the ordinary democratic decision making processes. Thus the question arises: why should the political leaders of one generation have the power to bind future generations to their conceptions of the good and the right? It is crucial to note that the moral significance of this question is not confined to old constitutions. Even if the constitution is new, it purports to bind future generations. It is this intention to impose constitutional constraints for the future which is problematic, and thus it does not really matter how old the constitution is.

It may be objected that this formulation underestimates the significance of '*We the people*', that it ignores the fact that constitutions tend to embody widely shared principles and ideals, representing, as it were, the nation's *raison d'état*. But this would make very little difference. Even if at the time of the constitution's enactment its principles and ideals are really shared across the board, the inter-generational issue remains: perhaps no one, even an entire generation, should have the power to make important moral decisions for future generations. At least not deliberately so. It is true, of course, that a great number of our current practices and collective decisions are bound to affect, for better and worse, the fortunes of future generations. But these collective actions and decisions do not purport to have authority over future generations. They are not deliberately designed to bind future generations to our conceptions of the good and the just. On the other hand, if we think that constitutions are legitimate, we should be able to explain how it is legitimate to make authoritatively binding decisions on important matters of morality and politics, that are supposed to lasting for generations and difficult to change by ordinary democratic processes. I doubt that such an argument can be provided, though I will not try to substantiate those doubts in any detail here.¹⁰ But perhaps it is not necessary. There are several arguments which strive to avoid this inter-generational problem or mitigate it considerably.

First, it could be argued that the moral legitimacy of the constitution simply derives from its moral soundness. The constitution is valid because its content is morally good, that is, regardless of the ways in which it came into being. The claim

¹⁰ There is one argument I would like to mention, though: it has been claimed that in the history of a nation, there are sometimes 'constitutional moments', when a unique opportunity arises to enshrine in a constitutional document moral principles of great importance. Since this is basically just a matter of unique historical opportunities, perhaps we should not attach too much weight to the inter-generational problem. The assumption is that the constitution legally enshrines values we would all see as fundamental as well, it's just that there is not always the political opportunity to incorporate those values into the law and render the values legally binding. This is an interesting point, but from a moral perspective, I think that it leaves the basic question in its place: either the constitutional protection of such values makes no practical difference, in which case it would be pointless, or else, if it does make a difference in being legally authoritative, then the inter-generational question remains: why should one generation have the power to legally bind future generations to its conceptions of the good government and the kind of rights we should have? An answer of the form: we just had the political opportunity to do it, is hardly a good one.

146 *Constitutional Interpretation*

would have to be that the principles concerning the form of government which the constitution prescribes and the rights and values it upholds are just the correct moral values under the present circumstances, and it is this moral soundness which validates the constitution. Needless to say, this argument cannot apply generally, just about to any constitution one encounters. It would only apply when it holds true, namely, when it is actually true that the content of the constitution is, indeed, morally sound. But even so, the argument is problematic. One could say that it misses the point of having a constitution at all. What would be the point of having a written constitution unless the constitutional document makes a normative-practical difference? It can only make such a difference if it constitutes reasons for action. But according to the argument under consideration, the only reasons for action the constitution provides are the kind of reasons we have anyway, regardless of the constitution, namely, that they are good moral reasons. According to the argument from moral soundness, then, it is very difficult to explain what difference the constitution makes.

This argument from moral soundness should not be confused, however, with a different and even more problematic argument for the legitimacy of constitutions, which draws not on the moral soundness of the constitution itself, but on the moral expertise of its framers. According to the latter, the constitution is legitimate because it had been enacted by people who, at least relative to us, are experts in those fields of political morality which are enshrined in the constitution. Thus, according to this argument, the legitimacy of the constitution derives from the moral authority of its framers. Notably, if this argument is sound, it could show how the constitutional document does make a practical difference. It would make a difference because it meets the conditions of *the normal justification thesis*: by following the constitutional prescriptions we are more likely to follow the correct moral reasons that apply to us than by trying to figure out those reasons for ourselves. But the argument clearly fails, and for two main reasons. First, because such an argument is bound to rely on a huge mystification of the moral stature of the framers, ascribing to them knowledge and wisdom beyond anything that would be historically warranted. More importantly, the argument fails because it assumes that there is expertise in morality, and this assumption is false. As I have mentioned in the previous chapter, there are good epistemic and moral reasons to hold that no one can possess expertise in the realm of basic moral principles.¹¹

According to the third argument, the moral validity of the constitution is not a static matter, something that we can attribute to the constitutional document. Validity is dynamic, depending on the current interpretation of the constitution and its application to particular cases. As long as the particular content of the constitution is determined by its interpretation, and the authoritative interpretation at any given time correctly instantiates the values which ought to be upheld in the community, the constitution would be morally legitimate because its actual content is shaped by the pertinent needs and concerns of the community at the time

¹¹ See also Raz (1998: 167).

The Moral Legitimacy of the Constitution 147

of interpretation.¹² In other words, this argument, which I will call *the argument from interpretation*, renders the moral validity of the constitution entirely dependent on the particular uses to which it is put. These uses are determined by the particular interpretations and legal decisions rendered by the court at any given time. Thus, a crucial assumption of this argument must be, that there is enough interpretative flexibility in constitutional documents to allow for the courts to adapt the constitutional prescriptions to current needs and values.

Before I consider the merit of the argument from interpretation, let me mention a fourth argument, recently suggested by Joseph Raz. According to Raz,

As long as they remain within the boundaries set by moral principles, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there.

[P]ractice-based law is self-vindicating. The constitution of a country is a legitimate constitution because it is the constitution it has (1998: 173).

As Raz himself points out, there is a whole range of practices which gain their moral validity from the fact of the practice itself. Social conventions are of such a nature. Conventions create reasons for action because they are practiced, and as long as the convention is not morally impermissible, the reasons for action it creates are valid reasons. The fact that we could have had a different, perhaps even better convention under the circumstances, does not entail that there is anything wrong with following the convention that we do have. Similarly, I presume, Raz wishes to claim that as long as the constitution we have is not immoral, the fact that we happen to have it is a good reason to abide by it. But we have to be more careful here. Our reasons for following a social convention are not entirely derivable from the fact that the convention is practiced, though they certainly depend on it. Conventions evolve either in order to solve a pre-existing coordination problem, or else they constitute their own values by creating a conventional practice which is worth engaging in.¹³ Either way, there must be something valuable in the practice of following the convention for it to give rise to reasons for action, beyond the fact that the convention is there and just happens to be followed. Similarly, the fact that the constitution is there and happens to be followed cannot be the whole reason for following it. It must serve some values, either by solving some problems which were there to be solved, or by creating valuable practices worth engaging in. I think that Raz recognizes this when he points out that constitutions typically serve the values of stability and continuity of a legal system (1998: 174–75).¹⁴

¹² This idea is usually expressed by the metaphor of the ‘living constitution’. See, for example, Kavanagh (2003).

¹³ For a much more detailed account of the nature of social conventions see Marmor (2001: chs 1–2).

¹⁴ Constitutions may promote other values as well, such as educational values, social cohesion etc. It would be a mistake to assume, however, that every type of good promoted by a given institution legitimizes the need to have that institution in the first place. Those goods can often be achieved by other means as well, which may be more legitimate or desirable.

148 *Constitutional Interpretation*

There is another crucial assumption here about which Raz is quite explicit: the conclusion about the self-validating nature of constitutional practice can only follow 'if morality *underdetermines* the principles concerning the form of government and the content of individual rights enshrined in constitutions.' (1998: 173). The same is true about social conventions, generally: unless their content is underdetermined by morality, they are not conventional rules. If morality *determines* the rule, say, R: 'All x's ought to φ under circumstances Cn', then the reason for φ -ing under circumstances Cn is a moral reason, irrespective of the fact that R is practiced.

I hope that we are now in a position to see that both Raz's argument and the argument from interpretation share a certain assumption about the nature of constitutions that is crucially important. Roughly, both arguments must assume that the written constitution, as such, actually makes less of a difference than one might have thought. Let me be more precise. The conditions for the legitimacy of a constitution must comprise the following conditions. First, the values and principles enshrined in it must be morally permissible. This goes without saying. (I am not suggesting that the constitution must be morally perfect, or optimal. Some moral errors a constitution contains may be outweighed by other values it promotes.) Second, when certain choices are made in particular cases, they would be legitimate if they are either morally underdetermined, or else, morally correct. The application of constitutional principles or values can be morally underdetermined in two ways: either they concern issues which are simply not determined by moral considerations, such as solution to a coordination problem,¹⁵ or else, if they do manifest moral choices, those would be the kind of choices which are made between incommensurable goods or values. However, in those cases in which the value choices are morally determinable, it is pretty clear that both the argument from interpretation and Raz's argument from self-validity must hold that only morally correct choices are valid. Therefore, either the constitution embodies choices which are morally underdetermined (in one of the two ways mentioned), or else, the constitution must be applied in a way which is morally sound. It follows from this that both arguments must assume that at least in those areas in which the constitution would make a moral difference, it can be interpreted to make the difference that it should, that is, according to the true moral principles which should apply to the particular case. To be sure, the thesis here is not that the constitutional document can be interpreted to mean just about anything we want it to mean. But the thesis must be that constitutional documents typically allow *enough interpretative flexibility* that makes it possible to apply their morally significant provisions in morally sound ways.

I do not wish to deny the truth of this last assumption. I will have more to say about it in the last section. For now, suffice it to point out one important implication of this thesis. Namely, that it makes the moral legitimacy of constitutions very

¹⁵ This is not to deny that there are cases in which there is a moral duty to solve a coordination problem. For a more detailed account, see Marmor (2001: 25–31).

much dependent on the practices of their interpretation. In other words, a great deal of the burden of moral legitimacy is shifted by these arguments to the application of the constitution, thus assuming that the constitution is legitimate only if the courts are likely to apply the constitution in a morally desirable way. This brings us to the second question about the legitimacy of constitutions, namely, the question about the legitimacy of judicial review.

3. THE LEGITIMACY OF JUDICIAL REVIEW

Three points about judicial review are widely acknowledged. First, that it is not a necessary feature of a constitutional regime. As I have already mentioned, it is certainly conceivable to have a legal system with a written constitution without entrusting the power of its authoritative interpretation in the hands of the judiciary or, in fact, in the hands of anybody in particular. Therefore, secondly, it is also widely acknowledged that the desirability of judicial review is mostly a question of institutional choice: given the fact that we do have a constitution, which is the most suitable institution that should be assigned the role of interpreting it and applying it to particular cases? Finally, it is widely acknowledged that the courts' power of judicial review is not easily reconcilable with general principles of democracy. Even those who support the legitimacy of judicial review, acknowledge the existence of at least a tension between our commitment to democratic decision procedures and the courts' power to overrule decisions made by a democratically elected legislature.¹⁶ This is a very complicated issue, and I cannot hope to expound here on the necessary elements of a theory of democracy to substantiate this point.¹⁷ For our purposes, it should be sufficient just to keep this aspect of judicial review in mind, without assuming too much about any particular theory of democracy.

Lawyers sometimes find it difficult to understand why the normative justification of judicial review is separate from the question of the legitimacy of constitutions. For them the reasoning of *Marbury v Madison* is almost tautological. We just cannot have it in any other way. If we have a written constitution which is the supreme law of the land, then surely it follows that the courts must determine what the law is and make sure that it is applied to particular cases. The power of the courts to impose their interpretation of the constitution on the

¹⁶ It should be acknowledged that not every legal decision of the court about the interpretation of the constitution amounts, technically speaking, to what we call 'judicial review', in the sense that not every constitutional decision is necessarily a review of an act of legislation. It may simply be a review of an administrative decision, or some other legal issue that may be affected by the constitution. However, it should be kept in mind that the practical effect of such constitutional decisions is basically the same: once rendered by the supreme (or constitutional) court, it cannot be changed by the ordinary processes of democratic legislation. Therefore, even if technically speaking, not every constitutional decision is an exercise of judicial review, for most practical purposes, the distinction is not morally/politically significant.

¹⁷ See Waldron (1999).

150 *Constitutional Interpretation*

legislature simply follows, so the argument goes, from the fact that the constitution is legally supreme to ordinary legislation. But of course this is a *non sequitur*. Even if it is true that as a matter of law, constitutional provisions prevail over ordinary legislation, and it is also true that there must be some institution which has the power to determine, in concrete cases, whether such a conflict exists or not, it simply does not follow that this institution must be the supreme court, or any other institution in particular.¹⁸ The argument must be premised on the further assumption that the court is the most suitable institution to carry out this task of constitutional interpretation. But why should that be the case?

One consideration which is often offered as a reply consists in the thesis that the constitution is a legal document and that therefore its interpretation is a legal matter. Since courts tend to possess legal expertise, they are the best kind of institution to be entrusted with constitutional interpretation. The problem with this argument is that it relies on a dubious inference: from the fact that the constitution is a legal document, and that its interpretation is, therefore, a legal matter, it does not follow that constitutional decisions are based on legal reasoning requiring legal expertise. Most constitutional decisions are based on moral and political considerations. That is so, because the kind of issues decided in constitutional cases are, mostly, moral and ethical in nature, such as determining the nature and scope of basic human and civil rights, or shaping the limits of political authorities and the structure of democratic processes.¹⁹ Therefore, one of the crucial questions here is whether the supreme court is the kind of institution which is conducive to sound moral deliberation and decision making on moral issues. This question is not easy to answer. Partly, because it is a matter of culture that may vary from place to place. But also because there are conflicting considerations here. On the one hand, courts do have certain institutional advantages in this respect, having certain characteristics which are conducive to moral deliberation. (For example, the fact that deliberation in a courtroom is argumentative, that it is open to arguments from opposing sides, the requirement to justify decisions by reasoned opinions which are made public, and so forth.) On the other hand, courts are also under considerable pressure to conceal the true nature of the debate, casting it in legal language and justifying their decisions in legal terms, even if the choices are straightforwardly moral or political in nature. As we have noted in previous chapters, there is a constant pressure on judges faced with decisions in 'hard cases' to present their reasoning in legal language even if the decision is not based on legal reasons in any meaningful sense. Although perfectly rational from the judiciary's perspective, such a pretence is not necessarily conducive to sound moral deliberation.

¹⁸ In fact there is another mistake here: even if the courts are assigned the role of constitutional interpretation, it does not necessarily follow that they should have the legal power to invalidate an act of legislation which is unconstitutional. The appropriate remedy could be much less drastic, eg a declaratory judgment, or there could be no remedy at all.

¹⁹ I do not wish to claim that *all* constitutional decisions are primarily concerned with moral issues; some constitutional decisions concern the structural aspects of government, in which case, often the issue is one of bureaucratic efficiency or such.

There is a much more important issue here. Those who favor the courts' power of judicial review often rely on an argument which is less concerned with the nature of the institution, and more with the nature of the decisions in constitutional cases. According to this line of thought, which I will call *the argument from consensus*, the reasoning which supports the institution of judicial review is as follows:

1. The rights and principles entrenched in the constitution are those which are widely shared in the community, reflecting a deep level of moral consensus.
2. The constitutional entrenchment of these rights is required in order to protect them from the vagaries of momentary political pressures, from shortsighted political temptations.
3. Precisely because the supreme court is not an ordinary democratic institution, it is relatively free of political pressures and shortsighted populist temptations.
4. Therefore, by entrusting the power of judicial review with the supreme court, we are likely to secure, as far as possible, the protection of those rights and principles which are, in fact, widely shared in the community.

Admittedly, there is a great deal to be said in favor of this argument. If its assumptions are sound, then it would not only justify the institutional choice of the court in deciding constitutional issues, but would also go a considerable way in mitigating the anti-democratic nature of judicial review. We could say that judicial review is anti-democratic only on its surface; at a deeper level, it secures the protection of those rights and principles which are actually held by the vast majority of the people.²⁰

I think that this argument fails. And it fails mostly because it is based on a misconception of the nature of rights and the role of rights discourse in a pluralistic society. Explaining this point requires a small detour, exploring some crucial aspects of the nature of rights.²¹ In what follows, I will assume that the most plausible account of the nature of rights is *the interest theory of rights*. Basically, according to this analysis, we would say that *A has a right to φ* if an aspect of A's well being, that is, an interest of A, *justifies* the imposition of duties on others, those duties which would be required and warranted to secure A's interest in φ .²²

According to this analysis, rights are actually *intermediary conclusions* in arguments which begin with the evaluation of interests and end with conclusions about duties which should be imposed on other people. When we say that A has a right to φ , we say that A's interest in φ justifies the imposition of duties on others in respect to that interest. From a strictly analytical point of view, however, the concept of a right is, in a sense, redundant; it is just an intermediary step in a moral argument leading from the values of certain human interests, to conclusions about the need to impose certain duties. Therefore, the question arises: Why do we need this intermediary step cast in the form 'a right'?

²⁰ For a recent defense of this argument, see Harel (2003). Cf Alexander (2003).

²¹ I have presented the argument which follows in the next few paragraphs in Marmor (1997).

²² See Raz (1986: ch 7)

152 *Constitutional Interpretation*

Joseph Raz gave two answers²³: One partial answer might be, that it simply saves time and energy; it is often the case that practical arguments proceed through the mediation of intermediary steps, simply because there is no need to begin each and every practical argument from first premises; that would be too tedious.

There is, however, a much more important reason: intermediary steps, such as rights, enable us to settle on a set of shared intermediary conclusions, *in spite of considerable disagreement about the grounds* of those intermediary conclusions. In other words, people can settle on the recognition of rights, despite the fact that they would deeply disagree about the reasons for having those rights. Rights discourse enables a common culture to be formed around some intermediary conclusions, precisely because of their intermediary nature.

Furthermore, it is crucial to realize that there is an important asymmetry between rights and duties. Rights, unlike duties, do not entail that the right-holder has any particular reasons for action. The proposition: 'A has duty to φ ', entails that A has a reason to φ . But having a right to do something does not entail that one has a reason to do it. (Your right to freedom of speech, for instance, does not give you any reasons to say something.) This analytical point is very important: it explains why people with different and competing sets of fundamental values are bound to disagree about the duties they have.²⁴ But this need not be the case with rights, since there is no immediate relation of entailment between rights and reasons for action. True, there is an indirect relation of entailment: rights justify the imposition of duties on others. But it is very often the case that people agree on the existence of a given right even if they actually disagree on the nature and scope of the duties which the rights justifies. Thus, it is normally easier for people with different conceptions of the good to agree on a shared set of rights than duties, as rights do not entail immediate reasons for action.

It is, however, the intermediary nature of rights discourse which is quintessential. It explains why rights discourse is particularly fit for pluralistic societies. Societies where different groups of people are deeply divided about their conceptions of the good, need to settle on a set of rights they can all acknowledge, in spite of deep controversies regarding the grounds of those rights (and their ramifications). Hence it is not surprising or accidental that in homogeneous societies there is very little rights discourse; such societies normally share a common understanding of ultimate values, and consequently of the various duties people have, and they do not need this intermediary step from ultimate values to duties. Only in those societies where people do not share a common understanding of ultimate values, namely, in pluralistic societies, that rights discourse is prevalent.²⁵

²³ See Raz (1986: 181). I do not intend to suggest that Raz would agree (or not) with the main thesis that I advocate here in the next few paragraphs.

²⁴ Unless, of course, the duties in question are very abstract, like the duty not to cause unnecessary suffering, or the duty to respect others. I am not suggesting that people with conflicting conceptions of the good and of ultimate values cannot agree on some duties we should all have. My point is relative: that it is easier to agree on a list of relatively specific rights than duties.

²⁵ Admittedly, this last point is actually a piece of armchair sociology. But not a particularly fancy one. I think that we are quite familiar with this phenomenon, namely, that rights discourse is much

But this social function of rights discourse also points to its own limits. The intermediary nature of rights discourse explains why determining the limits of rights, and their relative weight in competition with other rights or values, is bound to be a controversial matter. In order to determine in a reasoned manner the limits of a given right, or its relative weight in a situation of conflict, one would naturally need to go back to the reasons for having the right in the first place, and it is precisely at this point that agreement breaks down. As a matter of fact, more often than not we will discover that there was never an agreement there to begin with. In other words, precisely because of those reasons which explain the widespread consensus on the rights we have, there is bound to be disagreement over the boundaries of those rights and their desirable ramifications. Widespread consensus on how to resolve various conflicts between rights, or between rights and other values, is only possible in the framework of a shared culture of moral and political views, but it is typically in such cases that rights have relatively little cultural and political significance. If rights discourse is prevalent in a given society, it is mostly because there is little agreement on anything else, in particular, on the ultimate values people cherish.²⁶

If this account of the nature of rights discourse is basically correct, then it should become clear why the argument from consensus is bound to fail. It fails because it relies on a widespread consensus which is illusory. It is true that in pluralistic societies we do tend to agree on the rights which are enshrined in the bill of rights, but this is a very tenuous agreement which breaks down as soon as a conflict comes to the surface. Since it is conflict between rights, or rights and other values, that gets litigated in the constitutional cases, we are bound to discover that there is not going to be any consensual basis on which such conflicts can be resolved.

At this point the interlocutor is likely to ask: but what is the alternative? If we do not entrust the resolution of such conflicts in the hands of the court, how else are we going to resolve them? The answer is, of course, that we can leave the resolution of such evaluative and ideological conflicts to the ordinary legislative and other democratic decision making processes. Not because they are more likely to be morally sound than the decisions of courts. But at least they have two advantages: for whatever its worth, they are democratic. And, not less importantly, perhaps, legislative decisions tend to be much more tentative than constitutional decisions of a supreme court. In fact, they are more tentative in two senses: First, legislative decisions on morally or ideologically controversial issues do not tend to last for too long. Those who have lost their case today may still gain the upper hand

more prevalent in pluralistic societies than in homogenous ones. It is quite likely that there are other explanations for this difference, besides the one I offer here. I do not intend the explanation to be exhaustive.

²⁶ It is probably true, though not universally so, that the prevalence of rights discourse in a given society does reflect a deeper level of consensus about the acceptance of pluralism and perhaps even individualism. But this deeper level of tacit consensus, to the extent that it exists, is very abstract and quite unlikely to have significant bearing on constitutional interpretation.

154 *Constitutional Interpretation*

tomorrow.²⁷ Secondly, democratic decisions also tend to convey a more tentative kind of message than constitutional decisions of a supreme court. When the court decides a constitutional issue, it decides it in a sort of timeless fashion, declaring a timeless moral truth, as it were; such a message conveys to the losing party that it has got its profound moral principles wrong. As opposed to this, a democratic decision does not convey such a message; it tells the losing party not more than that it simply lost this time, and may win at another. It does not necessarily convey the message that the loser is morally wrong, or at odds with the basic moral values cherished by the rest of the community.²⁸

To be sure, none of this is meant to be conclusive. Ultimately, the desirability of judicial review is a matter of institutional choice, and a great many factors which figure in such a complex consideration are empirical in nature. Surely, one major consideration must concern the likelihood that a supreme court will get the moral decisions right, or at least, more frequently right than any other institution. Are there any reasons to believe that from an *instrumental* perspective, courts would do a better job in protecting our rights than, say, the democratic legislative assembly?

Supporters of judicial review think that there are plenty of such reasons. Jeremy Waldron (1999), however, is rather skeptical about this instrumental argument. This right-instrumentalism, he claims, faces the difficulty of taking for granted that we know what rights we should have, and to what extent, and then it is only an instrumental issue whether the courts, or the legislature, would do a better job in protecting them. But this is wrong, Waldron claims, because it assumes that we already possess the truth about rights, whereas the whole point of the objection to judicial review was that rights are just as controversial as any other political issue (1999: 252–53). Supporters of judicial review, however, need not make this obvious mistake. They can maintain that whatever our rights and their limits ought to be, they are of such a nature that legislatures are bound to get them wrong; or at least, judges are more likely to get them right. Even in the absence of knowledge or consensus about rights, there may be reasons to assume that some institutions are more likely to go right (or wrong) about such issues than others. Perhaps legislative assemblies do not have the appropriate incentives to even try to protect our rights, or they may be systematically biased about such issues, and so forth.

Waldron's reply to this, more plausible, version of rights-instrumentalism is that the assumptions it relies upon are just as controversial as the moral issues underlying rights discourse (1999: 253). But this is not a convincing reply. After

²⁷ There is one important exception: some countries may have a persistent minority group which is unlikely to have its interests protected by an ordinary majoritarian decision making process. It would be a mistake to assume, however, that the only way to protect the interests of persistent minorities is by constitutional entrenchment of their rights. Often a more sophisticated democratic process (forcing, for example, political actors in the majority to take into account the interests of the minority), may be more efficient.

²⁸ I have heard this last argument in a lecture by Bernard Williams which he gave at Columbia Law School a few years ago. As far as I could ascertain, Williams has never published his lecture, which I deeply regret. However, it should be admitted that observation underlying this argument is at least partly culture dependent; much depends on how the courts are actually perceived by the public.

all, how can we design political institutions, including legislative assemblies, unless we possess considerable knowledge about institutional constraints and the likely consequences of various institutional structures? Waldron should have confronted the institutional issue more directly, and perhaps he could show that rights-instrumentalism may actually fail on its own terms. Neither the long history of judicial review in the US, nor the institutional character of the courts, necessarily lend credence to the supporters of judicial review. It is certainly arguable that courts are essentially conservative institutions, typically lagging behind progressive movements in society,²⁹ severely circumscribed by adversary procedures, and most importantly, perhaps, constrained by the lack of any real political power which tends to limit severely their incentive and confidence in making progressive social changes. Perhaps legislative assemblies are not so diverse and progressive as Waldron depicts in his *Law and Disagreement* (1999), but he is certainly right to question whether courts are necessarily better suited to protect our rights. In any case, since judicial review is the constitutional practice in most contemporary democracies, and seems to be here to stay, I will move on to consider the second main issue about constitutional interpretation, namely, how should it proceed.

PART TWO: INTERPRETATION

4. ANY SENSIBLE ORIGINALISM?

The widespread attraction of 'originalism' is one of the main puzzles about theories of constitutional interpretation. Admittedly, 'originalism' is not the title of one particular theory of constitutional interpretation but rather the name of a family of diverse ideas, some of which are actually at odds with each other. Nevertheless, the underlying theme, due to which it is warranted to subsume such diverse views under one title, is clear enough: Originalists claim that the interpretation of the constitution should seek to effectuate, or at least be faithful to, the understanding of the constitutional provisions which can be historically attributed to its framers. Such a general thesis must comprise both a normative and a descriptive element. The normative element pertains to the conditions of legitimacy of constitutional interpretation: It maintains that an interpretation of the constitution which would not be faithful to the ways in which the constitution was originally understood by those who enacted it, would not be a morally legitimate interpretation. This normative thesis, however, must be premised on the complex factual assumption that we can have a fairly sound conception of who the framers of the constitution are, and that their views on what the constitution means are sufficiently clear and discernable to allow for the kind of interpretative guidance that is needed to determine (at least some not insignificant number of) constitutional cases facing the supreme

²⁹ Yes, of course there are exceptions. The Warren Court is a famous exception in the US supreme court's history, but it is precisely the point of it: the progressive agenda of the Warren Court (which only lasted, it should be recalled, for about two decades), *is such a remarkable exception*.

156 *Constitutional Interpretation*

court. There are so many reasons to doubt both of these assumptions that it is quite a mystery why originalism still has the scholarly (and judicial) support that it does.

Consider the factual assumptions first. There are numerous ways in which constitutions come into being; sometimes they are enacted as a result of a revolution or a civil war striving to stabilize and legalize the new constitutional order, at other times as result of a secession (which may be more or less orderly), and sometimes as a result of a legal reform that takes place within a well functioning legal system and according to its prescribed legal authority. In spite of this historical diversity, it is commonly the case that a very large number of political actors are involved in the process of creating (or amending) the constitution, and it is typically the case that our knowledge of their precise roles in the process, and their eventual impact on its result, is very partial, at best. Thus the term 'the framers of the constitution' usually refers to a very loose concatenation of a fairly large number of people and institutions, playing different legal and political roles in the constitution's enactment.³⁰ How likely is it that such a loose group of political actors would actually share a reasonably coherent moral and political philosophy underlying the various constitutional provisions? Or, indeed, that they would have any particular views about most of the constitutional issues which will come before the courts, often generations later?

But such factual doubts should be the least of our worries. The main problem with originalism is a moral one: Why should the framers of a constitution, or anyone for that matter, have the tremendous power of having their moral and political views about what constitutes good government and the nature of our basic rights, imposed on an entire nation for generations to come? Unless originalists can provide a moral justification for granting such a vast and lasting power on any particular person, or group persons, their case for originalism cannot be substantiated. And the problem is that there are only two kinds of argument one can offer here, and both of them are bound to fail. The idea that the framers' views should inform constitutional interpretation can either be derived from the assumption that the framers somehow had known better what ought to be done, that they should be considered as moral experts, as it were, or else it must be based on the idea that any conceivable alternative is even worse, less legitimate.³¹ Since I have already mentioned the doubts we should have about the idea that the framers can be regarded as moral experts, let me consider the second kind of argument.

Any alternative to originalism, so this argument runs, would involve the power of the judges of the supreme court to determine, on the basis of their own moral

³⁰ The problem of identifying the 'framers' is exacerbated in those cases in which there is an elaborate ratification process of the constitution.

³¹ In fact, there is a third argument which is often mentioned: originalists sometimes rest their case on the claim that the historical truths about framers' intentions are objective and thus allow an objective constraint on judicial discretion in constitutional cases. But this is puzzling, at best. First, because one can think of countless other ways in which judges could decide cases, much more objective than this one; they could toss a coin, for example. Secondly, the assumption that the interpretation of history is somehow objective or free of evaluative considerations, or that it is free of bias and ideological prejudices, is just too naïve to be taken seriously.

views, what the constitution actually means in controversial cases. In other words, the assumption is that unless judges are required to defer to the 'original' understanding of the constitution, they would simply impose their own moral and political views on us, and that would be illegitimate for various reasons. For example, because the supreme court is not a democratic institution, it is not accountable to the people, it does not necessarily reflect the wish of the people, and so forth. Once again, it should be noted that this argument rests on two limbs. It must assume that an original understanding of the constitution is actually capable of constraining, at least to some extent, the possible interpretations of the constitutional document, and it contends that such a constraint is, indeed, morally desirable.

Let me concentrate on the moral issue. Thus, to make the argument at least initially plausible, let us suppose that we do know who the framers of the constitution are, and suppose further that we can be confident that we know everything that there is to know about their purposes, intentions, and so forth. Framing this in terms of the intentions of the framers, let us follow the main distinction introduced in the previous chapter and divide the relevant intentions of the framers into those which constitute their *further intentions* and those which constitute their *application intentions*.

Now, most originalists would readily admit that deference to the framers' *application intentions* is very problematic. Or, at the very least, they would have to admit that the older the constitution, the less it would make sense to defer to the framers' *application intentions*.³² Surely it makes no sense to rely on the views of people who lived generations ago about things they were completely unfamiliar with and could not have possibly imagined to exist. But if we think about this in a principled way, we must acknowledge that this conclusion cannot be confined to particularly old constitutions. Just as it makes no sense to bind the constitutional interpretation to *application intentions* of 'old' framers, because they could not have predicted the kind of concerns we face today, it would make no sense to bind any constitutional interpretation *for the future* by the *application intentions* of framers in our generation.

Thus, if originalism is to make any sense at all, it must be confined to the framers' *further intentions*. Even if we have no reason to speculate about the framers' thoughts and expectations with respect to the ways in which the relevant constitutional provisions should be applied to particular cases, so this argument runs, we do have reasons to understand and respect the general purposes that the framers had had in enacting the constitutional provision which they did. Although not phrased in terms of this distinction between application and further intentions, this is basically the view about constitutional interpretation which Dworkin advocates. History should be consulted, Dworkin claims, in order to understand what is the general moral or political principle that the framers had sought to enact in the constitution. We must try to understand the 'very general

³² See, for example, Goldsworthy (2003: 177)

158 *Constitutional Interpretation*

principle, not any concrete application of it' (1996: 9). The latter should be left to the supreme court to figure out according to its best moral reasoning.

The main problem with this argument is, however, that it actually ignores Dworkin's own best insight about the nature of interpretation. Any interpretation, Dworkin (1986: 60–61) rightly claimed, must begin with certain views about the values which are inherent in the genre to which the text is taken to belong. Unless we know what it is that makes texts in that particular genre better or worse, we cannot even begin to interpret the particular text in hand. If I purport to offer an interpretation of a certain novel, for example, I must first have some views about the kind of values which make novels good and worthy of our appreciation. Otherwise, I could hardly explain why should we pay attention to this aspect of the novel rather than to any other. A certain view about what makes instances of a given genre good or bad must inform any interpretation of a text within that genre. Dworkin is absolutely right about this. But then the same principle should apply to legal interpretation, including in the constitutional context. Before we decide to consult history, or intentions, or anything else for that matter, we must first form our views about the kind of values which are inherent in the relevant genre. In the constitutional case, we must rely on the correct views about what makes constitutions good or bad, what is it that makes a constitutional regime worthy of our appreciation and respect. But as soon as we begin to think about *this* question, the appeal of the framers intentions dissipates even before it takes any particular shape.

I do not intend to suggest that an answer to the general question of what makes constitutions valuable is easy to answer, or even that we can have satisfactory answers to it. But at least we know some of the problems, and the moral authority of the constitution's framers is one of them. As we have noted above, it is one of the main concerns about the legitimacy of constitutions that by following a constitution as the supreme law of the land, we in effect grant the framers of the constitution legal authority which exceeds the authority of our elected representatives to enact laws according to respectful democratic processes. This is a very considerable power that is not easy to justify, particularly when we take into account the fact that it is supposed to last for generations (and is typically guaranteed to do so by the constitution's rigidity.) As we have noted earlier, the role of the framers in the enactment of a constitution is one of the most problematic aspects of the legitimacy of a constitutional regime. Once we discard any assumption about the framers' superior knowledge about matters of moral and political principle, as we should, not much remains to justify their particular role in legitimizing the constitutional framework that we have. Thus the more we tie our deference to the constitution to the framers' particular role in its enactment, the more acute the problem of moral legitimacy becomes. Whatever it is that makes constitutions good and worthy of our respect, could have very little to do with the moral or political purposes of its framers. The legitimacy of a constitution must reside in the solution it offers to the problems we face, not in the purposes, however noble and admirable, that the framers had had. And it is advisable to keep in mind that the

framers of a constitution could also have had purposes and intentions which are not so noble and admirable. Either way, it should make no difference.

Consider, for example, one of Dworkin's own favorite cases: suppose that the question is whether the equal protection clause of the 14th amendment of the US Constitution rules out school segregation or not. Dworkin contents that this question should not be determined according to the application intentions of the framers; in fact, we probably know well enough that the framers of the 14th amendment would not have thought that it rules out anything like school segregation. Instead, Dworkin claims, we should consider the kind of general principle which the framers intended by the phrase 'equal protection of the laws'. Then we shall see that it must be a very general moral principle of excluding *any* form of unjustified discrimination, and not only some weaker principle of formal equality before the law. 'History seems decisive', Dworkin writes, 'that the framers of the Fourteenth Amendment did not mean to lay down only so weak a principle as that one . . .' (1996: 9). But it is just puzzling how Dworkin ignores the possibility of the opposite historical verdict here: What if it really turned out that history was decisive in supporting the opposite conclusion? Suppose that it really was the case that the framers had in mind only, and exclusively, a very narrow principle of a formal equality before the law, and not anything as general as an anti-discrimination principle of equality.³³ Should that force us to the conclusion that *Brown v Board of Education* was wrongly decided? Or should it even mean that there is any consideration worth mentioning that counts against the moral legitimacy of *Brown*? We are just left to wonder why should we ever care about framers' purposes, as general or abstract as they may be.

I began this last discussion by suggesting that originalism is at least partly motivated by the fear of its alternative. I will get to this in a moment. However, it should be kept in mind that if originalism does not make any moral sense, the poor fate of its alternatives cannot provide it with any credentials either. Even if there is a problem of moral legitimacy with the supreme court's decisions on constitutional issues, it cannot be solved by striving to curtail the discretion of the court by means which are morally groundless. So what is the alternative? Perhaps this one: that the courts should strive to interpret the constitution according to their best possible understanding of the moral/political issues involved, striving to reach the best possible moral decision under the current circumstances. To be sure, I do not mean to suggest that there is always, or even most of the time, one decision which is *the best*. There may be several conceivable decisions, equally, or incommensurably good (or bad). The point is that in constitutional interpretation on matters of

³³ In some of his writings Dworkin (1977: 134, but cf 1985: 49) seems to have suggested that *the only relevant evidence* of the framers' intentions in such cases is a linguistic one: the very abstract formulation of the pertinent constitutional provision attests to the further intention of the framers' to enact the abstract principle as such, and not any specific principle which they may have hoped to achieve, but did not enact in the constitutional provision. But this is not a coherent argument: either the issue is an historical one, in which case no evidence can be excluded, or else, it is not an argument which refers to historical truths, in which case it is very unclear why should we speak about the framers here at all. To put it briefly, originalism cannot be derived from textualism.

160 *Constitutional Interpretation*

moral or political principle, there is no substitute to sound moral reasoning. For better or worse, the courts are entrusted with the legal power to interpret the constitution and sound moral reasoning is the only tool at their disposal. This is only a conclusion at this stage, not an argument. Before it can be substantiated, we must consider a few more alternatives and modifications.

5. ALTERNATIVE METHODS?

What is the legal authority of the court to rely on moral arguments in constitutional interpretation? The simple answer is that the constitution is phrased in moral terms, enshrining moral and political principles and individual or group rights. More precisely, however, the effect of the moral language and moral subject matter of constitutional clauses is to confer on the court a type of *directed power*.³⁴ This is a legal power, and it is directed in two respects: It is the kind of power that the courts ought to exercise, and it is constrained by certain prescribed aims and reasons. When the law grants a certain legal power to an agent, it typically leaves it entirely to the choice of the agent whether to exercise the power or not. However, the law frequently grants certain powers to various agents, mostly judges and other officials, which they are duty bound to exercise. This is one sense in which the power to interpret the constitution and, as I will argue below, actually to change it, is directed. When the constitution prescribes, for example, that 'cruel and unusual punishment' should be invalidated, it actually imposes a duty on the supreme court to determine what kinds of punishment are cruel and unusual, and therefore, invalid. Note, however, that this power is constrained in another crucial sense, since it limits the kind of purposes judges should take into account and the kind of reasons they can rely upon to justify their decision. Not any kind of consideration would justify invalidating certain penal practices, only those which are really cruel. And since cruelty is a moral concept, the reasons for such a decision must be moral ones, and not, say, economic efficiency or budgetary concerns.

The claim that judges have directed power to rely on moral arguments in their interpretation of constitutional clauses is not news, of course. Controversies are abound, however, with respect to the kinds of moral argument which are legitimate and the boundaries of such interpretative reasoning. I will consider three such controversies: the question of whether judges should rely on the conventional conceptions of morality; the question of 'enumerated rights', and the question of whether there is a distinction between conserving and innovative interpretations.

1. Conventional Morality?

It is difficult to deny that our constitutional regime has trapped us in a very uncomfortable situation. On the one hand, it is clear that constitutional cases

³⁴ See Raz (1994: ch 10) and Marmor (2001: 67–68).

involve decisions of profound moral importance and judges who are entrusted with the interpretation of the constitution must make decisions on very important issues of moral principle. But once we realize that the court's decisions in constitutional cases are, practically speaking, almost impossible to change by regular democratic processes, we are bound to feel very uneasy about the courts' power to impose its moral views on the nation without any significant political accountability. Understandably, then, it is tempting to seek ways to mitigate such concerns. Now, there seems to be an obvious consideration which presents itself: judges should interpret the constitution on the basis of those moral and ethical values which are widely shared in the community, that is, even if they happen to believe that such moral views are mistaken and not critically defensible. So there seems to be an easy way out of the dilemma: as long as judges are confined to rely on conventional moral values, those values which are widely shared by the entire community, their decisions would not disrupt the democratic nature of the regime and thus we mitigate the problem of lack of accountability.³⁵

This is not a very good idea, however, and for several reasons. To begin with, more often than not, it is not a real option. In a great number of cases which get litigated at the constitutional level, there is no widely shared view that can settle the interpretative question. Such cases tend to be litigated precisely because there is a widespread moral controversy and various segments of the population hold opposing views on the matter. Nor can we assume that controversies are only at the surface and that there is bound to be greater consensus at a deeper level. As I have already argued in section 3, quite the opposite is true. It is typically the case that only at a very superficial level we can all agree that a certain right should be protected, but when we begin to think about the deeper reasons for such normative conclusions we will soon realize that the disagreements are rather profound.

Secondly, and more importantly, the idea that constitutional interpretation should be grounded on those values which happen to be widely shared in the community would undermine one of the basic rationales for having a constitution in the first place. Values that are widely shared do not require constitutional protection. If we have a good reason to enshrine certain values in a constitution and thus remove their protection from the ordinary democratic decision making processes, it must be because we think that those values are unlikely to be shared enough, so to speak, as to allow their implementation without such constitutional protection. It is precisely because we fear the temptation of encroachment of certain values by popular sentiment that we remove their protection from ordinary democratic

³⁵ This is not an idle method invented by scholars only to be refuted in their articles. Many constitutional decisions are actually justified by such a reasoning. For example, it is often claimed that the US supreme court's decision to legalize capital punishment is justified because it gives effect to the views held by the vast majority of Americans. Recently, the court justified its decision to change its views on the constitutionality of the execution of retarded persons by appealing to changes in the popular sentiment. See *Atkins v Virginia* (536 US 304, 2002). Similarly, I am often told by my colleagues that it is impossible to change the absurd reading of the second amendment's so called 'right to bear arms' because it reflects widely shared popular beliefs.

162 *Constitutional Interpretation*

processes.³⁶ After all, the democratic legislature is the kind of institution which is bound to be sensitive to popular sentiment and widely shared views in the community. We do not need the constitutional courts to do more of the same. If we need constitutional protection at all, it is because we assume that ordinary legislation is all too sensitive to popular sentiment and widely shared views. And then we must think that even if a moral view is widely shared, it can still be mistaken and that it would be wrong to implement it. Without holding such a view on the limits of conventional morality, constitutionalism makes no sense.³⁷

None of this means that the courts should ignore conventional morality altogether. In some cases there may be *good moral reasons* to take into account conventional morality, even if the latter is partly mistaken. But these are rare occasions. A typical case I have in mind concerns the phenomenon of moral change.³⁸ New values are sometimes discovered, or invented. We may come to realize new values of things or actions, hitherto unnoticed. Or things can lose their value when we come to realize that they are no longer valuable.³⁹ Such changes in evaluative judgments tend to involve a transitional period and such transition tends to be more difficult for some than for others. People differ in their capacities to adapt and internalize the need for change. Racial equality, and more recently, gender equality, are prominent examples that come to one's mind in this context. Thus, it may happen, as it often does, that the individuals who occupy the supreme court realize the need for change and would have good reasons to implement it. But if most people are not yet there, if it is the case that new values have not yet taken root in most of the population, it may be advisable to postpone constitutional change until a time when it would be better received and easier to implement. This is not a rule, and contrary conclusion is certainly warranted in some cases. Arguably, the *Brown* case is such a counter example, and the difficulties of implementing it, that lasted for decades, attest to it. But the fragility of this implementation process, and its tremendous cost, also point to the limits of innovation that courts can pursue. It is difficult to generalize here. Much depends on social context and a great many social variables that we can only hope to guess right.

³⁶ I am not claiming here that, all things considered, this is a sound reason for constitutional protection of rights and principles. All I am saying is, that to the extent that there is such a sound reason, it must assume this point. There is a sense, however, in which the argument should be more nuanced. Two people may share a certain value but differ in the ways in which they apply the value they share to particular cases. Shared values do not necessarily entail shared judgments on particular cases.

³⁷ Perhaps this argument could also be used to reach the conclusion that democratic legislative assemblies are not to be trusted with the protection of constitutional rights. This might be too quick a move, however. Much depends on specific legislative procedures, and various institutional constraints. See, for example, Garrett and Vermeule (2001).

³⁸ Another example, which is rarely relevant in constitutional cases, concerns those political choices in which the right decision is simply the one which is actually preferred by the majority. These are usually cases in which we must make choices about preferences of taste, where no particular preference is supported by any general reasons; in such cases it makes sense to maintain that the preferences of the majority should prevail, just because they are the majority. I have elaborated on this type of decisions in my 'Authority, Equality, and Democracy'.

³⁹ See Marmor (2001: 160–68).

2. Enumerated Rights?

The phenomenon of moral change raises another important concern in constitutional interpretation. Very few constitutions explicitly grant to the supreme court the power to invent new constitutional rights as need arises. Constitutions tend to contain a specific list of individual (and, more recently, certain group) rights, mandating the court to enforce those rights and not others.⁴⁰ But when the constitution is relatively old, and social change brings with it new concerns and new values, social and moral pressure may build up to recognize a new basic right, not enumerated in the constitutional document.⁴¹ Should then the courts simply incorporate the new right by their own innovation, or just wait for a formal constitutional amendment? An answer to this question partly depends on the specific legal and political culture. In some countries, the constitution is not particularly rigid and constitutional amendments are more frequent. Under such circumstances, there is likely to be an expectation, and perhaps a justified one, that new rights should be recognized only through the formal amendment process. In other places, particularly if the constitution is very rigid, there may be a greater amount of tolerance in allowing the courts to innovate and extend the constitution as need arises. But the question is not only a social-political one. It also pertains to the nature of legal interpretation and the morality of constitutional law.

There are two possible cases. Sometimes the constitutional document does not mention a specific right, but it can be derived by a moral inference from those rights and values which the constitution does mention. This is the easier case: If a given right can be derived from those rights and values which are listed in the constitution, there is a great deal to be said in favor of the conclusion that the courts should draw the correct moral inference and recognize the right in question. No other stance would be morally consistent. The main difficulty concerns the second type of case, where no such derivation is possible; cases in which it cannot be claimed that the new right in question is simply deducible from those which are already recognized in the constitution. In these latter type of cases, it seems natural to claim that a recognition of a new right, un-enumerated in the constitution, amounts to changing the constitution itself, which is a legal power that the courts do not, and should not, have. Introducing any change in the constitution, this argument assumes, is exclusively within the domain of constitutional amendments

⁴⁰ Some lists of rights are more open ended and allow the courts to incorporate rights on the basis of new interpretations of existing rights. A good example is Article I of the German *Basic Law* which states that the right to human dignity is inviolable. The value of human dignity is broad and flexible enough to encompass a considerable range of rights and values thus allowing the German Constitutional Court a considerable amount of innovation.

⁴¹ A good example is the right to privacy in the US constitution. Privacy is not mentioned in the constitution, and there is certainly no right to privacy enumerated there, but as the court realized during the mid to late 1960s, a need to recognize and enforce such a right became apparent. Consequently, in series of important and rather controversial decisions, the court recognized the right to privacy as a constitutional right. See: *Griswold v Connecticut* (381 US 479, 1965); *Katz v United States* (389 US 347 (1967) and others.

164 *Constitutional Interpretation*

according to the processes prescribed by the constitution, and not something that the courts should do within their power of rendering constitutional decisions.⁴²

This sounds right, but under closer scrutiny, the argument turns out to be more problematic than it seems. The argument assumes that there is a distinction between the ordinary interpretation of constitutional clauses, which is presumed to be legitimate, and their change, which is not. But if any interpretation amounts to a certain change, then the distinction is, at best, a matter of degree and not a distinction between two kinds of activity. In other words, it is arguable that any interpretation of the constitution changes its meaning, and hence it would make no sense to claim that judges do not have the power to change the constitution. They do it all the time, and the only genuine concern is about the extent of the change which is legitimate, or desirable, under the pertinent circumstances.

I have already argued, in previous chapters, that any interpretation changes our understanding of the text, or the possible uses to which it is put. Interpretation, by its very nature, adds something new, previously unrecognized, to the ways in which the text is grasped. Let me reiterate briefly. In the ordinary use of a language, competent users just hear or read something, and thereby *understand* what the expression means. This does not amount to an interpretation of the expression. Interpretation comes into the picture only when there is something that is not clear, when there is a question, or a puzzle, something that needs to be clarified. There is always the possibility of misunderstanding, of course, but then again, misunderstanding does not call for an interpretation. We typically clarify a misunderstanding by pointing out the relevant fact, eg 'this is not what x means', or 'this is not what I meant' or such. Interpretation, on the other hand, is not an instance of clarifying a misunderstanding. You do not interpret anything simply by pointing out a certain fact (linguistic or other) about the text or its surrounding circumstances. Interpretation must always go beyond the level of the standard understanding of the meaning of the relevant expressions. When you offer an interpretation of a certain text, you strive to bring out a certain aspect of the text which could not have been grasped simply by, say, reading it and thereby understanding what the expression means. Thus, at least in one clear sense, interpretation always adds something, a new aspect of the text which had not been previously recognized or appreciated.

Does it mean that interpretation always changes the text, or would it be more accurate to say that it changes only our understanding of it? ('Understanding' here should be taken in a very broad sense, including such as what we value in the text, what uses it can be put to, and so on.) It seems natural, and generally quite right to say that it is the latter. The text, we should say, remains the same; its interpretation changes only what we make of it.⁴³ But there are two relevant exceptions. First, when we have a long series of successive interpretations of a given text, a point may be reached where the distinction between the original meaning of the

⁴² See, for example, Goldsworthy (2003).

⁴³ Cf Raz (1995).

text, and its meaning as it has been shaped by previous interpretations, may get very blurred. This is an actual, historical process, and it may, or may not, happen.

Be this as it may, the second exception is the important one: As opposed to interpretation in all other realms, legal interpretations which are exercised by the court, are *authoritative*. The court's interpretation of the law actually *determines what the law is* (that is, from the point of interpretation onwards). That is why in the legal case, authoritative interpretations of the text actually change it. When judges in their official capacity express their interpretation of the law, it is the law. Judicial decisions attach new legal meanings, and thus new legal ramifications, to the text, and in this they change, in the legal sense, the text itself, not only our understanding of it. Needless to say, often these changes are minute and hardly noticeable; at other times, they are more evident, even dramatic. But once an authoritative interpretation of a law has been laid down, the law is changed, and the new law remains in force until it is changed again by a subsequent interpretation. All this is bound to be true about constitutional interpretation as well. In the legal sense, the constitution means what it is taken to mean by the supreme or constitutional court. And as their interpretation changes, so does the legal meaning of the constitution itself.⁴⁴ Thus the thesis we examined, according to which judges have the power to interpret the constitution but not to change it, is groundless. Any interpretation of the constitution changes its legal meaning, and therefore, the constitution itself.

A note of caution may be in place here. None of the above entails that judges cannot make mistakes in their constitutional interpretation. Surely, such an assumption would be absurd. There are better and worse interpretations, and there are mistaken interpretations as well. But the fact is that even erroneous interpretations make the law. I believe that the US supreme court has made an error, a huge error, in deciding that capital punishment does not violate the eighth amendment. I think that it was a mistaken interpretation of the constitution. Unfortunately, however, it is still the law. Capital punishment is constitutional in the US legal system.

All this being said, we are still not entitled to reach a conclusion about the courts' authority to invent new constitutional rights. We have only shown that one argument against it is not sound, but other arguments may still be valid. I doubt it, however, that any general conclusion would be warranted. When a need for a certain constitutional change is present, the change ought to be made. The question of who should make it, and according to what procedures, is partly a question about the political culture of the relevant society, partly a question of institutional choice and, arguably, partly a matter of democratic theory. Perhaps in certain legal systems these considerations yield a fairly determinate conclusion. I cannot speculate on such matters here.

⁴⁴ Lawyers would consider this quite obvious: when a question arises about the constitutionality of a certain issue, it is mostly the case law that lawyers would refer to.

3. Conserving and Innovative Interpretations

In popular culture there is a conception of the courts' role in constitutional interpretation as one which moves between activism and passivity, sometimes leaning more towards the one than the other. Sometimes the courts come up with novel, even surprising decisions, at other times they manifest conservatism, passivity, or restraint. Judicial activism, however, can mean several different things.

First, there is a distinction which pertains to the content of the moral and political agenda of the court, to the extent that it has one. In this sense, we could say, for instance, that the Warren court was liberal and progressive, and the Rehnquist court is conservative. The moral and political agenda of the court, however, does not entail anything about the kind of constitutional interpretation which would be required to effectuate the relevant agenda. Sometimes, by exercising restraint or just not doing much, you get to advance a conservative agenda, at other times, you do not. The US supreme court during the *Lochner* era, for example, was activist in pursuing a very conservative agenda. It all depends on the base line and the relevant circumstances. The nature of the moral objective does not determine the nature of constitutional interpretation strategy which is required to achieve it.

Another distinction which lawyers and political theorists often talk about concerns the willingness of the court to confront opposition and engage in a conflict with the other political branches of the government or with certain segments of the population. The more the court is willing to impose its views in spite of (real or potential) opposition, the more it is an 'activist' court, we would say. But again, activism in this sense is neither related to the content of the moral views in question, nor does it entail anything about the nature of constitutional interpretation, as such. Both during the *Lochner* era, and the Warren court era, the US supreme court pursued an activist role, but driven by opposite moral/political agendas in these two cases. Furthermore, activism in this sense does not necessarily translate itself to any particular type or method of constitutional interpretation. Activism, in this sense, simply means the willingness to confront political opposition. What the opposition is, and what it takes to confront it, is entirely context dependent.

The distinction which does pertain to methods of constitutional interpretation is the one which divides interpretations of the constitution into those which conserve previous understandings of it, and those which strike out in a new direction, so to speak. Raz calls it the distinction between *conserving* and *innovative* interpretations. Both are inevitable in the interpretation of a constitution. In fact, constitutional interpretation, Raz suggests, 'lives in spaces where fidelity to an original and openness to novelty mix . . . constitutional decisions are moral decisions that have to be morally justified, and the moral considerations that apply include both fidelity to the law of the constitution as it is, . . . and openness to its shortcomings and to injustices its application may yield in certain cases, which leads to openness to the need to develop and modify it.' (1998: 180–81).

I think that Raz would admit that just about any interpretation involves both a conserving and an innovative element. On the one hand, interpretation must be an interpretation *of a text*, which entails that it must be, to some extent, true to the original, defer to the text it strives to interpret. Otherwise, as Dworkin would say, it is just an invention of a new text, not an interpretation of one. But as we have already seen, every interpretation must also have an innovative element, it must add some new insight or understanding, something which is not obviously there already. In other words, every interpretation is a mix of a certain deference to the original and shedding new light on it, and if there is a distinction between conserving and innovative interpretations, it is a distinction between the proportions of these two elements. It is a difference in degree, not a distinction in kind.

Nevertheless, there is a sense in which the distinction is very familiar. Lawyers frequently refer to 'landmark decisions', and by this they usually refer to decisions which have introduced a major change in the law or, at the very least, have clarified an important aspect of it which had been confused or unclear before the decision was rendered. These would seem to be innovative interpretations. And then, of course, there are many decisions which do not qualify as 'landmark' decisions, in that they simply reaffirm an aspect of the law which was already known. Or, if they introduced a change, it was relatively small or marginal. I have no qualms about this distinction. But it may be worth asking what is it, exactly, that the court conserves in its 'conserving interpretation'? The constitution itself? Its 'original meaning'? And what would that be? What could be meant by Raz's expression 'fidelity to the law of the constitution as it is'?

In one sense, we know the answer: faced with a constitutional case, the court may decide to adhere to its previous interpretations of the relevant constitutional issue, or else, it may decide to change it. So when we speak about conserving interpretation, what we have in mind is the conservation of its *previous interpretations* by the court. Accordingly, innovative interpretation would be a form of overruling the court's own previous interpretation of the pertinent constitutional clause. This makes perfect sense. The question is whether it would still make sense to speak of a conserving interpretation when it is not a previous *interpretation* which is supposed to be conserved, but somehow the constitution itself, or 'the constitution as it is', to use Raz's expression.

Before we explore this issue, let me reiterate a crucial point: even in constitutional law, there are 'easy cases'. Easy cases do not tend to reach constitutional courts, but it does not mean that the constitution cannot be simply understood, and applied, to countless instances in ways which do not involve any need for interpretation whatsoever. Governments operate on a day-to-day basis, elections are run, officials elected, and so on and so forth, all according to the provisions of the constitution. Almost invariably, however, constitutional cases get to be litigated and reach the supreme court in those 'hard cases' where the relevant constitutional clause is just not clear enough to determine a particular result. (Sometimes a case reaches the court in spite of the fact that there is, actually, a previous interpretation which would determine the result, but one of the parties

168 *Constitutional Interpretation*

manages to convince the court to reconsider its previous doctrine and potentially, overrule it. But even in those cases, there must be a plausible argument that the relevant constitutional clause could mean something different from what it had been previously thought to mean.) In other words, constitutional cases are almost always hard cases, arising because the constitution 'as it is' is just not clear enough. So what would it mean to conserve 'the meaning of the constitution as it is', when the litigation stems from the fact that it is not clear enough what the constitution requires in that particular case? Unless we want to revive a mythical originalism here, I think that there is nothing that a constitutional interpretation can conserve unless it is a previous interpretation. When there is no previous interpretation that bears on the case, and the case is respectable enough to have reached constitutional litigation, conserving interpretation is simply not an option because there is not anything to conserve there.

One final comment. I have been arguing here that in the realm of constitutional interpretation, there is hardly any alternative to sound moral deliberation. Constitutional issues are mostly moral issues, and they must be decided on moral grounds. On the other hand, I have also raised some doubts about the moral legitimacy of judicial review and, to some extent, about the very legitimacy of long lasting constitutions. So is not there a tension here? Yes there is, but it does not necessarily point towards a different conclusion. It would be a mistake to maintain that because the very legitimacy of constitutional interpretation is clouded in some moral doubts, judges should adopt a strategy of self-restraint, refraining from making the right moral decisions just because they might be considered bold, unpopular, or otherwise potentially controversial. Perhaps it is true that constitutional courts have too much political power in the interpretation of the constitution. But since they do have the power, they must exercise it properly. If the best way to exercise the power is by relying on sound moral arguments, then moral considerations are the ones which ought to determine, as far as possible, the concrete results of constitutional cases. Sometimes moral considerations may dictate caution and self-restraint and at other times they may not. But what the appropriate moral decision ought to be is rarely affected by the question of who makes it.

I should be more precise here. I do not intend to claim that courts should not exercise self-restraint. Far from it. There are many domains, including within constitutional law, where caution, self-restraint and avoidance of intervention is the appropriate strategy for courts to pursue. That is so, because there are many areas in which the courts are less likely to get things right than the particular agency or authority which they are required to review. This is basically a matter of comparative institutional competence. My argument above is confined to the nature of the moral considerations which ought to determine constitutional decisions. If the decision is of such a nature that it depends on relative institutional competence, then morality itself dictates that those who are more likely to have the better judgment should be left to make the relevant decision. Either way, the courts should rely on sound moral judgment.

Alternative Methods? 169

None of this means that the doubts about the moral legitimacy of judicial review should be shelved away and forgotten. Far from it. The practical conclusions which follow from such concerns could justify the need for reform and amendment of our constitutional regime. Perhaps constitutions should be made less rigid, allowing for easier amendment procedures; perhaps certain powers of constitutional interpretation ought to be shifted from the judiciary to the legislative assembly; perhaps constitutions should mandate their own periodical revisions and re-confirmation by some democratic process. I am not sure about any of these suggestions, but I am confident that there is much room for innovation and improvement.

* I am very grateful to Erwin Chemerinsky, David Enoch, Chaim Gans, Elizabeth Garrett, Alon Harel, and Michael Shapiro, for their comments on drafts of this chapter. I have also benefited from discussions of this chapter at the USC faculty workshop, McGill University Legal Theory workshop, and at the faculty of law at Tel Aviv University.

