

TWO MODELS OF CONSTITUTIONALISM AND THE LEGITIMACY OF LAW: DICEY OR MARSHALL?

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A INTRODUCTION

In this paper, I compare two models of constitutionalism. The first model can be associated with the main tradition of American constitutionalism, at least since Chief Justice Marshall's reasoning in *Marbury v Madison*.¹ I shall characterize it as the 'American' or 'Marshallian' model. The second model can be associated with the main tradition of British constitutionalism, at least since Albert V Dicey's theory expounded in his *Introduction to the Study of the Law of the Constitution*.² I shall characterize it as the 'British' or 'Diceyan' model.³ The distinction I wish to emphasize is the following: while the first model entails that the basic rules and principles of constitutional law should be conceived as the *source* of (what should be accepted as) legitimate governmental action and decision, the second model entails that they should be conceived as the *consequence* of (what should be accepted as) legitimate governmental action and decision. My purpose is to give some reasons to accept not only that the British or Diceyan model makes sense from a descriptive and from a normative point of view, but that it makes better sense than the American or Marshallian model from both points of view. If the argument is sound, it may contribute both to the rehabilitation of Dicey's constitutionalism and to a better understanding of contemporary practice of constitutional adjudication, especially in those countries that share a British constitutional heritage.⁴

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¹ 5 US (1 Cranch) 137 (1803) (US Sup Ct).

² AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan, London 1959).

³ One might wish to describe differently the American and British models. Up to a certain extent, the characterization depends on the particular features one wishes to emphasize for a given purpose. Moreover, my description of the models do not claim to represent American or British constitutionalism as they 'really' are or what would be considered as contemporary dominant views of the two models.

⁴ In my view, the Diceyan model of constitutionalism fits the contemporary practice of constitutional adjudication in many Commonwealth countries, such as Canada, Australia, South Africa, New Zealand and India. I also believe that it fits the practice of constitutional adjudication in many countries that are not members of the Commonwealth, such as Germany, Italy and, paradoxically, the United States. This paper, however, is not an essay in comparative constitutional law. I concentrate on Canadian practice, assuming it to be paradigmatic (but see n 17 and n 47, below). Moreover, this paper is not an essay on the concept of legitimacy. For my purposes, it is sufficient to say that I use the concept in its moral sense. Moral legitimacy is a matter of a person or a group of persons claiming to have authority or exercising effective power over individuals such that they are morally justified to command in general or to issue a particular command. Moral legitimacy is established by virtue of

B TWO MODELS OF CONSTITUTIONALISM

The American model of constitutionalism, as I shall call it, refers to the conception of constitutionalism one may legitimately associate with Chief Justice Marshall's reasoning in *Marbury*.⁵ This model has probably become dominant within contemporary normative constitutional theory. It expresses two main ideas. First, it expresses the idea that a written constitution is legally foundational. The constitution constitutes the 'supreme law of the land' and provides the criteria of legal validity of all political action and decision. It follows that all governmental powers in the State, be it the judiciary, the legislative or the executive, ultimately owe their legal existence, scope and force to the terms of the written constitution.⁶ Second, it expresses the idea that the supremacy of the written constitution has been made morally legitimate by virtue of some original act of will or consent by a sovereign people. In Marshall's reasoning, for example, the people are conceived as having an 'original right' to establish at will their own constitution and the expression of their will is found in the written Constitution.⁷ It follows that everything that is done in accordance with its terms is morally authorized and, consequently, should be accepted as legitimate in principle. Correspondingly, everything that is inconsistent with its terms is not made under its authority and, consequently, should not be accepted as legitimate in principle.⁸

It follows from the Marshallian model that the written constitution, being the expression of the will of the sovereign people, should be conceived as the very *source* of what should be accepted as legitimate governmental action and decision. By providing the conditions governmental action and decision must satisfy in order to be accepted as constitutionally valid, the written constitution supplies the conditions such action and decision must satisfy in order to be accepted as morally legitimate. Thus if the constitution provided that 'no legislation is valid law unless

formal, procedural or substantive morally justified conditions that an authority or power must practically satisfy. For a remarkable recent discussion on three concepts of legitimacy, see R Fallon, 'Legitimacy and the Constitution' (2005) 118 *Harvard L Rev* 1787.

⁵ See (n 1), above.

⁶ This assertion would also apply to legal powers that are not explicitly mentioned in the text, such as 'residual' or 'reserved' powers, and to legal rights such as 'pre-existing' rights provided that they are referred to through a general constitutional provision. See, for example, the Ninth and the Tenth Amendments to the American Constitution; Constitution Act 1867 ss 91 and 92(16) (30 & 31 *Vict c 3*) (UK); Canada Act 1982 c 11 sch B paras 26 and 35 (UK).

⁷ *Marbury* (n 1) 176, 177: 'That the people have an original right to establish for their future government such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, . . .'

⁸ I described the American model in greater detail in LB Tremblay, '*Marbury v Madison* and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 *George Washington Intl L Rev* 515.

it possesses such and such democratic pedigree', the legitimating force of legislation that would satisfy this condition would owe nothing to the fact that it would be consistent with some independent moral principle of democracy. The legitimating force would merely derive from its conformity with the provisions of the constitution. The same judgment would follow if the constitution allowed a legislature to do horrible things; a valid statute prescribing doing such things would be conceived as morally permissible in principle and entitled to judicial enforcement, merely by virtue of its conformity with the constitution.

This first model explains why the institution of judicial review of the constitutionality of governmental action and decision can be accepted as morally legitimate. Governmental institutions are conceived as nothing more than 'trustees' or 'agents' of the sovereign people. The scope of their legitimate authority is accordingly conditioned by the original will expressed in the written constitution.⁹ Consequently, when the judiciary reviews the constitutionality of legislative and executive acts and declares invalid or inoperative such and such acts inconsistent with the terms of the Constitution, it actually upholds the will of the people.¹⁰

The British model of constitutionalism, as I shall call it, refers to the conception of constitutionalism one may legitimately associate with Albert V Dicey's theory of the British Constitution, although my description goes much further than what Dicey would probably have conceded. In his *Introduction*, published by the end of the 19th century, Dicey argued that the British Constitution had three main characteristics: the sovereignty of Parliament, the rule of law and constitutional conventions. With respect to the rule of law, Dicey argued that this concept included three distinct though kindred conceptions. The first two are well-known: (1) absence of arbitrariness and exclusion of wide discretionary power through legality and (2) equality before the law. The third meaning is much less known. It expressed what I take to be Dicey's model of constitutionalism. It expressed the idea that the law of the constitution is the consequence of the rights of private persons, as determined by the courts in particular cases. Dicey wrote:

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to per-

⁹ *Marbury* (n 1) 176, 177: 'This original and supreme will organizes the government, and assigns to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void'.

¹⁰ *ibid* 177, 178: 'It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply'.

sonal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts . . . [The constitution is] the fruit of contests carried on in the courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law. . . . [I]n England, the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals. . . . [W]ith us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; . . . thus the constitution is the result of the ordinary law of the land.¹¹

These passages are open to interpretation. In Dicey's mind, they certainly meant that British judges had been committed to enforce certain basic individual rights against governmental action and decision on the ground that these rights were protected by the 'ordinary law of the land'. But the ordinary law of the land was for the most part the common law, that is, the laws and customs declared or recognized to be law by judges. The ordinary law of the land, thus, partly constituted a set of 'judge-made' law. It follows that the basic rules and principles of constitutional law referred to by Dicey were the consequence of some judicial commitment to uphold a set of rights, protected by a kind of law elaborated by judges themselves, against governmental action and decision. Accordingly, the constitution was a 'judge-made constitution'; its formal source was judicial decisions.

Dicey's project was descriptive. He wished to state the positive laws of the constitution as they were, to arrange them in their order, to explain their meaning, to exhibit their logical connection and to discuss their formal sources.¹² As a nineteenth century legal positivist, he was not concerned with the normative constitutional theory that could have guided judicial practical reasoning in the process of constitution-making.¹³ This is why he explained the judicial attitude in terms of commitment toward certain rights and freedoms protected by the 'ordinary law of the land'. But this explanation remains unsatisfactory. For one may legitimately ask: How can we explain this judicial commitment toward the protection of individual rights against governmental action? How could we make practically intelligible the fact that judges would have been committed to uphold certain

¹¹ Dicey (n 2) 195, 196, 197–8, 203, 203.

¹² Dicey (n 2) 32–4. Yet, Dicey believed that the British Constitution was a good constitution. For example, he argued that basic political rights and freedoms were better protected in Great Britain by the ordinary law of the land through common law remedies in the courts than by written constitutions that declare rights but do not provide remedies or that could be suspended or taken away by the constituent.

¹³ Dicey (n 2) 1–35. On Dicey's legal positivism, see LB Tremblay, 'La théorie constitutionnelle et la primauté du droit' (1994) 39 McGill LJ 101.

rights and freedoms rather than upholding governmental power to override any inconsistent individual interest?

As I argued elsewhere, I submit that we can make it practically intelligible if we postulate that the judiciary has been committed to maintain and uphold the 'conditions' governmental action and decision must satisfy in order to be accepted by the courts as politically legitimate and, consequently, as entitled to judicial enforcement.¹⁴ Accordingly, Dicey's assertion that the law of the constitution was the consequence of the rights of private persons, as determined by the courts in particular cases, should be understood as meaning that the law of the constitution was the *consequence* of the 'conditions' governmental action and decision must satisfy in order to be accepted as politically legitimate and entitled to judicial enforcement, as determined by the courts in particular cases. In this sense, Dicey's model entails that the law of the constitution should be conceived as the consequence of (what should be accepted as) legitimate governmental action and decision. The reasoning is the following: by providing the conditions governmental action and decision must satisfy in order to be accepted as politically legitimate and, consequently, as entitled to judicial enforcement, the judiciary supplies the conditions such action and decision must satisfy in order to be accepted as constitutionally valid.

Such model of constitutionalism must presuppose some judicial commitment toward a certain normative conception of political legitimacy and, depending on the nature of this normative conception, the nature of the law of the constitution may vary. Thus if the normative conception of political legitimacy provided that the government can do anything at will, including horrible things, a governmental decree prescribing doing such things would be accepted by judges as morally permissible in principle and entitled to judicial enforcement. The courts would accordingly recognize the normative force of the decree. Similarly, if the normative conception of political legitimacy provided that 'no governmental action limiting personal freedom is morally legitimate unless it can be justified by some legal warrant or authority', the legitimating force of the legal means for the enforcement of this principle (the writ of habeas corpus, redress, for example) would owe nothing to the fact that they would derive from an existing written constitution. Their legitimating force would derive from their conformity with the independent principle postulated by the normative conception.

The basic law of the constitution is therefore derivative and its content is a function of the substance of the normative conception of political morality. Correspondingly, this conception of political legitimacy is logically antecedent to and independent of the resulting constitutional norms, for it is by virtue of this conception that judges can construct or determine the nature and content of constitutional norms. Of course, this does not tell us what this conception has been or

¹⁴ LB Tremblay, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law' (2003) 23 OJLS 525, 547–8.

what it should be, and moreover, this does not tell us how judges have proceeded or should proceed in order to construct it. However, if Dicey's description were true, the normative conception of political legitimacy that might have guided the judiciary should be associated with what has become known as the doctrine of constitutionalism. It has supplied certain conditions of reasonable governance and decent society, such as respect for certain individual rights and freedoms.¹⁵

C THE DESCRIPTIVE FORCE OF THE MARSHALLIAN MODEL OF CONSTITUTIONALISM

From a descriptive point of view, the American or Marshallian model of constitutionalism does not adequately fit the contemporary practice of enforcing a written constitution through the institution of judicial review. There is a gap between the constitutional system the American model purports to support and explain and the operative principles, values and norms by which the process of judicial review actually operates. The American model postulates that judicial review of the constitutionality of governmental action and decision can be accepted as legitimate provided that judicial decision to invalidate such action or decision is justified by the will of the original people, as expressed in the written constitution. For this reason, the model necessarily entails some version of what American scholars have called 'originalism'.¹⁶ It postulates that the reasons on the basis of which the courts may legitimately determine the legal validity of governmental action and decision must have been somewhat 'intended' by the original people. Accordingly, it presupposes a set of 'original' constitutional norms fixing the objective constitutional meaning and a kind of rational methodology that makes it possible for the courts to ascertain them.¹⁷ Yet, contemporary practice of judicial review is generally inconsistent with originalism.

In what follows, I substantiate this claim through a few examples drawn from Canadian constitutional law. I could have taken them from many other Commonwealth jurisdictions, such as Australia, India and South Africa, as well as from many non Commonwealth jurisdictions including the United States. But I shall not describe in any detail the actual form of constitutional adjudication in

¹⁵ In the 18th century, H St John Bolingbroke wrote: 'By constitution we mean . . . that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed'. Quoted in SM Griffin, *American Constitutionalism From Theory to Politics* (Princeton University Press, Princeton 1996) 11. See generally Tremblay (n 14).

¹⁶ Of course, the true nature of the original constitutional norms and the nature of true originalist methodology is a matter of debate among specialists. But the significant point is the formalist claim that no judicial interpretation and application of the written constitution is legitimate unless it is made in accordance with the principles (rules, purposes, values, standards) intended or understood by the original people. See Tremblay (n 8) 520-1.

¹⁷ *ibid* 520.

Commonwealth and non-Commonwealth jurisdictions; this would constitute variations on a comparative law theme. My immediate purpose is to argue that the American or Marshallian model of constitutionalism does not fit the actual practice of constitutional adjudication, assuming that this practice is generally known by the readers and that Canadian constitutional jurisprudence is somewhat paradigmatic.¹⁸

After 1982, Canadian constitutionalism has come to be generally conceived as a version of the American model of constitutionalism. In 1982, the United Kingdom Parliament enacted the Canada Act which included, among other things, a new 'local' procedure for the amendment of the Canadian Constitution and the Canadian Charter of Rights and Freedoms.¹⁹ The main purpose of the new procedure of constitutional amendment was to terminate the legal authority of the Imperial Parliament over Canada. Since Canada would now have the entire legal control over the content of its Constitution, this Constitution would now be the Constitution of the 'people' of Canada. It would become 'their' Constitution. The original name of the Constitution, the British North America Act, was changed to Constitution Act, 1867,²⁰ suggesting that the text should not be referred to as an old Imperial Act, but as the constitution of an independent and sovereign country. One of the main purposes of the Charter was to unite the Canadian people around a set of fundamental substantive values.²¹

Formally, Canadian constitutionalism came to be conceived by judges in terms similar to those of the American model of constitutionalism.²² In the very first case dealing with the Charter of Rights and Freedoms, *Law Society of Upper Canada v Skapinker*,²³ the Supreme Court denied any special legitimating force to the fact that the written Constitution had been enacted by the United Kingdom

¹⁸ For a general introduction to contemporary practice of constitutional adjudication see, for example, N Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (CUP, Cambridge 2002). See, more specifically, T Blackshield, G Williams and BF Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, Annandale, New South Wales 1996) and P Hanks, P Keyzer and J Clarke, *Australian Constitutional Law: Materials and Commentary* (7th edn Butterworths, Sydney 2004) (for Australia); HM Seervai, *Constitutional Law of India: A Critical Commentary* (3rd edn Tripathi, Bombay 1983); SP Sathé, 'Judicial Activism: The Indian Experience' (2001) 6 Washington U J of L & Policy 29 (for India); P de Vos, 'South Africa's Constitutional Court: Starry-Eyed in the Face of History' (2001–2002) 26 Vt L Rev 837 (for South Africa). For an introduction to judicial adjudication in the area of fundamental values in New Zealand, see PA Joseph, *Constitutional and Administrative Law in New Zealand* (2nd edn Brookers, Wellington 2001); P Rishworth, G Huscroft, S Optican and R Mahoney, *The New Zealand Bill of Rights* (OUP, Oxford 2003). For an introduction to the practice of constitutional adjudication in the US, see LH Tribe, *American Constitutional Law* (3rd edn Foundation Press, New York 2000).

¹⁹ Constitution Act 1982 pt 1 (being Canada Act 1982 sch B) c 11 (UK) [hereinafter 'the Charter'].

²⁰ 30 & 31 Vict c3 (UK) reprinted in RSC 1985 app II no 5 [hereinafter 'Constitution Act 1867'].

²¹ See PH Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 Canadian Bar Rev 30.

²² See Tremblay (n 8) 526–9: 'Indeed, it has become a daily experience to hear lawyers, politicians, public figures, or journalists speaking about the "Americanization" of the Canadian Constitution'.

²³ [1984] 1 SCR 357.

Parliament. This fact, the Court held, had a 'mere historical curiosity value'.²⁴ It was a formal process of constitutional amendment that had lost relevancy 'on the ultimate adoption of the instrument as the Constitution'.²⁵ The written Constitution should be seen as 'a part of the constitution of a nation'.²⁶ One year later, in a case dealing with the supremacy of the Constitution and the legitimacy of judicial review, the *Motor Vehicle Act (BC) Reference*,²⁷ the Supreme Court clearly said that:

It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.²⁸

Indeed, the expression 'elected representatives of the people of Canada,' as opposed to the Imperial Parliament' emphasized the legitimating source of the Charter, as opposed to its legal source. More recently, in a case calling into question the legitimacy of the Canadian Constitution, the *Quebec Secession Reference*,²⁹ the Supreme Court stated that the proclamation of the *Constitution Act, 1982* was legitimate, although formally enacted by the Parliament of the United Kingdom: 'the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution'.³⁰ As for the legitimacy of the Constitution Act 1867, the Court asserted that this Act, although legally instituted by the Imperial Parliament, resulted from 'an initiative of *elected representatives of the people* then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat'.³¹

This was significant. The 'original' will, consent or decision of the elected representatives of the people would have conferred the Constitution its legitimating force. Naturally, thus, the basic rules and principles of the written Constitution came to be seen as the *source* of legitimate governmental action and decision.³² It

²⁴ [1984] 1 SCR 365.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *Motor Vehicle Act (BC) Reference* [1985] 2 SCR 486.

²⁸ *ibid* 497.

²⁹ *Reference Secession of Quebec* [1998] 2 SCR 217.

³⁰ *ibid* [47].

³¹ *ibid* [35] (emphasis added). Not only were the resolutions that subsequently became the British North America Act approved by local delegates, but they were confirmed by Local Parliaments before being translated into law by the Imperial Parliament.

³² In the *Quebec Secession Reference* (n 29) [72], for example, the Supreme Court asserted that Canadian laws and political institutions have no other source, authority and legitimacy than what is provided for in the Constitution and that the legitimacy of the Constitution derived from the people: 'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. . . . This Court has noted on several occasions that with the adoption of the *Charter*,

should have followed, then, that the process of constitutional interpretation should have come within originalism: the constitutional norms which establish the legitimate sphere of governmental actions and decisions and on the basis of which the court could legitimately determine their validity should have been intended by the original will, consent or decision of the elected representatives of the people. But this has not been the case. The practice of constitutional adjudication in Canada has been radically inconsistent with originalism.

In its very first decisions applying the Charter, the Supreme Court explicitly rejected originalism.³³ In 1985, for example, the Court explicitly stated that the meaning of the Constitution, that is, its substance or its norms, should not derive from the original intention of the bodies which adopted the Charter or from the original meaning as understood at the moment of adoption.³⁴ The Court considered various epistemological reasons, such as the ambiguity of the 'historical usage of the terms used',³⁵ the 'inherently unreliable' character of the relevant statements and speeches by prominent figures³⁶ and the fact that the 'intent' of the legislative bodies that adopted the Constitution was 'nearly impossible of proof'.³⁷ However correct such arguments could be, they made the Court's position quite paradoxical. If judicial review based upon the written Constitution is conceived as legitimate for the specific reason that the Constitution has been willed, consented to or decided by the elected representatives, then the norms that may legitimately be used as judicial reason to invalidate governmental action and decision must be inferred from what has been willed, consented to or decided, that is, the original norms of the Constitution. But if the epistemological reasons are correct and, accordingly, the 'discovery' or 'reconstruction' of such norms is impossible, one may wonder what legitimating force original consent really has?

Secondly, the Court decided that constitutional interpretation must be progressive. This approach even constituted an independent reason, perhaps the most important, to reject originalism: constitutional meaning should not be 'frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs'.³⁸ In the Court's opinion, constitutional values must grow and develop 'over time to meet new social, political and historical realities often unimagined by its framers'.³⁹ The Constitution, in short,

the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch . . . They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. . . .

³³ See Tremblay (n 8) 531–8.

³⁴ *Motor Vehicle Act (BC) Reference* (n 27).

³⁵ *ibid* 512.

³⁶ *ibid* 508.

³⁷ *ibid*.

³⁸ *ibid* 509.

³⁹ *Hunter v Southam Inc* [1984] 2 SCR 145, 155.

should be understood as a ‘living tree’.⁴⁰ Indeed, this approach might be right. But it also contributes to make the Court’s position paradoxical. According to the American model, the legitimating force of constitutional norms and values derives from the fact that they have been willed, consented to or decided by the original people or by their elected representatives. However, progressive interpretation allows the courts not only to use a set of norms or values that have not been willed, consented to or decided by the original people or by their elected representatives as reason not to enforce certain governmental action or decision but to determine themselves the conditions under which legitimate constitutional norms must be adjusted to societal needs, abandoned and replaced by new norms.

Thirdly, the Supreme Court of Canada held that the interpretation of constitutional provisions must be ascertained by an analysis of their purposes.⁴¹ But such purposes are not ‘original’ purposes, that is, purposes the drafters of the constitution had in mind when the text was written down. The purposes are constructed in accordance with the Constitution’s larger objects and the Constitution’s ‘proper linguistic, philosophic and historical contexts’, as understood by judges.⁴² They result from a version of what philosophers call a ‘wide reflective equilibrium’ between all considerations that have something relevant to say about the meaning of the provisions.⁴³ Accordingly, the purposes of constitutional provisions may have nothing, or very little, to do with what the elected representatives of the Canadian people consented to as a matter of psychological and historical fact.⁴⁴ The purposes of constitutional provisions, therefore, constitute various judicial constructions that can be conceptually detached from what is supposed to give the Constitution its normative force.

Fourthly, the Canadian Supreme Court has also recognized that judicial review could be based upon what it describes as ‘unwritten constitutional principles’. But such principles, being ‘unwritten’, do not necessarily express some original will, decision or intent. They are rather constructed by the judiciary so as to make sense of the body of express constitutional provisions read in accordance with history and precedent.⁴⁵ Now, judicial appeal to unwritten constitutional principles may

⁴⁰ See *Motor Vehicle Act (BC) Reference* (n 27).

⁴¹ See *Hunter* (n 39).

⁴² *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 344.

⁴³ On an analysis of the process of purposive interpretation, see LB Tremblay, ‘L’interprétation téléologique des droits constitutionnels’ (1995) 29 RJT 459. On the concept of ‘wide reflective equilibrium’. In this context, see 489–91.

⁴⁴ See the criticisms of P Monahan, *Politics and the Constitution* (Carswell, Toronto 1987) ch 5.

⁴⁵ In the *Quebec Secession Reference* (n 29) [49]–[51] it was said that: ‘Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based . . . Our Constitution has an internal architecture, or . . . a “basic constitutional structure”. The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole . . . Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them’.

serve different purposes. For example, the courts may refer to them as aids in the process of interpreting the specific text of constitutional provisions⁴⁶ or they may refer to them to 'fill out the gaps in the express terms of the constitutional scheme'.⁴⁷ In all cases, they state a reason to create new abstract and concrete constitutional norms and obligations or new exceptions to existing constitutional norms and obligations. Since the resulting constitutional norms and obligations based upon such unwritten principles cannot be justified in terms of original will, consent or decision, as expressed in the written text, their legitimating force remains problematical.

These examples drawn from the Canadian practice of constitutional adjudication are not peculiar to Canada; as I said, they can be found in many Commonwealth jurisdictions, such as Australia, India and South Africa, and non Commonwealth jurisdictions as well, including the United States.⁴⁸ They, however, show that it has become very difficult, even for a judiciary committed to the American or Marshallian model of constitutionalism as a basic normative theoretical position, to act in accordance with its basic postulates. Indeed, epistemological and normative reasons in a 'post-formalist' legal culture might explain this attitude and might be sufficient to justify it. However, in all cases, it should be admitted that the American or Marshallian model of constitutionalism is not consistent with the actual judicial practice of enforcing a written constitution against governmental action and decision.

D THE DESCRIPTIVE FORCE OF THE DICEYAN MODEL OF CONSTITUTIONALISM

In this section, I argue that contemporary practice of constitutional adjudication is consistent with Dicey's model of constitutionalism and, accordingly, that Dicey's model makes better sense of contemporary practice of constitutional adjudication

⁴⁶ In these cases, where the resulting interpretations reasonably fit the express terms of the Constitution, judicial review based upon unwritten principles is not different in kind from judicial review based upon progressive and purposive interpretation that reasonably fits the express terms of the Constitution. Both forms of review come within orthodox constitutional law.

⁴⁷ *Reference Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof* [1997] 3 SCR 3 [85].

⁴⁸ See, for example, the following Australian cases: *Eastman v The Queen* [2000] HCA 29 [134]–[158] (HC); *Kartinyeri v The Commonwealth* [1998] HCA 52 (HC); *David Russel Lange v Australian Broadcasting Corporation* [1997] HCA 25 (HC); *McGinty v State of Western Australia* (1996) 186 CLR 140 (HC); *Australian Capital Television Pty. Ltd and Ors v Commonwealth* [1992] HCA 1 (HC). For South Africa see *S v Zuma* 1995 (2) SA 642 (Constitutional Court) [13]–[15]; *S v Makwanyane and another* 1995 (3) SA 391 (CC) [9]–[19]; *S v Mhlungu and others* 1995 (3) SA 867 (CC); *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC) [46]. For India see eg *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 (SC); *Maneka Gandhi v Union of India and another* AIR 1978 SC 597 (SC); *Francis Coralie Mullin v Administrator, Union Territory of Delhi and Others* AIR 1981 SC 746 (SC); *Bandhua Mukti Morcha v Union of India and others* AIR 1984 SC 802 (SC). In New Zealand see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA). More generally, see the references in n 18, above.

than the American model. My purpose, however, is not to *prove* that such practice is actually based upon Dicey's model, especially if one understands by 'proof' a kind of demonstration that meets empiricist or positivist standards of verification.

According to the Diceyan model, I recall, the rules and principles of the Constitution can be conceived as the consequence of certain criteria of political legitimacy accepted and enforced by the courts. This entails two basic propositions. First, the courts must be in a position to ascertain and recognize as normative a set of criteria of legitimate governmental action and decision. Secondly, the criteria of political legitimacy must be conceived as logically antecedent to and independent of the resulting constitutional norms, for it is by virtue of them that judges can construct or determine the nature and content of constitutional norms. Indeed, they constitute (or derive from) a certain normative theory of political legitimacy. According to Dicey's theory, such criteria included governmental respect for certain individual rights.

However, Dicey's theory purported to describe the laws of an unwritten constitution. How would such a theory be acceptable in a context where constitutions are written? Does a written constitution commit us to a Marshallian model of constitutionalism? The answer is no and the reason is found within Dicey's model.

Dicey propounded a view on judicial interpretation of legal texts. I shall call this view 'Dicey's textualism' to distinguish it from other versions of textualism. According to Dicey's textualism, there is only *one* formal interpretive constraint within the process of judicial interpretation: judges must understand textual provisions in terms of meaning or norms that can plausibly (that is, reasonably) be supported by the 'words' used in the text.⁴⁹ Insofar as the concept of original or legislative 'intention' plays a normative role in that process, the alleged intention must also be inferred from the 'words' of the legal text taken as a whole, as opposed to any psychological or socio-historical fact. In the context of an Act of Parliament, Dicey said: 'The courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament'.⁵⁰

*[T]he English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent.*⁵¹

Yet, Dicey's textualism is not very constraining. Judges may determine the meaning of constitutional provisions in accordance with a whole range of competing interpretive approaches and methodologies. They may proceed within

⁴⁹ Dicey (n 2) 407.

⁵⁰ *ibid* 73–4.

⁵¹ *ibid* 407–8 (emphasis added). See, in general, ch XIII.

formalism and abstract conceptualism or within pragmatism, they may favour strict constructionism or liberal constructionism, they may apply formal deductive reasoning or purposive reasoning, they may be originalist or favour a progressive interpretation, and so on. Indeed, the words of legal texts often support competing meanings. Yet, so long as judges interpret the words of the text by reading in values that plausibly fit them, the resulting norms should be recognized as legitimate.

For this reason, Dicey's textualism might sound a very poor constitutional theory, if at all. It seems to free judges from any guidance, whereas the main point of constitutional theory, at least as understood within contemporary constitutional scholarship, seems to be to supply a set of normative interpretive constraints that should guide judges in the process of determining which plausible meaning is the right one. Yet, Dicey's textualism is specifically designed for the purposes of Diceyan constitutionalism. It allows the courts to use their authority to resist what they regard as unreasonable, indecent or illegitimate governmental action or decision. Dicey's textualism allows judges to give legal texts meanings that are, in their views, morally entitled to judicial enforcement. In the context of Dicey's 19th century British unwritten Constitution, that meant that the courts could interpret an Act of Parliament so as to avoid enforcing legislative norms authorizing the exercise of governmental power that would be understood by judges as arbitrary or inconsistent with certain basic rights and freedoms.⁵² Indeed, Dicey's textualism is the key to understand Dicey's reconciliation of the sovereignty of Parliament with the rule of law. As Dicey wrote:

The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, *that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.*⁵³

Now, Dicey's textualism could be as significant in contemporary contexts where constitutions are written. Then it would mean that the courts could interpret constitutional documents so as to avoid enforcing legislative and executive acts understood by judges as arbitrary, unreasonable, indecent or illegitimate for some reason (say because they would violate certain basic moral rights and freedoms). The case being, one would be entitled to claim that the people or their elected

⁵² See, for example, *ibid* 412.

⁵³ Dicey (n 2) 413–4.

representatives are sovereign, but from the moment they have uttered their will through the constitution, that will becomes subject to the interpretation put upon it by the judges of the land who are influenced by their commitment to enforce reasonable, decent and legitimate governmental action and decision. In my view, this proposition would correspond to Dicey's assertion that judges are influenced by the 'feelings of magistrates' no less than by the 'general spirit of the common law' disposing them to construe a legal text in a mode which would not necessarily commend itself to its authors if they had been called upon to interpret their own constitutional document.

My thesis is that contemporary practice of constitutional adjudication would be best conceived as being generally regulated by some version of textualism, as understood within Dicey's model of constitutionalism. Once more, Canadian constitutional jurisprudence may exemplify this thesis, although many other Commonwealth and non Commonwealth jurisdictions could be used as well. In Canada, judges have not postulated that the provisions of the written Constitution are ascertainable in accordance with one single normative interpretive methodology or one single kind of legitimate arguments. Canadian judges have determined the meaning of constitutional provisions in accordance with a whole range of competing interpretive approaches and methodologies. They have proceeded from time to time in accordance with some version of legal formalism, abstract conceptualism, pragmatism, strict constructionism, liberal constructionism, formal deductive reasoning, purposive reasoning, originalism, progressivism, and so on. The only formal constraint seems to have been the 'words' used in the constitutional text: meanings should plausibly be supported by the interpreted provisions.⁵⁴

In the context of the Charter, for example, the Supreme Court has established that the process of interpretation must be 'purposive', 'progressive' and 'generous'. The purposive approach claims that the Constitution must be understood in the light of the interests its provisions 'are meant to protect'.⁵⁵ However, such interests are by no means regarded as formally established in advance, either by some original intent or otherwise by the objective meaning of the words. Judges determine the interests by using almost any relevant argument and consideration, such as the words used in the text, headings, English and French versions, precedents, concepts, history, philosophical and political tradition, international documents, foreign constitutions and foreign constitutional interpretations. Moreover, since

⁵⁴ One might argue that there was a time when Canadian constitutional provisions were conceived as embodying one single objective and determinate meaning formally ascertainable by judges, provided that they used the correct methodology. But this time has gone at least since the Judicial Committee of the Privy Council of the United Kingdom stated that 'The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits'. See *Henrietta Muir Edwards v Attorney-General for Canada* [1930] AC 124, 136 (PC) (Lord Sankey). Contemporary judges do not, in general, conceive the Constitution as embodying a single uncontroversial objective determinate meaning. See also n 18 and n 50, above.

⁵⁵ *R v Big M Drug Mart Ltd* (n 42) 344.

the process of interpretation must also be generous and progressive, the Constitution being a 'living tree', the courts may easily depart from the interests constitutional provisions were 'meant to protect', if they ever meant to protect something determined, or understood in prior cases as 'meant to protect'. This is why the Canadian constitutional expert Peter Hogg could describe as 'orthodox constitutional law' the propositions that 'judicial review of legislation must be based exclusively on the words of the constitution, and that the words of the constitution should receive a progressive interpretation [and] a "purposive" interpretation'.⁵⁶ With respect to progressive interpretation, he argued that:

. . . judicial review can be derived from the constitution while departing from or ignoring the original understanding. The doctrine of progressive interpretation is no less faithful to the constitutional text than interpretivism. Like interpretivism, it is based on the words of the constitution, read in the context of the document as a whole. It differs from interpretivism only in that the doctrine of progressive interpretation assumes that the words of the constitution need not be frozen in the sense in which they were understood by the framers, but are to be read in a sense that is appropriate to current conditions.⁵⁷

Similarly, Hogg maintained that a purposive approach to constitutional interpretation is 'useful in elaborating those words . . . that are especially vague or ambiguous',⁵⁸ even if the actual purpose is usually unknown and if the Constitution pursues 'a range of purposes'.⁵⁹ As long as the interpretation is consistent with the terms used in the constitutional provisions, judicial review is acceptable. Indeed, Hogg argued that 'judicial review is only legitimate if it is based on the text of the constitution'.⁶⁰

Consequently, contemporary practice of constitutional adjudication, as exemplified by Canadian experience, should be best conceived as coming within Dicey's textualism, as opposed to originalism for example. This fact constitutes a reason, although not sufficient, to believe that Dicey's model of constitutionalism makes better sense of contemporary practice of constitutional adjudication than the American model. Moreover, insofar as the actual practice of textualism did operate within a set of normative constraints similar in principle to that postulated within Dicey's model, then one would have good reason to conceive contemporary practice of constitutional adjudication as coming within Dicey's model, as opposed to Marshallian model.

However, the demonstration that this is actually the case is almost impossible to do, especially if one is expecting a kind of 'proof' consistent with empiricist or positivist standards. Judges do not, or very rarely, state that their textualism is ultimately constrained by a set of normative criteria of political legitimacy that

⁵⁶ See PW Hogg, 'The Charter of Rights and American Theories of Interpretation', (1987) 25 Osgoode Hall LJ 97, 103.

⁵⁷ *ibid* 101.

⁵⁸ *ibid* 103.

⁵⁹ *ibid* 113. For a criticism of this paradoxical proposition, see Tremblay (n 43).

⁶⁰ *ibid*. See also the Charter (n 19) and Dicey (n 2) 73-4.

determines the kind of governmental action and decision that are morally entitled to judicial enforcement. In other words, judges do not, or very rarely, explicitly recognize in cases that constitutional norms are the consequence of what should be accepted as legitimate governmental action and decision. Yet, one may legitimately ask: How can we explain this judicial commitment to what I call textualism in constitutional context, indeed in free and democratic society? How could we make practically intelligible the fact that judges formally free themselves from originalism, literalism or other kinds of formalism in context where written constitutions are regarded as the basis of legitimate governmental action and decision? How can we rationally accept Dicey's textualism without endorsing arbitrariness and judicial tyranny? I suggest that one answer can be found in Dicey's model of constitutionalism. Dicey's textualism can be made practically intelligible if we postulate that the judiciary is committed to maintain and uphold the conditions governmental action and decision must satisfy in order to be accepted by the courts as politically legitimate and, consequently, as entitled to judicial enforcement.

Conceiving the practice of constitutional adjudication in accordance with Dicey's model would indeed entail a certain number of assertions. Judges who must decide what the written Constitution means should be seen as being ultimately guided by a set of normative criteria of legitimate governmental action and decision. This set would be conceived as logically antecedent to and independent of the constitutional norms judges would recognize as valid and operative, for it would be by virtue of this set of normative criteria that constitutional norms would be determined and constructed. It would be by virtue of these criteria that the interpretive approaches (purposive, generous and progressive, for example) and relevant factors (terms used in provisions, concepts, historical, political and philosophical contexts, for example) guiding the courts in the process of constitutional interpretation (determining the 'interests constitutional provisions are meant to protect', for example) would be adjudicated. These criteria would form the normative theory of political legitimacy accepted by the courts as sufficiently justified for the purposes of contemporary constitutionalism.

However, we have reason to believe that this makes sense of contemporary process of constitutional adjudication, at least as exemplified by Canadian constitutional law. The rules of interpretation, as well as the set of unwritten constitutional principles, appear as flexible rhetorical means enabling judges to read the meaning of constitutional provisions in terms of norms that, when they are applied, contribute to maintain the legitimacy, decency and reasonableness of governmental action and decision. For example, in *R v Holmes*,⁶¹ Chief Justice Dickson of the Canadian Supreme Court wrote:

The overarching principle of judicial review under the Charter is that the judiciary is entrusted with the duty of ensuring that legislatures do not infringe unjustifiably upon certain fundamental individual and collective interests in the name of the broader

⁶¹ [1988] 1 SCR 914.

common good. Viewed from one perspective, this profound responsibility potentially can be seen as challenging the nature of democratic institutions in Canada, to the extent that those institutions represent the collective voice of the communities and individuals which comprise Canadian society. Viewed from another perspective, however, in interpreting and giving meaning to constitutional guarantees and determining what constitutes reasonable limits under s. 1 of the Charter, the courts are guided by the same principle under both lines of inquiry: namely, that Canadian society is to be free and democratic. The infusion of the spirit of individual and collective democratic aspirations into the process of defining the contours of constitutional guarantees and determining the reasonableness of state-imposed limitations on those guarantees thus ensures that the courts are and will remain allies of Canadian democracy, strengthening any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society.⁶²

This does not mean that the actual judicial conception of political legitimacy is right, justified or otherwise acceptable. But it is entirely consistent with the proposition that the Canadian Supreme Court is basically concerned with promoting and maintaining the legitimacy of governmental action and decision they are asked to enforce in any given case. The proposition that the courts are guided by the principle that Canadian society is to be free and democratic in the process of 'interpreting and giving meaning to constitutional guarantees and determining what constitutes reasonable limits under s 1 of the Charter' suggests that the norms of constitutional law are the consequence of a set of criteria determining the legitimacy of governmental action and decision judges are asked to enforce in any given case. This is entirely consistent with Diceyan model of constitutionalism.

Accordingly, there are reasons to argue that a Diceyan model of constitutionalism is superior to the American model from a descriptive point of view. On the one hand, Dicey's model seems to be corroborated by the kind of textualism manifested in the practice of constitutional interpretation. On the other hand, the model makes sense of Dicey's textualism: it makes it practically intelligible by supplying its point and its justification. Yet, the mere fact that a Diceyan model of constitutionalism is consistent with contemporary practice of constitutional adjudication does not prove that this practice is actually grounded upon Diceyan constitutionalism. In particular, it does not prove that judges committed to textualism are actually committed to maintain and uphold the conditions governmental action and decision must satisfy in order to be accepted by the courts as politically legitimate and, consequently, as entitled to judicial enforcement. However, it certainly constitutes a reason to argue that a Diceyan model makes better sense of contemporary practice of constitutional adjudication than the American or Marshallian model. If it is the case, it constitutes a good reason to test the hypothesis that contemporary practice of constitutional adjudication might actually be, after all, grounded upon Diceyan constitutionalism.

⁶² *ibid* 931–2.

E THE NORMATIVE FORCE OF THE DICEYAN MODEL OF CONSTITUTIONALISM

In this section, I put forward one general argument showing that the Diceyan model of constitutionalism makes sense from a normative point of view and that we have reason to believe that it is sounder than the American model. However, the Diceyan model is immediately problematical: it supports a kind of judicial activism radically inconsistent with the sovereignty of the people and with the principle of democratic legitimacy. How can we make it acceptable from a normative point of view? How can we accept as morally and politically legitimate a judicial process coming within a Diceyan model of constitutionalism?

In our democratic tradition, the judiciary is generally conceived as having no inherent political legitimacy. Its moral and political legitimacy is conceived as deriving from a moral principle indicating a set of positive facts by virtue of which judicial power is *specifically* authorized. I call this thesis the Specific Legitimacy Thesis.⁶³ It claims, among other things, that judicial legitimacy is conditioned by the 'rule of law'. Although contested, this concept minimally means that the content and substance of judicial decisions must be in 'accordance with the law' or, to put it differently, they must be 'justified by law'.⁶⁴ On the other hand, the law that justifies judicial decision must itself be politically legitimate. If judicial legitimacy is conditioned by the law that supports judicial decisions, then the judiciary has no more legitimacy than the law that supports its decisions. Accordingly, no judicial decision is acceptable as morally permissible, unless the law used by judges as reason for decision is itself morally legitimate. If judicial decisions are to be accepted as politically legitimate, thus, it must be in accordance with a law that is acceptable as legitimate in accordance with some normative standard of political morality.

It follows from this reasoning that *if* judges wished to act in a legitimate way, or *if* we want them to act in a legitimate way, they should base their decisions upon reasons that are both legal and acceptable as morally legitimate. For this purpose, they should be allowed, authorized or entitled in some way *to verify* whether the norms they are asked to enforce in a given case are both valid laws and legitimate norms according to some independent normative standard of political morality. Moreover, if such norms appear not to be legally valid or legally valid but not legitimate, they should be allowed, authorized or entitled in some way *to set them aside*. But what could be the source of such authorization or entitlement? According to the Specific Legitimacy Thesis, judicial legitimacy is conditioned by the rule of law

⁶³ I have developed the following argument in detail in Tremblay (n 14) 527–38.

⁶⁴ In my view, the concept of the rule of law entails two basic ideas: first, governmental actions and decisions, including judicial decisions, must be 'rational', that is, based on reasons, and, secondly, the reasons for governmental actions and decisions must be, in a certain sense, 'legal'. On the concept of the Rule of Law, see LB Tremblay, *The Rule of Law, Justice, and Interpretation* (McGill-Queen's University Press, Montreal 1997) 29–34.

provided that the law that is used as reason for judicial decision is morally permissible. It should follow, then, that any such authorization or entitlement should be grounded upon or derived from another law (say a constitutional law). But this other law cannot legitimize a judicial decision based upon it (for the purposes of verifying the legality and the legitimacy of a norm alleged to be law and setting aside) unless it is itself acceptable as morally legitimate. It should follow, then, that the court should be allowed, authorized or entitled to verify the legitimacy of this other law and, if it appears not to be legitimate, to set it aside. But what could be the source of such further authorization or entitlement? According to the Specific Legitimacy Thesis, it should be a further law the legitimacy of which being acceptable as morally legitimate, and so on, at an infinite regress. So the Specific Legitimacy Thesis creates a dilemma: either judges try to maintain their own political legitimacy at the cost of infinite regress or they enforce any norm alleged to be law, even those that have no legitimacy at all, at the cost of losing their own specific legitimacy.

If one wants to argue for the legitimacy of a Diceyan model of constitutionalism, one must find another ground. My suggestion is this: the political legitimacy of judicial power can be grounded upon a very general principle of political morality. This general principle provides that 'all political authorities in a state ought to act, as far as possible, in a legitimate way'. This general principle is rarely acknowledged within contemporary constitutional theory. Yet it has been presupposed by most systematic thinking within normative political philosophy, at least since the works of Jean-Jacques Rousseau and Immanuel Kant.⁶⁵ It is both constitutive and regulative of the discourse on legitimacy within legal and political theory, for such discourse would not be intelligible without it. I maintain that this general principle of political morality actually underlies the recurrent debate on the legitimacy of judicial review.

Now, this general principle entails that all political authorities in a state ought to do what is factually and morally necessary in order to act, as far as possible, in a legitimate way. For example, it entails that political authorities in a state ought not to act in ways that would not be legitimate. This, I submit, entails the existence of a general entitlement or authorization to act, as far as factually and morally possible, in a legitimate way. This assertion might be conceived as a version of the widely held ethical principle, the 'ought-implies-can' principle. Since the general principle prescribes that political authorities ought to act as far as possible in legitimate way, it must entail that such authorities are morally permitted, authorized or entitled to do what is necessary in order to act, as far as it is factually and morally possible, in a legitimate way and to avoid to act, as far as it is factually and

⁶⁵ Rousseau opens the first Chapter of *The Social Contract* with: 'Man is born free, and everywhere he is in chains. One believes himself the others' master, and yet is more a slave than they. How did this change come about? I do not know. What can make it legitimate? I believe I can solve this question'. See V Gourevitch (tr), Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (CUP, Cambridge 1997) 41. See also H Reiss (ed), *Kant's Political Writings* (CUP, Cambridge 1991).

morally possible, in ways that would not be legitimate. In other words, the general principle of political morality necessarily confers a kind of general legitimacy to political authorities to do what is necessary to maintain their own legitimacy, as far as it can be morally and factually possible. Otherwise, the general principle of political morality would be pointless from a practical point of view.

The judiciary exercises, as a matter of fact, political authority in the state. Accordingly, the general principle of political morality entails, on the one hand, that the judiciary ought to act, as far as possible, in a legitimate way. On the other hand, it entails that the judiciary is morally entitled to do what is necessary in order to act, as far as it is factually and morally possible, in a legitimate way. This general legitimacy to do what is necessary to maintain their political legitimacy constitutes the ground for the legitimacy of judicial review. I call this thesis the 'General Legitimacy Thesis'.⁶⁶ However, what can the judiciary do in order to act, as far as possible, in a legitimate way and, accordingly, to maintain their political legitimacy? The answer derives from the Specific Legitimacy Thesis. It follows two consequences: (1) judges are morally entitled to verify whether the alleged law they are asked to enforce in any given case is legally valid and, if so, if it is morally legitimate in accordance with the relevant normative standards and (2) judges are morally entitled not to enforce (or to set aside or ignore) any alleged law that is not legally valid or, if legally valid, not morally legitimate. Otherwise, the judiciary could violate the general principle of political morality by acting in ways that may not be legitimate.

The General Legitimacy Thesis supplies the ground or source of the moral authorization or entitlement conferred to the judiciary to verify whether the norms they are asked to enforce in a given case are valid legitimate laws according to some independent normative standard of political morality and to set them aside, if such norms appear not to be valid or not to be legitimate laws. It supplies the ground or source of the legitimacy of judicial review. I suggest that the normative force of the Diceyan model of constitutionalism proceeds from a thesis of this kind. It can be explained by the fact that there is a general principle of political morality providing that 'all political authorities in a state ought to act, as far as possible, in a legitimate way' and that judges, as political authority, are under a basic moral obligation to respect this general principle: the judiciary ought to act as far as it is morally and factually possible in a legitimate way. It follows that if Dicey's description of the rules and principles of constitutional law in the United Kingdom in the 19th century were true, that is, if these rules and principles really had been the consequence of judicial enforcement against governmental action and decision of certain basic individual rights and freedoms as defined by judges, then this practice could be acceptable as morally legitimate in principle. Of course, the actual practice could not be accepted as legitimate within the 'General Legitimacy Thesis' unless it could be shown that the legitimacy of the action of the Crown and

⁶⁶ See Tremblay (n 14).

its servants was conditioned by at least one fundamental criteria of political legitimacy providing that there are things the government cannot do to individuals, notably violate their basic rights and freedoms. Moreover, it does not matter for my purposes whether British judges have actually conceived their own legitimacy within the 'General Legitimacy Thesis'.⁶⁷ The normative force of the Diceyan model of constitutionalism is not a historical or psychological issue.

The Diceyan model might appear to fit best where political practices embody unwritten constitutions. However, I see no good reason why it would not be acceptable where the constitution is written. The general principle of political morality requiring judges to do what is necessary in order to act, as far as possible, in legitimate way entails that judges are entitled to verify in any given case whether the norms they are asked to enforce are valid laws and, the case being, whether they possess moral legitimacy. For although the norms are valid according to a written constitution, if they were not morally legitimate, they would not be morally entitled to judicial enforcement and the judiciary would be morally entitled not to enforce them. It follows that the written criteria of constitutional validity are not themselves entitled to judicial enforcement wherever they formally acknowledge the validity of a norm that is not morally permissible. For a constitutional provision cannot morally authorize the courts to act in an illegitimate way, and this is what it would do if it asked them to use as reason for decision an illegitimate law. Assume, for example, that the written constitution provided that a majority of the elected representatives can legally do horrible things to one class of citizens and that the fundamental criteria of political legitimacy provided that legitimate majoritarian legislation should treat its citizens as equals. A legislative norm doing horrible things to one class of its citizens in accordance with the constitution would be both valid and illegitimate. Accordingly, the judiciary would be morally entitled not to enforce this legislative norm (for using it as a reason for decision would not be acting in a legitimate way) and, consequently, to ignore the written constitutional provision. Of course, the judiciary is not compelled to invalidate the written constitutional rule or act as if the Constitution did not exist; it can interpret it in ways that avoid unacceptable (or illegitimate) results or it can create exceptions to undesirable constitutional rules.⁶⁸ In all cases, judicial review of legislation would be authorized and the interpretation of the written constitution would be partly determined by a judicial commitment to maintain its own legitimacy.⁶⁹ Indeed, as I said above, this is entirely consistent with contemporary practice of judicial review and explains why the basic rules and principles of constitutional law can be conceived as a consequence of what should be accepted as legitimate governmental action or decision.

The Diceyan model, therefore, can make sense where the constitution is written, for the mere fact that a written constitution considers as legally valid a piece

⁶⁷ However, I have reasons to believe that they did. See n 12–14, above and accompanying text.

⁶⁸ See text to n 52, above.

⁶⁹ See Tremblay (n 14).

of legislation does not entail that a judicial decision based upon this law is acceptable as legitimate. The Marshallian model claims exactly the opposite. According to the Diceyan model, the Marshallian model could be acceptable in principle if the whole domain of political legitimacy of legislative and executive actions could be ultimately reduced to the criteria of legal validity explicitly written in the constitution, whatever governmental institutions are (a Parliament or a dictatorship) and whatever these institutions are authorized to promote (equality or slavery). It could be acceptable, in other words, if the issue of political legitimacy somehow could be reduced to legality. This is precisely what the Marshallian model claims to have done through the notion of people's 'original right' to establish its own constitution. But this is not reasonable: from the point of view of political morality and legitimacy, it matters whether political institutions are democratic or not and whether a constitutionally valid law promotes equality or slavery, internal security or warfare. Similarly, it should matter for judges who are committed to maintain their own legitimacy. Accordingly, a written constitution cannot bar the way to judicial review of governmental action and decision that are inconsistent with the relevant normative standards of political legitimacy.

What I now want to argue is that we have reason to believe, from a normative point of view, that the Diceyan model makes better sense than the American model. I do not intend to linger on the normative weaknesses of the American model. I assume that they are sufficiently known. First, the model postulates that the people (say through their elected representatives) have a sovereign right to govern themselves. Yet, it entails that the consent, the will or judgments of past majorities must prevail over the consent, will or judgment of present-day citizens. Accordingly, it prevents later people to democratically determine for themselves, as sovereign, what conception of justice, policies and ends should be promoted for the good of their own community. This is practically antidemocratic and apparently inconsistent with its basic postulates.

Secondly, the model postulates that written constitutions embody the whole set of authoritative constitutional norms that constitute the source of legitimate governmental action and decision. Yet, constitutional language is (one might think 'necessarily') open textured and does not and cannot contemplate all possible problems of governance.⁷⁰ Accordingly, it prevents written constitutions from

⁷⁰ According to Chief Justice Marshall in *McCulloch v Maryland* 4 Wheat 316, 17 US 316, 407, 415 (1819), a constitution should not have: '... the prolixity of a legal code ... Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language ... It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding ... This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'.

embodying the whole set of authoritative constitutional norms that constitute the source of legitimate governmental action and decision, such norms being generally ultimately determined (decided and interpreted) by judges. Once again this is practically antidemocratic and we have reason to believe that Marshall's model cannot live up to its own postulates.

Thirdly, as I said, this model artificially reduces the whole sphere of political legitimacy to legality, making it a form of legalism, ultimately justified on the ground of some 'original right of the people'. Accordingly, any law established in accordance with the written constitution should be conceived as morally legitimate, even if it is totally unreasonable, arbitrary, unjust, unfair or otherwise indecent or horrible. Any such law must be regarded as morally entitled to judicial enforcement, even if the norm is totally unreasonable, arbitrary, unjust, unfair or otherwise indecent or horrible. Finally, any judicial decision that enforces any such law must be accepted as morally legitimate, even if the norm it enforces is totally unreasonable, arbitrary, unjust, unfair or otherwise indecent or horrible. From the point of view of political morality, one might reasonably conclude that something is rotten in the Marshallian model of constitutionalism.

These weaknesses have probably constituted the main challenges within contemporary constitutional scholarship, especially in the United States. Although there have been various theoretical attempts to correct the Marshallian model, it has not been admitted yet that any of them has succeeded. I do not intend, however, to discuss these attempts in this paper.⁷¹ I want to argue that the Diceyan model of constitutionalism does not manifest these weaknesses.

First, it is not necessarily antidemocratic. If democratic theory constitutes the best normative theory of political legitimacy available, as it is generally admitted within normative constitutional theory, then the judiciary is entitled to verify whether the norms they are asked to enforce in a given case are consistent with the best theory of democratic legitimacy available and, if such norms appear to be democratically legitimate, to use them as reason for decision. Correlatively, if such norms appear not to be democratically legitimate, judges are entitled not to enforce them. Of course, depending on the nature of the normative theory of democracy actually accepted by the courts, the conditions of democratic legitimacy of governmental action and decision could vary. For example, a conception of democracy coming within majoritarianism may justify judicial enforcement of laws that could be regarded as illegitimate according to a conception of legitimacy coming within some complex version of constitutional democracy or deliberative democracy. Consequently, the nature and content of the basic rules and principles of the constitution, both unwritten and written, as interpreted and enforced by the courts, can vary in accordance with the nature of the normative theory of democracy accepted by the courts. This would not necessarily be antidemocratic for, by

⁷¹ I have examined some of them in Tremblay (n 14).

hypothesis, the basic rules and principles of the constitution recognized by the courts would institute and maintain democracy as a mode of governance.⁷²

Secondly, the Diceyan model of constitutionalism can live up to its own postulates. It is true that judges, as well as philosophers and citizens, may reasonably disagree on the ground, nature and content of the conditions governmental action and decision must satisfy in order to be accepted by the courts as legitimate and, consequently, as entitled to judicial enforcement. But reasonable disagreements in this area cannot invalidate the Diceyan model; for such disagreement should be seen as one consideration judges must take into account in the process of determining the conditions governmental action and decision must satisfy in order to be accepted by the courts as legitimate.⁷³ One cannot merely assume that the fact of reasonable disagreements necessarily entails that the people as a whole or the majority of the people (or any body else) are morally entitled to make and unmake any law they wish, for this assumption constitutes an answer to what is in question, namely, the normative conditions of political legitimacy, and this answer must be argued for.⁷⁴ Moreover, if one maintained a form of moral scepticism or relativism with respect to the conditions of political legitimacy, one would still have to determine the non moral conditions governmental action and decision must satisfy in order to be accepted by the courts as entitled to judicial enforcement. Unless one accepted to decide such conditions in arbitrary way, the determination would be supported by a set of non-moral considerations showing why such conditions are both necessary and sufficient. Such process of reasoning might have something to do with pragmatism. Insofar as the reasons were practically intelligible, they would constitute an argument showing the 'best' conditions governmental action and decision must satisfy in order to be accepted by the courts as legitimate. Consequently, although conceived as non-moral, the argument could be open to critical assessment and deliberation.

Thirdly, it does not artificially reduce the whole sphere of political legitimacy to legality. On the one hand, the Diceyan model of constitutionalism recognizes the existence of certain normative standards of political legitimacy by virtue of which the legitimacy of valid legal rules can be assessed. On the other hand, the model entails that any alleged law inconsistent with these standards of political morality (legislative and executive acts, for example) or authorizing laws inconsistent with these standards of political morality (alleged constitutional or statutory norms, for example) may not be enforceable as a matter of law. Moreover, insofar as totally unreasonable, arbitrary, unjust, unfair or otherwise indecent or horrible legal norms were conceived as illegitimate, the judiciary would be morally entitled

⁷² Of course, this assertion presupposes that the normative theory of democratic legitimacy recognized by the courts constitute a reasonable theory, indeed, the 'right' normative theory of legitimacy.

⁷³ On this issue, see J Waldron, *Law and Disagreement* (OUP, Oxford 1999) ch 10–11.

⁷⁴ To this extent, Waldron's arguments on reasonable disagreement, n 73 above, must constitute one consideration to be weighed by judges when they determine the conditions a purported legislative norm must satisfy in order to be recognized as morally entitled to judicial enforcement.

not to enforce them. To this extent, one may certainly assert that all laws that are judicially enforced are (conceived as) morally legitimate. But this has nothing to do with legalism. Finally, judicial decisions that enforce such legitimate laws are acceptable as morally legitimate.

Consequently, not only the Diceyan model of constitutionalism makes sense from a normative point of view, but we have reason to believe that it makes better sense than the Marshallian model.

F CONCLUSION

In this text, I have contrasted two models of constitutionalism. The first model, deriving from the main tradition of American constitutionalism, entails that the basic rules and principles of constitutional law should be conceived as the *source* of (what should be accepted as) legitimate governmental action and decision. I have called it the 'American' or the 'Marshallian' model. The second model, deriving from the main tradition of British constitutionalism, entails that the basic rules and principles of constitutional law should be conceived as the *consequence* of (what should be accepted as) legitimate governmental action and decision. I have called it the 'British' or the 'Diceyan' model. I have tried to show that we have reasons to believe that the British or Diceyan model is superior to the American or Marshallian model, both from a descriptive and from a normative point of view.

If my arguments are accepted, then, normative constitutional theory can and should move from a reflection on the 'right' constitutional interpretive methodology (originalism, for example) to a reflection on the substantial and/or procedural criteria of political legitimacy of legislative and executive action and decision. Since it can be expected that, within our legal and political tradition, such criteria would come within democratic theory, constitutional law should develop in accordance with the rules, principles and values that constitute the best normative theory of democratic legitimacy available. It would also follow that the nature and content of constitutional norms should not be conceived as the source, but as the consequence of legitimate governmental action and decision. In any case, we have good reason to believe that contemporary normative constitutional theory is actually moving in this direction. The important body of constitutional literature conceiving constitutional norms, not as limiting or disabling, but as 'enabling' democracy, both supports and is supported by the Diceyan model.⁷⁵

⁷⁵ These theories can be called 'democracy-reinforcing theories'. See, for example, JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge Massachusetts 1980); F Michelman, 'Law's Republic' (1988) 97 Yale LJ 1493; F Michelman, 'Foreword: Traces of Self-Government' (1986) 100 Harvard L Rev 4; R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge Massachusetts 1996); C Sunstein, *Designing Democracy: What Constitutions Do* (OUP, Oxford 2001); C Sunstein, *The Partial Constitution* (Harvard University Press, Cambridge Massachusetts 1993). My own contribution to normative deliberative democracy theory is found in Luc B Tremblay, 'Deliberative Democracy and Liberal Rights', (2001) 14 Ratio Juris 424. See in general Tremblay (n 14).

