Introduction

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Constitutional interpretation is a serious matter in any political community committed to the rule of law. Widespread disagreement about the most fundamental moral issues is to be expected, and it is bound to play itself out in the interpretation of legal rights. The essays that make up this volume – contributed by some of the most accomplished legal philosophers and constitutional law scholars in the common law world – address three pressing issues in contemporary constitutional interpretation and constitutional theory: (1) the role of moral reasoning in constitutional interpretation; (2) the legitimacy and justification of judicial review; and (3) the place of unwritten constitutional principles in the constitutional order. Although these papers reflect the jurisdictional roots of their authors, they are theoretical works of wide application rather than doctrinal accounts of the workings of the constitution of any particular jurisdiction.

I

The essays in Part I are concerned with morality and its place in constitutional interpretation.

What does it mean to interpret the constitution? Are judges engaged in an enterprise of moral reasoning, or is legal reasoning about moral questions something different? What sort of morality informs legal reasoning? What does it mean to say that a limit on a right is justified?

The focus of constitutional law scholarship is often on interpretive methodology and the well-known schools of interpretation. But as Steven D. Smith argues, the *object* of constitutional interpretation is never made clear. What, exactly, is it that is interpreted under the rubric of constitutional interpretation? We assume that we are interpreting "the constitution" – which may be written and detailed or largely unwritten – and get right into the substantive question

at hand. The focus of scholarship is usually not on what it is that we are trying to know, but on *how* we can know it.

All of the well-known schools of interpretation are vulnerable to the complaint that there is no consensus around their adoption, nor is there ever likely to be one. Each school has its proponents, but no school provides an accurate descriptive account of what is going on in constitutional interpretation; all of them are apt to some extent, but at the same time all of them are normative in nature. They are, Smith argues, best understood as prescriptions for reform. Intention-based originalists want the intention of the drafters to be the focus of constitutional interpretation; text-based originalists want the original meaning of the words of the constitution itself to be the focus; whereas nonoriginalists insist that the focus should be on the principles they suppose to be inherent in the constitution.

In light of this, how is it possible to engage in a practice of constitutional interpretation? The tentative answer from Smith is that "the constitution" is a placeholder – a "facilitative equivocation" – for a variety of interpretive purposes, one that obscures the lack of agreement about what exactly is being interpreted, and deliberately so, in order to let the interpretive enterprise proceed. The importance of the enterprise to the community is contestable, but there is no doubt that it goes on and that its consequences are often momentous.

It is often supposed that, in interpreting the constitution, judges are engaged in moral reasoning. As Jeremy Waldron argues, this gives rise to a number of questions, given that people disagree in good faith about moral issues (including rights) and there is no way in which to determine the truth in these matters – at least, no way that is, itself, beyond dispute.

Waldron notes that philosophers ascribe a wider meaning to the term moral reasoning than do legal philosophers and lawyers. Philosophers are concerned with morality as a subset of ethical reasoning, normative reasoning, or practical reasoning, whereas legal philosophers and lawyers may simply use the term to refer to anything other than black-letter legal reasoning. Waldron thinks the distinction between wider philosophical and narrower legal senses of morality may be important. Judges operate in the realm of government and in the context of political issues; they decide for society rather than simply as individuals. The question, then, is whether the philosopher's conception of moral reasoning is appropriate for the sort of practical reasoning with which judges must be concerned.

The need for judges to pay attention to institutional factors often comes at the expense of their ability to engage with the primary moral issue before them, as litigation over assisted suicide demonstrates. No one doubts that assisted suicide has a moral dimension, but the legal questions it raises concern institutional

roles – normative questions about institutional responsibility in a constitutional democracy rather than a moral question of the sort over which philosophers have relevant expertise.

Waldron thinks that conceptions of adjudication wrongly assume that the component parts of the judicial task – understanding and applying the law, on one hand, and engaging in moral reasoning on the other – can be separated cleanly. What if, he asks, the task of moral reasoning is always "contaminated" by the legal processes such as applying rules, deferring to text, and following precedent? If this is so, the more pervasive the involvement of moral reasoning in the judge's task, the less relevant the philosophical ideals for moral reasoning will be. In other words, we should not assess judicial performance having regard to the standards of moral philosophy no matter how important moral reasoning appears to be in a particular context, because judges do not engage in *pure* moral reasoning. They engage in *legal* reasoning, and legal reasoning is neither pure moral reasoning nor is it like reasoning in Rawlsian reflective equilibrium. Judges are constrained in ways that the method of reflective equilibrium is not: They are constrained by precedent, doctrine, and other things that flow from authoritative legal text such as constitutions. Even accepting that legal reasoning may have a moral component, philosophical ideals are not apposite.

According to Waldron, if we think that moral reasoning about rights is important, then we may need a venue in which it can occur, uncompromised by the sorts of things with which legal reasoning is properly concerned. It matters whether the moral reasoning is purely personal or is done in the name of society, because each must be assessed according to different standards. Contrary to the argument W.J. Waluchow makes in his paper, however, it does not follow that judges are better at moral reasoning, even if we mean reasoning in the name of society, involving an attempt to keep faith with society's existing commitments. There are other ways of reasoning in the name of society and these must be compared.

Waldron asserts that everyone agrees that some morally important issues should be addressed by the legislature, even if its decisions are subject to judicial review. When legislatures address a problem, they, too, reason in the name of society. Unlike courts, however, they are not constrained by legalisms – text, doctrine, and precedent. They may consider the matter directly and, to the extent that legislators reason on their own behalf, they do so in the context of hundreds of others doing the same thing, all of whom are attempting to persuade the others to support their positions.

There are, then, two ideals of moral reasoning in the name of society on important moral issues: one legislative, and one judicial. Both are bound to operate imperfectly. Which ideal should be used to judge an institution's moral

reasoning? And which institution should we choose to do the moral reasoning? It is usually argued that the decision to adopt a bill of rights presupposes that the judiciary should make the relevant decisions: We have decided to treat rights issues as legal issues, so judicial reasoning is required. But only in a formal sense do bills of rights govern the outcome of rights disputes. In practice, their text does not settle any of the relevant matters, usually because they were drafted in such a way as to finesse the major disagreements that are likely to arise. Bills of rights bear on these matters, to be sure, but they do not resolve them in a manner that is beyond reasonable dispute. To commit these matters to the judiciary is to discourage their confrontation by our legislators. Better, Waldron argues, to use the legislative model of moral reasoning than the judicial one to ensure that the issues are addressed on the merits, rather than get bogged down in interpretive disputes about the meaning of the constitution. From Waldron's perspective, if we want real moral deliberation on rights questions, our job is to make legislative debate the best it can be.

W.J. Waluchow takes a different tack, outlining a conception of morality that *ought* to be relevant to judges in interpreting a bills of rights – something between "Platonic morality," on one hand, and the morality of the community on the other, both of which he regards as problematic. The relevant conception of morality, which Waluchow dubs the "community's constitutional morality," includes the set of moral norms and considered judgment that are properly attributed to the community as a whole, as reflected in the community's constitutional law and institutions. Significantly, and contrary to Waldron, he argues that judges are better placed than legislators to reason from this morality.

Waluchow's argument depends on the existence of an "overlapping consensus" in the moralities of the communities in a multicultural society. In this case, the consensus concerns not particular judgments about rights, but, instead, broader premises – the sort of vague commitments that characterize agreement to bills of rights that include such things as equality, due process, and so on. This overlapping consensus may not be apparent; he stresses that it may be recognized only upon careful reflection. He invokes John Rawls' reflective equilibrium concept in arguing that responsible moral decision-making requires that we reconcile our general moral norms so that they are consistent, rather than in opposition to one another, and in harmony with our considered judgments about particular cases and types of cases.

This is a large task, and leads to what Waluchow considers the main problem: Having made commitments to constitutional morality, members of the community will, from time to time, embrace opinions that are at odds with their broader commitments, properly understood. He observes that this problem is uncontroversial when speaking of personal morality, yet it becomes

controversial when moral rights acquire legal force in bills of rights. Judges are often criticized for making decisions at odds with the community's current moral views. It is forgotten that their decisions are designed to give effect not to the community's moral views or opinions, but instead to the larger commitment the community has made to its constitutional morality – something that Waluchow thinks should be clear if the requirements of reflective equilibrium are met.

Waluchow uses the controversial example of same-sex marriage to illustrate this point. In his view, opposition to same-sex marriage is tantamount to racial bigotry and sexism, practices that all agree are condemned by our bill of rights commitments. The problem is that opponents of same-sex marriage have failed to understand their own constitutional commitments. Judicial review is salutary, then, because judges are well placed to understand the community's constitutional commitments and to identify their implications, and may perform an important role in educating the community in the process.

Waluchow assumes that ascertaining the community's true moral commitments is not significantly different from what judges normally do in common-law cases and, in this regard, his views are quite different from those of Waldron. To the extent that Waluchow acknowledges a need to "fill the gaps," he is content to have judges do it because he regards common-law methodology as superior to legislative action. He suggests, again contrary to Waldron, that judicial decisions may well be more acceptable than legislative decisions to those who lose out, and concludes with a paradox: Not only may judicial review be consistent with democracy, it may well be one of its requirements.

Judicial review is all about assessing the nature and quality of the reasons proffered in support of state action. In many jurisdictions, there is a formal division between the tasks of defining rights and assessing justification for limiting them. A two-stage approach to rights protection is taken, and Bradley Miller argues that this is problematic for a number of reasons.

The separation of definition and justification in bills of rights such as the *Canadian Charter of Rights and Freedoms*, the *New Zealand Bill of Rights Act*, and the *South African Bill of Rights* renders the formal definition of rights far less important than the highest court's approach to the concept of reasonable limits on those rights. Freedom of expression is the best example of this: It is easy for courts to expound on the importance of expression and commit to expansive interpretations of it only to limit the extent of the *freedom of* expression at the second stage of the inquiry, when justification for limits on particular forms of expression is assessed.

The separation of definition and justification and the establishment of a presumption against limits on rights (and concomitant burden of justification

on the state) is thought by many to be a virtue of two-stage bills of rights, but Miller argues that this is based on a clear misunderstanding. As American experience demonstrates, it is not the case that in the absence of a reasonable limits provision, bills of rights must protect rights absolutely. Moreover, the separation of definition and justification causes conceptual difficulty. It encourages the courts to define rights in such a way as to leave something for the justification clause to do, and causes courts to misdescribe the nature of reasoning with constitutional rights. It is commonly thought, for example, that reasonable limits provisions allow infringements on rights to be upheld, when what is really happening is that the claim of right is defeated in view of the nature and force of the reasons proffered in support of the state's action.

There are further problems. The separation of definition and justification may cause contextual factors that should be relevant to determining whether or not the right has been infringed to be excluded from consideration at the first stage of the inquiry. Alternatively, the concepts of definition and justification inquiries may collapse into each other. It would be one thing if there were a meaningful distinction between matters of principle and policy, as Ronald Dworkin has argued, but Miller eschews this distinction. Following John Finnis, he advances a nonaggregative account of interests in which legislating for the common good is a matter of securing the background conditions necessary for each person to pursue his own good, rather than securing the aggregate interests in the community. Thus, both sides in a dispute may be speaking the language of rights.

Using the Supreme Court of Canada as his example, Miller argues that "reasonable limits" jurisprudence should not be understood as simply a means of giving effect to majoritarian preferences. Properly understood, it is a means of establishing the common good for the community, which includes the rights claimant. It does not make sense, then, to approach rights as inherently more important than anything the state is pursuing, such that the state should always face a difficult burden of justification. Everything depends on whether or not the state is pursuing a collective interest that can be supported by a sound moral and political philosophy.

This leads Miller to consider the "dollars vs. rights" controversy. In the early days of the Canadian Charter, the Supreme Court of Canada incautiously suggested that fiscal concerns could never be a relevant reason for limiting rights. This was based on the hostility of the Court to aggregative interests when rights were at stake. But, Miller argues, a decision to spend or not spend money is not an end in itself; it is instrumental to some purpose, and this purpose must be considered in order to determine whether or not a limit on

a right is justified. In order to do this, the moral evaluations behind the fiscal decision must be considered.

Having regard to the legislature's responsibility to legislate for the common good – understood as providing individuals with the conditions necessary for them to pursue their own good – on Miller's account, the question should be whether or not the reasons for legislating were strong, and the government has not treated any person or group wrongly in making its decision. If the reasons are strong, and the government has not acted improperly in the latter sense, its decision is justified and there is no reason to attempt to limit the impact of the decision by describing the province's fiscal situation as an "emergency." There may be no reason to grant automatic priority to Charter rights over the justificatory values inherent in the Charter's reasonable limits provision. Fiscal justification for limiting rights is inadequate per se, but an argument that situates a limit on a right in the context of the requirements of a free and democratic society is not, and fiscal consequences are not irrelevant to that context.

II

The essays in Part II are concerned with the perennial problems of legitimacy and justification where judicial review is concerned.

How does judicial review fit into a democratic constitutional order? Do the precepts of liberal constitutionalism demand it? If so, are attempts to limit its scope incoherent? How should a jurist with misgivings about the legitimacy of judicial review approach the task of judicial review? Is there a principled basis for judicial deference?

Larry Alexander attempts to separate the basic questions. Constitutions tend to be written, are generally understood as higher forms of law, and are usually entrenched against majoritarian amendment or repeal. But the line between constitutional and ordinary forms of law is not clear. The UK has no formal constitution, but appears to have a constitution nonetheless. The people accept as much, and this is what counts. Constitutions rest on acceptance, not formality; they are, on Alexander's account, not democratic but anarchic. The real question is not whether we should have one, but instead whether existing arrangements should be formalized such that they are removed from control by democratic majorities.

Alexander assumes that judicial review is a corollary of the decision to have a written constitution, and that judges are better equipped to interpret constitutions if interpretation involves discerning their intended meaning. To object

to judicial review is, he suggests, to object to the decision to constitutionalize things in the first place. This is all controversial, but Alexander acknowledges that he is referring only to constitutions with determinate rules, rather than indeterminate standards. The latter call for evaluative judgments, and the case for judicial review in regard to these is weaker – yet may still be strong, in his view.

The case for including rights in a constitution depends on whether the relevant rights are legal rights or pre-existing moral rights. Legal rights must be embodied in a rule or standard, but a standard requires some moral reference point, and if there is no moral right, none may exist. It might be thought desirable to entrench specific rules, for example, as corollaries to the requirements of democratic government. Judicial review can work well for these, but if instrumental rights are protected in indeterminate standards, then evaluation will be required, and it will be controversial.

The case for including moral rights in a constitution, and determining the way in which they should be enforced, occupies the bulk of Alexander's attention. He identifies the problem from the outset: Moral rights have to be constrained by the institutional provisions of the constitution, lest they overwhelm them. The equal protection clause in the Fifth Amendment cannot be invoked, for example, to declare the Senate unconstitutional on the basis that it denies equality among voters by basing membership on states rather than population. For Alexander, it follows that moral rights can never be constitutionalized to their full extent, whatever might have been intended, and that our understanding of constitutionalized moral rights must be subordinated to the decisions of the body charged with interpreting them. If a court is to have the final say, then its decisions must be seen as constitutionally controlling even if they are thought wrong.

In short, there are real limits on our ability to constitutionalize moral rights. But, he notes, we are subject to real moral rights in any event. They are superordinate no matter how we purport to deal with them in our constitution. The question is not *whether* they should bind us, but *how* we should be bound by them. The debate about constitutionalizing moral rights is a debate about who should decide what those moral rights require.

The relative ease with which legislative decisions can be reversed is not an argument in support of legislative supremacy, in his view, unless it *should* be easier to reverse judicial decisions, and that is the very question in issue. But, as Alexander notes, if judges are better at settling moral questions – a point on which he remains agnostic – there is no reason why their decisions should be more easily overturned. On the contrary, there is every reason to make it difficult to do so.

If we assume that there are right answers to moral questions, and the judiciary is well placed to answer them, does a majority have a right to be morally wrong in any event? Alexander argues that democratic majorities aren't all that they are cracked up to be; they are, at best, a majority of legislative representatives, and their view may not reflect a real majority in the community in any event. But even assuming the superiority of the legislature's democratic credentials *vis a vis* the court, Alexander insists that they do not have a right to be wrong.

He concedes, as Waldron argues, that the U.S. Supreme Court's forays into moral questions constitute less-than-compelling reasons to prefer judicial resolution; that court, like most others, has a tendency to respond with legalistic reasoning rather than moral deliberation. But Alexander turns the point around, illustrating some of the matters that need to be resolved if legislatures are to be supreme in matters of moral deliberation.

How are legislatures to be constituted? More broadly, he asks why it should be assumed that democratic resolution of moral issues should take place at the national level. Given that legislatures are not the only bodies with democratic credentials, why favour them over other bodies – international or otherwise – with such credentials? And given that the franchise for electing a legislature is subject to extensive restrictions, how does this affect the case for legislative supremacy in any event? Given that moral decisions are not either/or propositions, how are problems of intransitivity to be avoided? Is it legitimate to vote based on self-interest or is a broader judgment required? Finally, how are process-related rights that are preconditions to democratic decision-making to be protected?

According to David Dyzenhaus, "constitutional positivists" like Jeremy Waldron and Jeffrey Goldsworthy – both of whom reject the notion that judges should have the final say on human rights matters, rather than the idea of human rights – are in an impossible position. Waldron's argument focuses on jurisdictions with strong-form judicial review, but Dyzenhaus notes that the distinction between strong and weak-form review depends upon the way in which the public perceives what the judges say. If legislators amend legislation to conform to judicial interpretations, there is no meaningful distinction. Additionally, Dyzenhaus notes that interpretive commands in weak bills of rights turn out to be tantamount to instructions not to apply inconsistent legislation – the very sort of power judges have in strong review models. So Waldron cannot assume that weak-form judicial review is not problematic. Moreover, his concession that judicial review of executive action is appropriate gives away too much.

On Dyzenhaus's account, Waldron's core case against judicial review of legislation amounts to the claim that, given the pluralism of society – given what

Waldron describes as good faith disagreement about the meaning of the rights we cherish – we should prefer legislative interpretations of rights to judicial interpretations because legislative interpretations have democratic credentials, and legislatures have the capacity to engage in the sort of deliberation that courts, confined by the circumstances of litigation, do not.

Dyzenhaus disagrees with this argument from top to bottom. In his view, the establishment of a human rights culture – or any culture of justification that subordinates majoritarian settlement – is problematic for constitutional positivists because it leads inevitably to the establishment of strong-form judicial review. All that remains is for them to counsel judicial restraint and, according to Dyzenhaus, there is no principled basis for doing so. In any event, by this point, the game has been lost; to argue about whether or not a judge has gone too far is to presuppose the legitimacy of judicial review.

Dyzenhaus then turns his sights on Jeffrey Goldsworthy, who has argued in favour of a moderate form of originalism. According to Dyzenhaus, no term in a constitution – not even a boilerplate term like "peace, order, and good government" in the Australian Constitution – cannot be given a new meaning by courts in the right circumstances. A judge could invoke the term "good government," he argues, to limit the power of the Australian Parliament if it were to attempt to change the system of government by installing a dictatorship.

Judges committed to constitutional positivism are, on Dyzenhaus's account, attempting to do the impossible. They are committed to recognizing a legislative monopoly on law-making, but they are operating in a common-law legal order. The best they can do is to attempt to curb judicial activism, which Dyzenhaus defines as the propensity of judges to affirm their interpretation of a bill of rights over the legislature's. Even here, however, they are unlikely to be successful. Indeed, to the extent that judges discover inconsistency between legislation and their understanding of a bill of rights, they will, themselves, be activists.

The problem, in short, is that constitutional positivists have been overtaken by events. As Dyzenhaus puts it, "their understanding of their obligation of fidelity to law is inconsistent with many of the pieces of constitutional furniture in place." In effect, he challenges them to acknowledge the need for the extensive legal reform he says is necessary to make their views tenable.

For her part, Aileen Kavanagh does not accept that exercises of restraint in judicial review are necessarily unprincipled. The concept of deference is under-theorized, however, and she asks not only why judges sometimes defer to the elected branch of government, but whether or not there are circumstances in which they should.

Deference, on Kavanagh's account, is a matter of the court assigning weight to the judgment of the elected branch when that judgment is at variance with its own, or when the court is uncertain about the correctness of its judgment.