THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW

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In the world of constitutional law, theory and practice seem to be moving in opposite directions. As a matter of constitutional practice, since the end of the Second World War an extensive and growing literature produced by lawyers, judges, and political scientists acknowledges the emergence of a ground-breaking constitutional paradigm. In states as diverse as Germany, South Africa, and Canada, this modern constitutional paradigm integrates (1) a written constitution that exhaustively establishes the conditions for the valid exercise of all public authority, (2) a constitutionally entrenched bill of rights that recognizes and delineates the right of persons, as bearers of dignity, to just governance, and (3) a politically independent judicial body that is both empowered and obligated to respond to constitutional complaints by reviewing the constitutionality of state action. The emergence of this paradigm has been described as “the most important public law event of the twentieth century”, ¹ “a constitutional and civil rights revolution”, ² and as the “full realization” of democracy.³

As a matter of constitutional theory, however, modern constitutionalism remains enigmatic. Some commentators see constitutional forms of government, in general, and judicial review in particular, as an illegitimate constraint on the democratic right of a majority (or plurality) to enact its preferences into law. Others are sympathetic to older forms of constitutionalism and overlook the significance of more recent constitutional developments. Consequently, a chasm separates the operation of modern constitutionalism from a theory that could explain and guide it. In this context, this new constitutional paradigm has had to develop without (and often in opposition to) a theoretical framework.

The overarching purpose of this project is to formulate an original theory of public law – the branch of law that concerns the juridical relationship between the individual and the state – that illuminates postwar developments in constitutional practice around the world. My claim is that this

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theory not only articulates the distinctiveness of modern constitutional practice but also delineates the obligation of all states to bring themselves within its parameters.

I proceed in four sections.

The first section explores the strategy that constitutional theorists invariably employ in justifying constitutionalism over other modes of governance. This instrumental strategy involves identifying some advantageous outcome, and then arguing that constitutionalism is justified because it is conducive to its realization. Different theorists focus on promoting different kinds of outcomes – elevating levels of public debate, realizing a liberal conception of justice, protecting equal rights in times of crisis – but are united by the view that if constitutional governance can be justified, it is because of the good results that it brings. I argue that the instrumental strategy should be abandoned both because it relies on empirical claims that are likely unverifiable and because it fails to illuminate the conviction, held by constitutional practitioners from around the world, that modern constitutionalism is a fundamental innovation in governance.

The second and third sections seek to bring the theory and practice of modern constitutionalism back together by setting out the moral problem to which modern constitutionalism systematically responds. In the second, I look to the legal and institutional structure of a modern constitutional state to identify a set of fundamental theoretical questions that it raises. In responding to these questions, I elaborate a theory of public law. The distinctive feature of this theory is its recognition that in any legal system, the right of government to exercise public authority is always accompanied by a duty of just governance, that is, a duty to bring the existing legal order into the deepest possible conformity with the equal freedom of all who are bound by it. The problem common to all precursors of modern constitutionalism is not that they necessarily violate the right of persons to just governance, but that this right can be violated with impunity. In legal systems in which public authority is exercised by the few, as in autocratic or oligarchic forms of government, the right of the many to just governance remains susceptible to violation. Conversely, in legal systems in which public authority is exercised by the many, as in majoritarian democracies, it is the right of the few to just governance that remains vulnerable.

The third section presents the modern constitutional state as an innovative and systematic attempt to make the exercise of public authority accountable to neither the preferences of the many nor the few, but, for the first time in the long history of public law, to the right of each and every inhabitant of the legal order to just governance. This accountability is evident in the distinctive features of a modern constitutional state: a written constitution that empowers and binds all
branches of government, a constitutionally entrenched bill of rights that secures the inherent dignity of each person in relation to the state’s public authority, and a politically independent judicial body that reviews the constitutionality of state action. These features create the legal and institutional conditions under which any person who believes that his or her right to just governance has been violated (and, in some circumstances, representative or surrogate actors) may raise a constitutional complaint in order to constrain the exercise of public authority to the terms of its justification. So conceived, a modern constitutional state addresses a problem that arises in every legal system, but that no legal system can address apart from the legal and institutional structure of a modern constitutional state. Precursors to modern constitutionalism may succeed in having elevated debates on matters of public importance or enacting just laws, but only a modern constitutional state creates the legal and institutional conditions in which the exercise of public authority is accountable to the right of every person within the legal order to just governance. I illustrate my argument by exploring the way in which the transition to modern constitutionalism in Germany, South Africa, and Canada addresses the problem of accountability that characterized the preceding regime.

The fourth section defends modern constitutionalism from objections raised by its leading critic, Jeremy Waldron. Waldron’s objections can be divided into two kinds. Objections of the first kind attack justifications of constitutionalism that rest on disputable empirical claims about human nature. Objections of the second kind attack constitutional practice directly by arguing that it is undemocratic and therefore illegitimate. I respond to objections of the first kind by noting that the justification of constitutionalism that I offer does not proceed on the basis of controversial empirical claims. Thus, even if Waldron succeeds in casting doubt on the empirical claims to which some proponents of constitutionalism appeal, the justification offered here remains unaffected. I respond to objections of the second kind by explaining that even though constitutionalism is not majoritarian, it is nonetheless a democratic form of government. It is democratic insofar as citizens exercise political rights and thereby govern themselves through their representatives. It is not majoritarian insofar as it creates a legal context in which the legislative power of the citizenry is accountable to the inherent dignity and fundamental rights of each person bound by it.

I. The Instrumental Strategy

In what follows, I explore the most common justification of the legal and institutional features of a modern constitutional state, as explicated above. Because my question concerns
whether this model of governance can be justified as a whole in a range of historical, cultural, and political contexts, there are certain justifications that I will not explore here. First, I sidestep a series of more fine-grained discussions concerning judicial methodology and constitutional design. Debates, for example, concerning the appropriate doctrine for the judiciary to employ in assessing the scope and limits of constitutional rights presuppose a more basic issue: Why should rights be entrenched within a constitution and subject to judicial review? If these more basic features of a modern constitutional state are unjustifiable, then judicial review of constitutional rights would be illegitimate regardless of the methodology employed. The same point can be made with respect to questions concerning the virtues and vices of centralized and decentralized systems of judicial review. If the practice of judicial review cannot be justified, then either approach would be inadmissible. Second, I will not consider justifications that seek to legitimate a particular aspect of modern constitutionalism, such as the use of judicial review to protect democratic rights, but not other fundamental rights. Even if successful, such justifications cannot purport to illuminate modern constitutional practice as a whole. What I want to consider is whether there is a standpoint from which the fundamental features of a modern constitutional state can be jointly justified.

Once these approaches are set aside, the most prominent remaining strategy for justifying rights-based constitutionalism involves identifying some beneficial outcome and then arguing that constitutional arrangements contribute to its realization. Proponents of this strategy appeal to a range of different desirable outcomes, but share the conviction that if constitutional governance is justifiable, it is because it is an instrument for the achievement of outcomes that are themselves desirable.

Ronald Dworkin is representative of this instrumental approach. In *Freedom's Law*, Dworkin explains that when considering issues of constitutional design, in general, and rights protection, in particular, he sees “no alternative but to use a result-driven rather than a procedure driven standard for deciding them.” Accordingly, when Dworkin reflects on whether constitutional rights should be protected through judicial review, he turns his attention to the kinds of outcomes that this arrangement generates. For Dworkin, judicial review is justified because it produces a welcome benefit by improving the quality of public debate:

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5 Ibid., 109.
When an issue is seen as constitutional…and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public debate is often improved, because the argument concentrates from the start on questions of political morality…When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed by future decisions, a sustained national debate begins, in newspapers, and other media, in law schools and classrooms, in public meetings and around dinner tables. The debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.\(^7\)

As Dworkin explains, judicial review improves the quality of public debate by framing issues of public importance not in terms of their popularity or expediency, as legislatures too often do, but as questions of political morality.\(^8\) Once questions of public importance are framed in this way, the judiciary responds by selecting “the best answers”.\(^9\)

As time passed and the judgments of the United States Supreme Court became increasingly objectionable in Dworkin’s eyes, he tempered his enthusiasm for judicial review. While he maintained his rejection of the view advanced by “many lawyers and political scientists” that the practice of judicial review of constitutional rights “is inevitably and automatically a defect in society”, Dworkin distanced himself from the view that the practice invariably contributes to the legitimacy of a democratic state.\(^10\) Within any given legal setting, the appropriateness of the practice rests on pragmatic considerations “that vary from place to place”, which include a country’s track record in protecting individual and minority rights, as well as “the strength of the rule of law, the independence of the judiciary, and the character of the constitution judges are asked to enforce.”\(^11\) For Dworkin, the judicial review of constitutional rights is not an essential feature of any well-ordered regime, but an arrangement that may be rightfully adopted or rejected.\(^12\) Whether the United States will, in the final analysis, have chosen wisely by adopting judicial review depends, Dworkin explains, “on the character of future Supreme Court nominations. We must keep our fingers crossed.”\(^13\) In a world in which the judicial review of constitutional rights had solidified as a

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\(^7\) Ibid., 345.
\(^8\) Ibid., 344.
\(^9\) Ibid., 34.
\(^11\) Ibid., 398.
\(^13\) Justice for Hedgehogs, 399.
central feature of constitutional governance around the world, Dworkin refrained from defending judicial review as a general feature of a well-ordered legal system.

Those who join Dworkin in defending constitutionalism share his presupposition that questions concerning the appropriateness of a constitutional regime should be addressed in reference to the benefits it brings and the burdens it alleviates. Aileen Kavanagh holds that the “ultimate standard by which we judge political institutions is their likelihood of achieving good substantive outcomes.” According, the “justification for constitutional review must depend ultimately on empirical assumptions about the likelihood that courts will succeed in protecting rights.” Kavanagh recognizes that the success of courts in protecting rights may vary in different contexts and therefore holds that scholars should support constitutional arrangements when they would be effective in protecting rights and oppose them when they would be ineffective. Whereas Kavanagh defends constitutionalism by focusing on the benefits that it might bring, Samuel Freeman calls attention to the burdens that it might alleviate. Freeman conceives of constitutional democracy as an expedient for safeguarding equal rights in social and historical circumstances in which legislative power might be used to “subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality”. For Freeman, as for Kavanagh and Dworkin, the justification of judicial review “is contingent upon the extent to which these procedures serve the ends in virtue of which they are found appropriate.” Constitutionalism is appropriate when it is conducive to the promotion of the best outcomes in relation to the complex matrix of factual circumstances at hand. As circumstances fluctuate within a given legal system, constitutionalism may be rightly adopted as beneficial and subsequently forsaken as detrimental and vice versa.

The instrumental strategy cannot establish that constitutionalism is, as a general matter, preferable to other modes of governance. On the one hand, each of the advantageous outcomes to which defenders of constitutionalism anchor their justifications can, in principle, be realized within

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14 “Constitutional Review, the Courts, and Democratic Scepticism,” *Oxford Journal of Legal Studies* 62 (2009): 134. Here Kavanagh follows Joseph Raz, “Disagreement in Politics,” *American Journal of Jurisprudence* 43 (1998): 45: “A natural way to proceed is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side effects.”
15 Ibid., 104.
16 Ibid., 123-5.
18 Ibid., 361.
19 Kavanagh, 108.
other kinds of legal systems. On the other, the various advantages that constitutionalism supposedly generates might fail to materialize within a constitutional regime. Thus, Jeremy Waldron has responded to Dworkin by cataloguing instances in which public debate has flourished in majoritarian democracies and floundered in constitutional states. If modern constitutionalism is simply an instrument for the promotion of outcomes that it might fail to produce and that can be realized in its absence, then why is it valuable?

To this, a defender of constitutional democracy might reply that constitutionalism is not valuable because it provides advantages that other forms of government are incapable of offering. Rather, a constitutional regime realizes the same kinds of advantages as other forms of legal ordering, but it might realize these advantages to a greater extent. Thus, Dworkin holds that the American experiment with judicial review of constitutional rights has been justified because the “United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.” His claim is not that legislatures, unlike courts, are incapable of protecting rights, but that if the United States lacked judicial review and legislatures had the final say about questions of rights, then the United States would be less rights-protecting than it is today.

This claim is more problematic than Dworkin acknowledges. Dworkin’s claim takes the form of a counterfactual: If it was not the case that A, then the result would not have been B. As Waldron has rightly observed, counterfactual claims are “extraordinarily difficult to assess.” To verify Dworkin’s claim that the United States is more just than it would have been in the absence of judicial review, one would have to determine the overall balance of just and unjust outcomes that have accumulated in the history of American constitutional jurisprudence. One would then have to weigh this determination against the sum of just and unjust outcomes that would have occurred in

22 For a similar argument claiming that a constitutional democracy is more likely to enact norms that conform to a liberal conception of justice than a procedural democracy, see John Rawls, Justice as Fairness: A Restatement (Cambridge: Harvard University Press, 2001), 145-148.
23 The canonical formulation of a counterfactual appears in David Hume, An Enquiry Concerning Human Understanding (1748), VII.II (“where, if the first object had not been, the second never had existed.”).
25 Ibid., 337-8 (explaining that verifying Dworkin’s counterfactual would require weighing just judicial decisions like Brown v. Board of Education, 347 U.S. 483 (1954) against unjust decisions, such as those that struck down progressive labor legislation during the Lochner era).
the range of possible alternative legal systems. The former determination is perhaps incalculable; the latter is unknowable. To be sure, the problem with Dworkin’s counterfactual claim is not that he is wrong in asserting that if the United States lacked judicial review of constitutional rights, then it would be less just. Indeed, Dworkin might be correct. But since the veracity of his claim seems impossible to verify, his justification of constitutionalism dissolves into mere assertion. Thus Waldron concludes that it remains “an open question whether judicial review has made the United States (or would make any society) more just than it would have been without that practice.”

So long as this problem of verification persists, we cannot elevate constitutionalism over other forms of government by pointing to the superiority of its outcomes. Instead, the instrumental justification yields the more modest conclusion that there might be circumstances in which constitutional governance is compatible with the realization of desirable outcomes. If this is all that can be said in favor of constitutionalism, then those who have described the modern constitutional paradigm as a “fundamental innovation” must be mistaken. Modern constitutionalism is not fundamental if it is just another means of achieving desirable outcomes that could be brought about without it. Modern constitutionalism is not innovative if it, like other modes of governance, might fail to bring about the outcomes by which it is justified. The instrumental justification fails to illuminate the basic conviction of constitutional practitioners in modern constitutional states around the world.

The instrumental strategy of constitutionalism’s defenders can be contrasted with the way in which constitutionalism’s critics seek to establish the primacy of their vision of democracy. Whereas modern constitutionalism is a form of democratic ordering in which the validity of legislation hinges on its conformity to justiciable constitutional norms, opponents of constitutionalism typically affirm a majoritarian conception of democracy, in which the content of legislation is not constrained by constitutional norms. In a majoritarian democracy, what the majority (or plurality) enacts into law through the appropriate lawmaking procedure is valid. Defenders of majoritarian democracy do not claim that such an arrangement is justified because it is compatible with or even effective in the pursuit of morally significant outcomes. Instead, they argue that the very procedure through which a majority enacts its preferences is morally salient. Since rational beings are capable of forming their own ends, the role of a legitimate state is not to subjugate persons to the preferences of their rulers.

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28 On these conceptions of democracy, see John Rawls, 145 (distinguishing constitutional democracy from procedural democracy).
but to create the conditions in which each citizen can guide the exercise of public power. Because it is unrealistic to suppose that citizens will invariably agree about what preferences public power should serve, a procedure is required that both recognizes the capacity of citizens to formulate their own preferences and that affords each citizen an equal say in determining what preferences public power should pursue. Majoritarian democracy is that procedure. In a majoritarian democracy, preferences are legitimated not by the merit of their content, which might generate disagreement, but by attracting the assent of the many, that is, a majority or plurality of adult citizens at the ballot box. Majoritarian democracy is valuable not because of what it might bring, but because of what it is: an arrangement premised on the right of each citizen, as a rational being, to have an equal say in collective decision making. From this standpoint, the defect of constitutionalism is clear: the benefits constitutionalism offers are uncertain, but the injustice it perpetrates in constraining the will of the majority is inescapable.  

This project offers a new approach for thinking about modern constitutionalism by rejecting the unstated assumption that both defenders and opponents of constitutionalism share: any justification of constitutionalism must be result-driven. Instead, I will argue that just as opponents of constitutionalism defend majoritarianism by appealing to a democratic theory that reveals the moral significance of its procedures, so too a broadly parallel strategy is available to justify the legal and institutional structure of a modern constitutional state. If a legal theory can be formulated that illuminates the inner logic of a modern constitutional state and justifies its central features, then we can give up the instrumental strategy without giving up on modern constitutionalism.

In the next sections I will articulate a different way of thinking about modern constitutional practice. Instead of identifying a desirable outcome and then arguing that modern constitutionalism is one of the instruments that can be directed towards its realization, I will argue that modern constitutionalism is itself the solution to a moral problem that confronts every legal system. Because every legal system must address this problem and this problem cannot be addressed apart from the legal and institutional structure of a modern constitutional state, every legal system must ultimately transition to modern constitutional arrangements. Such a justification would depart from the instrumental strategy in two respects. First, it would establish that the transition to modern constitutionalism is itself morally necessary for a legal system rather than merely compatible with the achievement of some extrinsically desirable outcome. Second, it would justify modern constitutionalism not on the basis of peculiar cultural, historical, or political circumstances found in

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some legal systems but absent in others, but rather on the basis of a fundamental moral problem common to legal systems generally.

II. The Problem of Accountability

The distinctive character of modern constitutional practice raises a set of theoretical questions. Consider the first article of Germany’s Basic Law, which encapsulates the relationship that a modern constitutional state establishes between the free individual and the coercive state: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Three fundamental questions emerge from this article. First, if persons are beings with dignity and therefore entitled to determine and pursue their own purposes, what right has the state to exercise authority over them by establishing, interpreting, and enforcing legal obligations? Second, why must state authority respect and protect human dignity over other preferred objectives? Third, can the state respect and protect the dignity of its inhabitants in the absence of the constitutional norms, institutional arrangements, and legal doctrines that characterize a modern constitutional state?

I will take up each of these fundamental questions from the standpoint of a theory of public law that explicates the normative structure of a legal system. The first question concerns the very possibility of a legal system. The second concerns the moral standard for assessing the adequacy of exercises of public authority within a legal system. The third concerns the kind of legal and institutional structure that a legal system should adopt. I have responded to the first and second of these questions at greater length elsewhere, and my treatment of them here is skeletal. I simply want to say enough about them to enable the identification of a moral problem in the structure of a legal system, the problem of accountability. The subsequent section argues that this problem cannot be addressed apart from the legal and institutional structure of a modern constitutional state.

(i) The Right of the State to Exercise Public Authority

[Omitted.]

(ii) The Right of Persons to Just Governance

30 Grundgesetz (translation of The Basic Law for the Federal Republic of Germany (Berlin: German Bundestag, 2001)), art. 1(1).
31 Troper, 99: “There is…no scientific approach to constitutional law separable from a general theory of the state…The ‘state,’ or government, that is the object of this general theory is not an empirical reality but a set of principles and concepts that allow scholars to articulate and justify the content of positive norms. A description of the state is thus a description of principles, concepts, and justifications.”
(iii) Authority, Justice, and Accountability

I have argued that the public law relationship between rulers and ruled is structured by the following rights and duties. Government enjoys the right to exercise public authority by enacting, interpreting, and enforcing laws incumbent on private persons. This right is justifiable because in the absence of institutions that make, interpret, and implement law, persons would be incapable of interacting with one another on terms of equal freedom. Such a justification of the right of government to exercise public authority implicates a particular conception of public justice. Since the justification of public authority is premised on the right of each person to equal freedom, internal to the justification of public authority is a conception of an ideal legal order and a duty to approximate it. A legal order is just to the extent that public authority is consistent with the right of every person bound by it to equal freedom. A legal order is governed justly to the extent that it directs the exercise of public authority towards the realization of equal freedom under law. So conceived, public authority and public justice are the mutually implicating aspects of a legal system. There is no right to exercise public authority that is not accompanied by a duty to govern justly. There is no possibility of just governance in the absence of publicly authoritative institutions.

Once public law is conceived of in terms of mutually implicating principles of authority and justice, the problem of accountability comes into view. The problem is that the right of government to exercise public authority is always accompanied by a duty to govern justly, but persons subject to public authority have no legal mechanism that enables them to stand on their right to just governance and hold the exercise of public authority to the terms of its justification.

The problem of accountability is a distinctive feature of the public law relationship between rulers and ruled. In private law, which concerns the rights and duties apposite to the interaction of private persons, the problem of accountability is addressed by the presence of public institutions. When one suffers a private wrong at the hands of another, the sufferer can bring her case before the impartial authority of a judge and demand to be made whole by the wrongdoer. A different structure, however, obtains in the public law relationship between rulers and ruled. When one suffers a wrong at the hands of the public authority, the public authority is both a party to the dispute and judge in its own case. Accordingly, the public authority might ignore one’s grievance,

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33 For a classification of the kinds of juridical relationships that arise in private law, see Jacob Weinrib, “What can Kant Teach us about Legal Classification?” Canadian Journal of Law and Jurisprudence 23 (2010): 203-231.
deny that the grievance amounts to a wrong, or even concede the commission of a wrong but withhold a corresponding remedy. Every person subject to public authority has a right to just governance, but whether that right will be respected depends on the very party that is under an obligation with respect to it. Public institutions make private persons accountable to one another in their conduct, but public institutions generate a problem of accountability because they can violate the right of persons to just governance with impunity.

The problem of accountability is conceptual, not causal. Alexander Hamilton makes a causal claim in his remark, “Give all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many.” Hamilton’s remark is causal because it suggests that if there is a discrepancy between those who exercise power and those on whom power is exercised, the former will oppress the latter. The problem of accountability, in contrast, is conceptual because it arises not from the likelihood that public authority will be exercised unjustly, but from the mere possibility that the right of one or more persons might be violated. The problem would therefore arise even if circumstances were so fortuitously arranged that public authority had always been exercised justly because those entitled to just governance would nevertheless remain vulnerable to the unjust exercise of public authority. The problem arises in any legal system in which there is an incongruity between those who are subject to public authority and those who can hold the exercise of public authority to the terms of its justification by insisting upon just governance.

The history of the theory and practice of public law is a testament to the pervasiveness of the problem of accountability. When Aristotle surveyed the constitutions of the ancient world, he discerned three ways in which public authority could be constituted within a legal system. Public authority can be exercised by “one ruler or few or the majority”. Each of these modes of exercising public authority shares a common defect, the failure to address the problem of accountability. The problem of accountability is inescapable so long as public authority rests in the hands of a single person (as in a monarchy), a few persons (as in an aristocracy), or many persons (as in a majoritarian democracy). A monarchy is unaccountable to every person bound by its lawgiving, while an aristocracy is unaccountable to the many. A majoritarian democracy is sometimes described as an accountable form of government because it makes those who exercise public

35 On the distinction between the propensity towards injustice and vulnerability to it, see Alexis de Tocqueville, Democracy in America, 261-2: “I do not say that there is a frequent use of tyranny in America at the present day; but I maintain that there is no sure barrier against it…”
authority answer to the preferences of the majority of adult citizens, as registered periodically during elections. But from the standpoint of the normative structure of public law, outlined above, majoritarian democracy is defective in three respects. First, it directs the exercise of public authority towards the fulfillment of preferences rather than to the realization of public justice, as the justification of public authority requires. Second, majoritarian democracy holds that government is accountable to the people when it is answerable to the preferences of the majority of its adult citizens. In contrast, a legal system that addresses the problem of accountability would make the exercise of public authority answer to the right of every person within the legal order to just governance. This includes all adult citizens, but also children, immigrants, refugees, guest workers, and prisoners. Third, in a majoritarian democracy government is held accountable from time to time through elections. The problem of accountability is not addressed by such an intermittent mechanism. In addition, what is needed is an arrangement in which every person bound by law’s authority can stand on his or her right to just governance, regardless of whether an election has just concluded, is presently occurring, or will soon transpire.

The problem of accountability raises a fundamental challenge: How would a legal system be designed in order to ensure that the exercise of public authority was accountable neither to the preferences of the many nor to the few, neither during this election nor that one, but to the unceasing right of every person to just governance?

III. A New Form of Government

[Omitted.]

IV. Objections and Replies

[Omitted.]

Conclusion

Modern constitutionalism is a practice in search of a theory. In countries around the world, modern constitutionalism has become the pre-eminent response to the full range of pathologies of public law, from the inhumanity of failed states to the unaccountability of autocratic, oligarchic, and

majoritarian forms of government. At the same time, modern constitutionalism is increasingly subject to criticism from theorists committed to earlier models of governance, which are incapable of addressing the problem of accountability. The overarching purpose of this project is to articulate a theory of public law that renders intelligible the constitutional norms, institutional arrangements, and legal doctrines that together comprise the modern constitutional paradigm. By formulating the duty of existing states to bring themselves into increasing conformity with the modern constitutional paradigm, I offer a theory that connects the general normative structure of public law to the most innovative constitutional developments of the postwar world.

I close with a comment about the broader implications of this project. So far, I have confined my focus to a set of fundamental components within a modern constitutional state: constitutional supremacy, constitutional rights, and judicial review. Of course, these components do not exhaust the modern constitutional project. Modern constitutional states are also committed to a broad approach to the law of standing, the purposive interpretation of constitutional rights, a principled framework for justifying limitations of constitutional rights, and substantive restrictions on the kinds of constitutional reforms that may be lawfully enacted. In developing this embryonic theory of the modern constitutional state, I will argue that each of these commitments rests on a common basis. Each plays an indispensable role in creating a system of government that is accountable to the inherent human dignity of each of its members. What is required in a modern constitutional state reflects the reason why modern constitutionalism is itself required.