

Turtles All The Way Down? Is the Political Constitutionalist Appeal to Disagreement Self-Defeating?

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Cormac Mac Amhlaigh's stimulating article challenges the coherence of political constitutionalism.¹ He makes four main critical claims. First, that political constitutionalists contend disagreement goes 'all the way down'; second, that given they maintain this disagreement applies to processes as much as outcomes, there is no impartial, Archimedean point, from which to assess the rival claims of different procedures, and hence no way they can argue for the superiority of political over legal constitutionalism; third, that contrary to their assertion that process matters more than outcomes, the normative legitimacy of any process must rest on an outcome assessment of its preserving certain minimal standards, such as upholding basic rights; and fourth, that they can only defend a preference for political over legal constitutionalism where it is already in place and meets these minimal legitimacy requirements. All four of these criticisms have figured in different forms in the literature on political constitutionalism, but Mac Amhlaigh has undoubtedly advanced the argument by both offering a clear statement of each of them and showing how they are linked.

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¹ Cormac Mac Amhlaigh, *Situating Institutional Political Constitutionalism*

Needless to say I disagree - not unreasonably I hope - with the validity of all four, at least in regard to my own characterization of political constitutionalism (although much of what I say in my own defence may well apply to Jeremy Waldron's views as well, the other main target of Mac Amhlaigh's critique).² I believe that Mac Amhlaigh mischaracterizes what I shall call 'the circumstances of disagreement' and in doing so adopts a position that is itself self-defeating. At the heart of our disagreement lie two different conceptions of constitutionalism that only partially overlap with the distinction between legal and political constitutionalism. The first conception can be characterised as a form of what Bernard Williams termed political moralism.³ It conceives a constitution as a moral structure that provides foundations for and constraints upon the political and, in some versions, also goals for politics to enact. The second conception aligns itself more with what Williams called political realism.⁴ It gives greater autonomy to political concerns related to the need for an authoritative process of decision-making that are distinct from morality. Both conceptions could be institutionalised in ways that involved either judicial or legislative supremacy. For example, democratic institutions could be so designed that they promote a given conception of justice,⁵ as a political moralist would advocate, or Courts

² The main targets of his argument are R Bellamy, *Political Constitutionalism* (Cambridge University Press, 2007) (hereafter *PC*) and J. Waldron, *Law and Disagreement*, (Oxford University Press, 1999).

³ B. Williams, 'Realism and Moralism in Political Theory', in *In the Beginning Was the Deed* (Princeton University Press, 2005), 1-2

⁴ Williams, 'Realism and Moralism in Political Theory', 3

⁵ e.g. P. Van Parijjs, *Just Democracy: The Rawls-Machiavelli Programme*, (ECPR Press, 2011).

be viewed simply as a necessary political mechanism to provide authoritative decisions,⁶ as a political realist would argue.

What gives my account of political constitutionalism its distinctively political cast is its political realist starting point rather than the advocacy of legislative supremacy *per se*. It is this political realist character that leads to the emphasis on constitutional process rather than the achievement of certain constitutional outcomes, such as political moralists would advocate. As I suggest below, this process-based view does ultimately favour legislative over judicial supremacy. However, even if it provides no clear knock-down argument for the former, it certainly alters how we should conceive of the latter.

In what follows, I draw on Williams to suggest why all four of Mac Amhlaigh's charges misfire through invoking a political moralist as opposed to a political realist conception of constitutionalism. As a result, he is led to making a second order critique of the grounding of any first order constitutional reasoning, the necessity for and plausibility of which I largely deny. It is for that reason that he fears an infinite regress in the face of ubiquitous disagreement, whereas I am content to regard it as a permanent and unavoidable feature of the human condition and simply to start from where we are.

1. All the Way Down? The 'Circumstances of Disagreement'

Though Mac Amhlaigh puts the phrase 'disagreement all the way down' in quotation marks, it is not one I ever employ in the book, though

⁶ E.g. Martin Shapiro's characterization of the ECJ in M. Shapiro, 'The European Court of Justice', in P. Craig and G. de Burca, *The Evolution of EU Law*, (Oxford University Press, 1999), 321–7.

Waldron does.⁷ Of course, even without using the phrase my argument that ‘politics goes all the way down’ and defence of ‘the basic normative case for a thorough-going proceduralism that goes all the way down’ might be thought to entail such a position,⁸ whether I realised it or not. However, I believe that overstates my argument and is neither necessary to, nor supportive of, my case for political constitutionalism. Indeed, to the extent Mac Amhlaigh appears to embrace this position himself, at least for the purposes of this article, I shall argue it undermines the alternative case he wishes to make.

The belief that disagreement goes ‘all the way down’ might be taken as a form of what Ronald Dworkin called ‘external’ scepticism.⁹ Such a position would be sceptical about the whole enterprise of legal and political argument. It would maintain that the fact we disagree suggests that no moral and political view could ever be right. Yet that goes too far, as it would negate the very holding of a substantive position in the first place. Such ‘external’ scepticism can be deemed ontological. By contrast, what Dworkin called ‘internal’ scepticism reflects the experience of anyone who takes moral and political argument and their own positions within it seriously. It is the acknowledgement that the presence of other views to one’s own, including views that involve criticisms of one’s views, mean that one may be wrong. Such ‘internal’ scepticism can be regarded as epistemological – it reflects the limitations of our practical reasoning which make us prone to error.

Hypothetically, an objective and just resolution of people’s disagreements may exist – not necessarily *sub specie aeternitatis*, a

⁷ Just the once, so far as I can tell, at Waldron, *Law and Disagreement*, 295, where he states ‘It looks as though it is disagreement all the way down, so far as constitutional choice is concerned.’

⁸ Bellamy, *Political Constitutionalism*, 152, 174.

⁹ R. Dworkin, ‘Objectivity and Truth: You’d Better Believe It’, *Philosophy and Public Affairs* 25.2 (1996), 88.

notion I criticise below, but of a kind that makes sense to people in a given historically contingent situation. That supposition provides us with something to disagree about, rather than disagreeing for disagreement's sake. After all, both political and legal constitutionalists agree that protecting certain rights and guarding against particular ways of exercising power are important. However, they disagree about why, how, when and by whom – even among themselves. Practically, nobody has access to an objective perspective from which to resolve these disputes. Stupidity, ignorance or self-interest no doubt all play a part in creating much disagreement. Yet, disagreement also arises among the wise and well-intentioned because our individual perspectives on what ought to be done are inevitably partial in the sense of being both incomplete and reflecting a personal bias.¹⁰ Lacking omniscience, our knowledge of others and of the causes or effects of any action or policy will always be flawed, making our reasoning fallible and opening up the prospect that with the best will in the world we are prone to errors that may have profoundly damaging consequences. Similarly, our values and judgments tend to reflect our own experience and knowledge – however hard we try, it proves highly improbable that we could entirely satisfactorily place ourselves fully in the shoes of those whose ways of thinking and social context may be either metaphorically or literally outside our ken. These two forms of partiality together comprise the 'circumstances of disagreement'.

These 'circumstances of disagreement' have political and legal importance because of what Rawls, following Hume, termed the 'circumstances of justice'.¹¹ Scarce resources and limited altruism mean that no one can assume that they will either have enough to satisfy all

¹⁰ T. Christiano, *The Constitution of Equality*, (Oxford University Press, 2008) 88-96.

¹¹ J. Rawls, *A Theory of Justice*, (Harvard University Press, 1971) 126-30

they need for their projects, or can count on the spontaneous forbearance or support of others when necessary. As a result, conflicts will arise, leading to the need for collective rules assigning who is entitled to or owed what by whom, when and how. Yet, we must collectively agree on these necessary collective rules in the light of extensive disagreement about their substance, sources, subjects, sphere and scope. Such disagreements about the nature and application of rights and justice, combined with the need for collective agreements about them, together comprise what Waldron has called ‘the circumstances of politics’.¹²

The circumstances of politics make necessary the establishment of some form of political authority capable of determining our rights despite our disagreements. Bernard Williams regarded this necessity for the authoritative ‘securing of order, protection, trust and the conditions of co-operation’ as ‘the first political question’ because ‘it is the condition of solving, indeed posing, any others’.¹³ In that sense, politics goes ‘all the way down’, as I noted I did say, because it is fundamental. Yet, how are we to ensure such an authority is also constitutional? Clearly, it will be constitutive of the political community, but how could we agree on its meeting constitutional norms despite our disagreements about those norms? This is the question to which political constitutionalism attempts to provide an answer, with Mac Amhlaigh contending that response to be inadequate.

If the circumstances of disagreement were ontological, then any attempt to take constitutional norms such as rights seriously would be futile. This scenario belongs to what H. L. A. Hart famously termed the

¹² Waldron, *Law and Disagreement*, 107-13.

¹³ Williams, ‘Realism and Moralism in Political Theory’, 3

Nightmare of certain schools of American jurisprudence.¹⁴ It appears to assume that without unambiguous second order grounds for the truth and objectivity of our first order arguments; any view we express or agreement we reach will be arbitrary. Political constitutionalists have no need to adopt this position. They can sensibly engage in first order arguments about their situation in terms that make sense to us in the here and now without answering or even asking second order questions concerning the cosmic validity of these terms.¹⁵ This is what most people do most of the time about most of the things that matter to them. Yet, what Hart characterized as the Noble Dream of appealing directly to a correct understanding of certain rights and other constitutional norms - even of a basic 'minimal' kind, such as Mac Amhlaigh proposes - will not work either. Disagreement at the epistemological level means that the basis for such an appeal does not exist. Rather, rights and other constitutional norms can only be taken seriously in the manner whereby the necessary decisions about them are argued for and made. These decisions are not only political in purpose, as we saw, but also need to be regarded as being decided politically. Such political decision-making must aim at legitimacy, which I define below in section 3, without being able to show that the decision reached is the most just or the best - indeed, it must do so because it cannot show that to be the case. Consequently, all that can be shown is that the process of decision-making has treated the norms at issue as important and that people's different views about them have been respected and debated.

Herein lies the normative case for my advocacy of 'a thorough-going proceduralism that goes all the way down'. Namely, that there is no

¹⁴ H L A Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream', *Ga. L. Review* 968 (1977)

¹⁵ Williams, 'Realism and Moralism', p. 11.

other way to take constitutional norms seriously than through the way our arguments and decisions about them proceed. We cannot avoid starting with procedures. Yet, it can be noted, that is no different to many other areas of human enquiry. For example, acceptance of the findings of natural science turn likewise on the methods employed to validate them, which are similarly subject to continuous refinement. Different types of process are appropriate to different fields of enquiry. The claim made here is that the process for deciding constitutional issues cannot but be political in the broad sense of providing a politically necessary resolution of disputes between political opponents about the values to be realised in their collective life.

The priority of politics and the inescapability of procedures of a broadly political kind provide two key features of a politically realist constitutionalism. Together they motivate the move away from the focus on a legal document as a statement of moral principles as the hallmark of constitutionalism and towards a concentration on the manner in which constitutional norms are politically debated, decided and determined – both in general and in particular cases. Nevertheless, not enough has been said at this stage to definitely tip the scales towards political rather than legal processes of debate. These criteria might be satisfied by a broadly political account of legal constitutionalism – one, say, that characterised the moral reading of the constitution not as the enactment of the Noble Dream, as Hart assumed Dworkin conceived it,¹⁶ but, as was arguably nearer Dworkin’s position, as a political debate in legal terms about the moral principles a democratic society should uphold.¹⁷ Yet, if we disagree

¹⁶ Dworkin denied he held this ‘silly’ view in *Taking Rights Seriously*, 2nd impression, (Duckworth, 1978), p. 293.

¹⁷ As Jeremy Waldron has noted, Dworkin famously rejected the notion of any Archimedean point, remarking that the notion that there was a ‘right answer’ ‘locked up in some transcendental strongbox’ was ‘nonsense’ (*Taking Rights Seriously*, p.

as much about procedures as we do about outcomes, how can we decide between different kinds of political and legal processes? It might seem we can only escape the frying pan of ontological scepticism by entering the fire of an epistemological scepticism that involves an infinite regress regarding process.

2. No Archimedean Point: Procedures and the Problem of Infinite Regress

As Mac Amhlaigh observes, political constitutionalists may embrace a proceduralist view of constitutionalism but they do not thereby adopt the view of someone such as John Hart Ely, who believed that judicial review of the process of democratic decision-making is acceptable in ways that the review of the substantive decisions of democratic bodies is not.¹⁸ Political constitutionalists argue that procedures are as controversial as the decisions made by them – indeed, the two are intrinsically linked given that the validation of any decision comes through the way it is made. Yet, for that self-same reason, they can resist the futile attempt to find a perfect procedure from which we can assess the best procedure for given situations and purposes. On this account, there is simply no Archimedean point and so no need for an infinite regress towards some

216). On his account, we can only have arguments about right answers, and these must always be open to counter-arguments. His support for legal over political constitutionalism largely stems from the alleged superiority of legal argumentation – a process view in other words - which, as Waldron remarks, depended on a contestable understanding of political processes. See J. Waldron, ‘The Rule of Law as a Theatre of Debate’, in J. Burley (ed), *Dworkin and his Critics*, (Blackwell, 2004) at 326-7. Nevertheless, as Williams, ‘Realism and Moralism’, 12, discerned, Dworkin’s account of law trades on the possibility of political moralism. A more truly political realist account of courts as a model of public adversarial deliberation can be found in S. Hampshire, *Justice is Conflict*, (Princeton, 2000), especially 89-90, where he discusses the US Supreme Court.

¹⁸ J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Harvard University Press, 1981). See the critique of his position in *PC* 107-118.

originating procedure that might provide such a point.¹⁹ We can only start from the procedures we have and seek to improve them through voicing our disagreements within them and thereby motivating changes to them. Moreover, we do not need to engage in a second order reflection on the best possible procedure to offer sensible first order reflections on the adequacy of current procedures for our present needs.

This reasoning underlies my scepticism regarding the supposed special merits of constitutional conventions as mechanisms for legitimizing subsequently entrenched constitutions. Such proposals suppose these conventions might offer such an Archimedean point by representing an especially elevated and serious political process that would be superior to all subsequent processes. However, the evidence for a sharp distinction between constitutional and normal politics seems thin and hard to justify if all processes are potentially challengeable. Rather, there is a need for the processes that establish and adjudicate on constitutional questions to be permanently open to criticism and change.²⁰

Mac Amhlaigh and others have raised a number of potential problems with this process of continually re-building the constitutional ship at sea. First, objectors worry that it might undermine the authority of the prevailing process if it and the decisions it has made become liable to continuous challenge. The capacity of a political authority to settle issues will be weakened, damaging its capacity to respond to Williams' first political question. However, this worry seems exaggerated given these same objectors generally accept that Constitutional Courts can and do overrule their precedents and revise their competences without a descent

¹⁹ See *PC* 173-4

²⁰ See Richard Bellamy and Justus Schönlaue, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights', *Constellations* 11.3 (2004) 412-33

into anarchy. After all, many important and wide-ranging reforms to our democratic processes, such as woman's suffrage, have come about without wholesale revolution. Even when these reforms involved and were precipitated by protests outside the established processes, such as acts of civil disobedience, they invariably ended up being formally enacted and legitimated within them. In part, that was because even such radical reforms could be put forward not so much as wholesale rejections of these processes as better understandings of the practical requirements demanded by their inner rationale.

Mac Amhlaigh's second objection, that using a process, such as majority rule, to decide on the suitability of that same process is likewise illogical and illegitimate, fails for similar reasons. How, he argues, can a system of majority rule, say, be used to determine whether to constrain or extend majority rule or not?²¹ Again, this argument seems to depend for its coherence on the belief that some perfect procedure might exist that could determine all other procedures, thereby triggering the very infinite regress that these critics accuse political constitutionalists of being committed to. Yet this dilemma only exists for those who believe such an Archimedean point might exist. Without that possibility, the criticism misfires – there simply is no alternative than to grasp the procedural nettle as we find it. Not all decision procedures are inherently biased in their operation to the *status quo* - a system of making decisions on the toss of a coin, for example, offers an equal chance to any alternative to continuing the practice. Majority rule in and of itself has no inherent bias to majority rule. Rather, for well-known reasons,²² it is neutral between the options it is used to decide between, gives all involved an equal say,

²¹ This seems to be a version of the *nemo iudex in sua causa* argument, though he does not mention it by name. I examine this objection more generally in *PC* 118-20.

²² K. May, 'A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision', 20, *ECONOMETRICA* 680 (1952), 680.

and responds positively to what people choose. Consequently, it is unsurprising that majority systems in Canada, New Zealand and the UK have introduced both Bills of Rights and, in some instances, PR, admittedly in certain cases by allowing for an **alternative to the ordinary legislative** process to decide the issue, albeit usually one, such as a referendum, involving a form of majority rule, though a form different to that prevailing in **making** normal legislation. Yet, that decision itself was made and implemented by majority rule within the legislature. Moreover, these critics of majority rule within legislatures have little if anything to say about its similar use by judges in multimember courts to resolve their disputes.

I have still said nothing that need decisively favour legislative over judicial supremacy. True, a defence of judicial supremacy in purely ‘output’ terms is ruled out by the argument that the credibility and appropriateness of any outcome always turns on the character of the process employed to support it. However, legal constitutionalists can and do make just such a case in noting qualities of the legal process, such as its purported impartiality and even-handedness, which supposedly render it superior in these respects to political processes as a forum of constitutional principle.²³ By the same token, though, nothing here rules out the possibility for political constitutionalists to challenge a prevailing legal constitutionalist system either, as Mac Amhlaigh proposes must be the case. I return to that argument in section 4. Before doing so, I want to explore Mac Amhlaigh’s third claim that the political constitutionalist position implies that there are no criteria of legitimacy that could allow a criticism of any process, even that of a totalitarian regime. According to this objection, constitutionalism in and of itself must assume some

²³ Most famously, R. Dworkin, ‘The Forum of Principle’, in *A Matter of Principle*, (Harvard University Press, 1985) 33-71, but see too Hampshire, *Justice is Conflict*.

criteria that stand outside any process - a role he ascribes to a minimum theory of legitimacy.

3. Political not Metaphysical: The Basic Legitimation Demand

In addressing this point it is helpful to return to Williams' account of the political. He argued that it was not enough for a political system to answer the 'first political question'; it must also meet the 'Basic Legitimation Demand' (BLD).²⁴ To do so, the response to the first political question must offer 'an "acceptable" solution', one that can provide a justification of the political system's right to rule to each person subject to it. While he distinguished the two analytically, noting that an answer to the first political question provides a necessary but not a sufficient condition for meeting the BLD, he saw the two as interconnected since the first political question could not be answered adequately without meeting the BLD. As he elaborated it, 'acceptable to each' turns out to be a threshold condition – that there should be no group 'so radically disadvantaged' by the prevailing regime that they conceive themselves as enemies of the polity and its rulers.²⁵

Mapping Williams' account onto both Mac Amhlaigh's argument and the discussion of the circumstances of politics above, we can see the first political question as responding to the need for an authority capable of providing a stable set of rules of justice capable of coordinating the social activities of the members of a political community. Yet, if disagreement goes all the way down, then the criteria of legitimacy needed to decide if the BLD has also been met will themselves be subject to the disagreements that give rise to the need for such a political authority in the first place. As a result, Williams, seems open to a parallel

²⁴ Williams, 'Realism and Moralism', 4.

²⁵ Williams, 'Realism and Moralism', 5.

criticism to that levelled by Mac Amhlaigh at those political constitutionalists who appear to argue in similar terms: namely, that he must either concede that there are moral criteria of legitimacy that arise outside politics or accept that might could define right, or at least whatever works must be legitimate enough.²⁶

Williams conceded that the BLD is a moral principle but not one that is ‘prior to politics’. Rather, ‘it is a claim that is inherent **in** there being such a thing as politics: in particular, because it is inherent in there being a first political question.’²⁷ Developing this point, Williams reasoned that the first political question is unlikely to be answered in a stable way, that acknowledges the disagreements and conflicts that stand behind the very need for politics and raise the question in the first place, unless rulers can avoid their rule so radically disadvantaging a given group that that group could never find it acceptable in the sense of being preferable to open war. A situation in which a group of people hold power by terrorising another group does not provide an answer to the first political question but rather represents the very circumstance that the political is supposed to address. Might never implies right in and of itself because ‘the power of coercion offered simply as the power of coercion cannot justify its own use’.²⁸ In other words, might alone does not supply an account of political authority.

Nevertheless, this last argument might appear to imply that the BLD could be satisfied by acceptable ‘outputs’, as Mac Amhlaigh proposes, without involving any special sort of political ‘inputs’. However, that possibility would suggest that the legitimacy of a given regime can result from its promoting a certain moral ideal that lies

²⁶ E.g. Charles Larmore, ‘What Is Political Philosophy?’, *Journal of Moral Philosophy* 10, no. 3 (2013): 276–306, 291

²⁷ Williams, ‘Realism and Moralism’, 5

²⁸ Williams, ‘Realism and Moralism’, 5-6

outside of politics, in the sense of being beyond reasonable disagreement. For example, certain basic human rights and a minimal account of social justice might be defended, as Mac Amhlaigh and many other theorists do, as moral norms that ought to be accepted and acceptable to all because they avoid any group being radically disadvantaged by another. Yet, realists maintain that position cannot be plausible if the whole point of politics arises from disagreement about which moral ends and modes of moral reasoning are to be preferred. Rather, the ‘acceptance’ required of citizens must be with the way the political system operates and whether its operation is systematically skewed against a given group, so that they are consistently disadvantaged from participating, expressing their views or influencing decisions. Satisfying these requirements relates to input rather than output features of a political system, to the conduct of the decision-making process rather than the decisions themselves, though the two will be to some degree related. Such generally acceptable input features aim at avoiding any group being so radically disadvantaged in putting its views that it could be regarded as being dominated by some other group or groups within that political society. However, that need not mean that no group should ever be disadvantaged by any decision, merely that such discriminating decisions should be duly made in a non-dominating fashion.

The argument being made here is that the quality of the process carries some normative weight of an independent kind from either its pragmatic virtues or lack of them, on the one side, or its conduciveness to realising some desirable normative outcome, on the other. That weight consists in the way those subject to political decisions feel they are regarded within the decision-making process itself – the equality of concern and respect they are accorded. As I argued in the last section, this issue cannot be cashed out in terms of a definitive set of procedural

rights, given these too are subject to disagreement. Williams has been accused of assuming a prior moral claim that all human beings matter equally or that authority requires universal consent,²⁹ notions that might ground such a set of pre-political procedural rights. However, like political constitutionalists, his argument is purely political – it is a claim that derives from the nature of political authority itself towards those who are subject to it. How it gets cashed out has varied and been elaborated in different ways over time, but the rationale lies within the nature of political processes themselves rather than some pre-political morality. Nor is it to argue, as Lon Fuller attempted with the idea of the rule of law,³⁰ that all that is of normative value could be packed into the idea of legitimate procedures so that no bad politician could subvert them nor any bad outcome ever be produced by them. Rather, as I also observed, it merely shows that the legitimacy of outcomes cannot be separated from that of process and that addressing this last has to have priority in our constitutional thinking.

Does doing so favour legislative over judicial supremacy? Yes and no. I do not dispute that legal and political constitutionalists can both claim their respective processes accord dignity to the individuals who employ them. Moreover, both schools believe their respective mechanisms to be complimentary in doing so in various respects – that both need the other. However, as I remarked in section 1, a key component of the ‘circumstances of disagreement’ lies in the inevitable partiality of any person’s judgment about him or her self and others. Democratic mechanisms seek to address that structural problem in a

²⁹ M Sleat, ‘Bernard Williams and the Possibility of a Realist Political Theory’, *European Journal of Political Theory*, 11 (2010) 247-72. For a critique, see E. Hall, ‘Bernard Williams and the Basic Legitimation Demand: A Defence’, *Political Studies*, 63 (2015) 446-80.

³⁰ Lon Fuller, “Positivism and Fidelity to Law: a Reply to Hart,” *Harvard Law Review*, 71 (1957), 630–72, at p. 637.

public way by allowing all an equal say in their collective deliberations, albeit usually indirectly through their influence over their elected representatives. On this account the only way to realise justice in our relations with others is through public deliberation about justice in which each has an equal say. What touches all must involve all. Of course, how far democratic procedures succeed in this endeavour can be questioned but the political constitutionalist claim is that not to even attempt to develop such a process involves in and of itself an injustice precisely because the circumstances of disagreements makes processual and outcome issues so intertwined in this regard. It becomes difficult for justice to be done in any other way than by trying to show it has been done through the equal involvement of those concerned. It is for this reason that, as J S Mill noted in his *Considerations on Representative Government*,

it is a personal injustice to withhold from any one . . . the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people.³¹

Legal constitutionalists can and have sought to address this issue by noting the ‘democratic’ qualities of their own procedures.³² Indeed, judicial review has been frequently characterized as a means for rectifying precisely this ‘personal injustice’ in the case of ‘discrete and insular minorities’.³³ But that is to shift the debate in the direction political constitutionalists desired in mounting their challenge. It moves the argument away from seeing constitutionalism as a moral framework

³¹ John Stuart Mill, *Considerations on Representative Government*, in Mill, *On Liberty and Other Essays* (Oxford University Press, 1998), 329

³² I discuss some prominent examples of such attempts in Richard Bellamy, ‘The Democratic Qualities of Courts: a Critical Analysis of Three Arguments’, *Representation*, 49:3 (2013), 333-346.

³³ *United States v Carolene Products Co.* 304 US 144 at 152 n. 4 (1938), Ely, *Democracy and Distrust*, pp. 75–7, and see *PC* 110, 249-58

for and supplement to democracy, to a view of it as somehow intimately connected to how democracy operates, so that even a legal constitutionalism requires certain democratic characteristics in its processes rather than simply offering an alternative and corrective to the supposed inherent shortcomings of such processes – a supposition that political constitutionalists have sought to reveal as unwarranted.

‘Now and Around Here’: A Status Quo Bias?

This brings me neatly to Mac Amhlaigh’s final claim. He argues that so long as a prevailing constitutional system, be it legal or political, satisfies his minimal theory of legitimacy, then, given disagreements about process, a political constitutionalist could defend the continuance of that system where it exists but could not argue away from legal constitutionalism. The reason for this dismal conclusion arises from the supposed self-defeating nature of political constitutionalist arguments. In Mac Amhlaigh’s view, political constitutionalists are doomed to cling on to the turtle on which they find themselves or risk plunging into the abyss.

The political constitutionalist does accept that we must look at what makes sense ‘now and around here’,³⁴ sharing the view of legal constitutionalists that legitimate political rule within modern, pluralist societies involves some elements of both constitutionalism and democracy that are characteristic of liberalism (and, I would add, republicanism). Yet the reasons for this view being shared by most of the members of western democracies does not turn on any grand metaphysical consensus. It suffices to draw on the recent historical experience of various forms of illiberalism and compare them with life under more liberal regimes. As a result, constitutional government, be it

³⁴ Williams, ‘Realism and Moralism’, p. 8.

of a legal or a political kind, is likely to be accepted as broadly legitimate where it exists because it offers us a largely stable solution to the first political question. However, its capacity to do so in either way remains to a degree historically contingent – the BLD has been met by non liberal legal and political systems for most of human history.

Does this contingency mean, as Mac Amhlaigh suggests, that political constitutionalism can only be defended where it already exists, no doubt within the confines of suitably obscure specialist journals? That would only be the case if the non-arbitrary defence of either form of constitutionalism had to be grounded on some imaginary ultimate Turtle. However, unlike his minimal theory of legitimacy, the BLD has no need of such question-begging second order foundations. It can be grounded in the very idea of a legitimate state capable of answering the first political question.³⁵ Where this question receives a satisfactory response, as it does ‘now and around here’, we can (and should) still ask sensible first order political questions about the capacity of different systems to continue to be seen as legitimate in the type of societies we live in and the forms of disagreement they generate. That possibility rests open to *both* legal and political constitutionalists, with each prompting the other – as in this exchange – to improve their case. Yet that exercise can best be achieved not through abstract theorising about the moral foundations of constitutional values, which by and large political and legal constitutionalists share for the historical reasons given above, so much as through engagement with the ways legal and political institutions work and people’s capacity to employ and relate to them. The contribution of political constitutionalism lies in showing the normative necessity and worth of such an engagement, noting how it proceeds from the logic of

³⁵ Williams, ‘Realism and Moralism’, 8

the very arguments legal constitutionalists employ, such as treating people with equal concern and respect.

In this regard, a certain irony arises from Mac Amhlaigh's proffered 'defence'. A chief motivation behind political constitutionalism has been the critique of the conservative *status quo* bias of legal constitutionalism, which by seeking to entrench certain historically given constitutional norms risks locking in the privileges and biases of those favoured by the prevailing system. Indeed, the desire for hegemonic groups to preserve their dominance has been shown to motivate many moves from political to more legal forms of constitutionalism.³⁶ Political constitutionalism challenges such hegemonic projects, indicating the dangers they pose to the legitimacy of the constitutional process in the long term. In seeking to foreclose such challenges, Mac Amhlaigh's argument proves intellectually reactionary, the misguided idealisation of a given turtle as the best of all possible turtles.

³⁶ R. Hirschl, *Towards Juristocracy* (Harvard University Press, 2004)