A catholic view of protestant argument in law

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A Catholic View of Protestant Argument in Law

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1. Introduction

For an interpretivist, the familiar rule of law injunction that officials may only act 'in accordance with law' takes on an unfamiliar shape. Law here does not simply mean what is 'found in our books' – the literal or intended meaning of statutory texts, and the clear rules and principles laid down by judges in statutes and judgments.[1] It means the scheme of moral values and principles that animate our books and our political practices. When the state exercises power in accordance with the rule of law, so understood, say interpretivists, it possesses legitimate political authority. The decisions of the legislature and courts are – or, perhaps, *usually* are – morally binding and worthy of obedience.[2]

In the course of elaborating his interpretative theory of law as integrity, Ronald Dworkin tells us that an interpreter must take a 'protestant attitude' to the question of *which* scheme of principle animates our books and political practices.[3] This is an attitude, he says, 'that makes each citizen responsible for imagining what his society's public commitments to principles are, and what these commitments require in new circumstances'.[4]

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[1] *Entick v Carrington* [1765] EWHC KB J98.

[2] For a very clear statement of interpretive theories of law, see N Stavropoulos, 'Legal Interpretivism' at plato.stanford.edu/entries/law-interpretivist/.

[3] 'According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice': R Dworkin, *Law's Empire* (London, Fontana Press, 1986) 225.

[4] ibid 413. Dworkin also writes: 'Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one …. It becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme': ibid 190.

We find encapsulated in this attitude a conundrum. On the one hand, it is for each citizen to bring their individual moral convictions to bear on their community's past political decisions without deference to the views of others.[5] The right answer to a question of law is not necessarily the one a judge gives; or a decision may not be correct for the reasons the judge gives. On the other hand, protestant argument has, as Postema puts it, an 'interactive, public character' such that the interpreter argues with, and in the name of, their community about its moral commitments.[6] They imagine that the 'government speaks with one voice', even in circumstances of deep disagreement about why or when the actions of the community are legitimate and its laws binding.[7]

My aim in this chapter is to reconcile these Janus facing responsibilities of the protestant interpreter: those of individual conviction and community. I shall argue that, as interpreters, we should adopt an *inclusive and conciliatory attitude* towards other interpreters or interpretations. Or, to deploy the clumsy (but I hope not incendiary) title of this chapter for the first and last time: we must be catholic in our protestantism. By inclusive and conciliatory, I do not mean to eviscerate any sense of individual conviction in legal and constitutional argument. It is not the case, for instance, that an interpreter must compromise on the full rigour of their preferred moral theory, or that they should rein in their aspirations for it.[8] Nor is it the case that one theory of legitimacy may not give an objectively better account of the practice than another. I mean that the interpreter must see their individual arguments of conviction together with those of others as part of the same endeavour. They must *engage morally* with other theories, rather than seek ways to disqualify them. This is a responsibility of *inclusion*, I shall argue, in that it means accommodating interpretations ranging across each dimension of political morality – justice, fairness and procedural due process. It is a responsibility of *conciliation* in that it extends to making moral sense of views even if presented as morally neutral, positivist claims, or if otherwise couched in positivist-sounding language.[9]

I shall advance this account of – what we may call – 'inclusive protestantism' by way of a critique of Trevor Allan's distinctive and powerful interpretative theory of the rule of law.[10] I shall argue that Allan's approach is exclusive rather than inclusive, in that he privileges one justice-centric, judge-centric theory of legitimacy, making only minor concessions to interpretations that do not fall squarely within that theory.[11] It is non-conciliatory rather than conciliatory in that he typically seeks to *disqualify* the arguments of others on methodological grounds, rather than engage with them as moral theories. Less extremely, he is quick to designate decisions at odds with his theory

[5] 'A citizen's allegiance is to the law, not to any particular person's view on what the law is': R Dworkin, *Taking Rights Seriously,* rev edn (London, Duckworth Books, 1977) 185.

[6] GJ Postema, 'Integrity: Justice in Workclothes' in J Burley (ed), *Dworkin and His Critics* (Malden, Wiley-Blackwell, 2004) 295.

[7] Dworkin, *Law's Empire* (n 3) 165.

[8] See Section 3 below.

[9] See Section 2(B) below.

[10] For a comprehensive statement see TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford, Oxford University Press, 2013).

[11] For a similar charge against Ronald Dworkin, see Postema 'Justice in Workclothes' (n 6) 295. I present Dworkin's theory as a more inclusive one in this chapter.

as 'mistakes' or misapplications of the true law (or 'Law'), rather than as genuine contributions to a political community's moral record.[12]

In Section 2, I juxtapose the two accounts of protestant argument just outlined. I begin at the extreme end of legal and constitutional disagreement, the issue of wicked laws. Even in this troubling area, I make the case for inclusive and conciliatory terms of engagement. The larger claim arising out of this discussion is against Allan's assimilation of interpretative argument to his own justice-centric, judge-centric moral theory. I argue that the protestant interpreter must be free to draw their convictions from the full gamut of political morality. By way of illustration, I discuss Dimitrios Kyritsis's 'assurance' model of legitimacy, one that takes separation of powers rather than justice as the key to legitimacy.[13]

In Section 3, I consider the specific responsibilities of the inclusive protestant towards other interpreters; and I sketch how these responsibilities might bear upon our understanding of the British constitution. I argue that the inclusive interpretivist should respect a good faith, reasonable attempt to understand the law, even if they fundamentally disagree with that understanding. The by-product of this inclusive style of protestantism, I suggest, is an inclusive constitution in which multiple different theories of legitimacy may take root, each aspiring (through their advocates) for supremacy. It is a 'patchwork quilt' constitution that strives towards one-piece-duvet unity.[14]

2. Inclusive and Exclusive Interpretivism: Opening Up the Channels of Interpretative Debate

In a series of important articles, Trevor Allan criticises Ronald Dworkin's analysis of the Fugitive Slaves Act – a provision requiring citizens from one state to return escaped slaves to their slave owners in another state.[15] Dworkin reasons that

> the slaveholders had, in principle, a political right to regain their slaves on demand but … this right was trumped … by an emergency – in this case a moral emergency. We express that thought best by saying what most lawyers would say: that the Act was valid law but too unjust to enforce.[16]

In ways that we shall examine below, Dworkin presents this argument as an *interpretative* one. Allan replies, to the contrary, that Dworkin's argument is 'contradictory' and 'paradoxical' from the perspective of interpretivism and integrity. This is because

> all considerations of political morality (including justice) relevant to the question of obligation or obedience are also granted a role in the interpretative process by which the content of

[12] For the doctrine of 'mistake', see Dworkin, *Taking Rights Seriously* (n 5) 11–123. For Allan's most explicit alignment of the rule of law with natural law ('Law') in his work to date, see TRS Allan, 'Constitutionalism at Common Law: The Rule of Law and Judicial Review' (2023) 82 *CLJ* 236.

[13] See generally, D Kyritsis, *Shared Authority* (Oxford, Hart Publishing, 2015), D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017); D Kyritsis, 'Constitutional Law as Legitimacy Enhancer' in D Kyritsis and S Lakin (eds), *The Methodology of Constitutional Theory* (Oxford, Hart Publishing, 2022) ch 8.

[14] I borrow the metaphor of a patchwork quilt from Postema. See Postema 'Justice in Workclothes' (n 6) 313.

[15] I shall focus in particular on TRS Allan, 'Law, Justice and Integrity: The Paradox of Wicked Laws' (2009) 29 *OJLS* 705 and TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) *OJLS* 36, 58–82.

[16] R Dworkin, *Justice for Hedgehogs* (Cambridge, Belknap Press, 2011) 411.

> the law is ascertained or constructed. It follows … that Dworkin's theory cannot consistently acknowledge the existence of wicked laws, which ought to be resisted on grounds of justice. Such statutes or decisions are either not truly laws at all, from the perspective of integrity, or their legal status, if affirmed, amounts to the complete repudiation of political obligation: the claims of integrity are inapplicable to the regime in question.[17]

We need to be clear about the structure of this argument, placing it within Allan's broader interpretative theory of the rule of law. Allan contends that a statute or judgment has no meaning independent of 'basic principles of justice', including the protection of fundamental rights.[18] Such principles are among the necessary *determinants* of the law. In this way, 'legal and moral obligation perfectly coincide'.[19] It follows that an interpretivist judge has two options when faced with a wicked law. Either he must read it consistently with fundamental rights and other basic principles of justice; or, if that is not possible, he must declare that it is not law.[20] In that case, the judge must 'succumb to scepticism' (i.e. decide that moralised, interpretative argument is not possible in that community) and decide that the practice as a whole, 'deserves repudiation rather than allegiance'.[21] There is, Allan says, 'no half-way house' between these two options.[22] The only way that Dworkin can claim that a law can be valid yet unjust is to abandon interpretivism altogether for 'brute fact' conventionalism.[23] He must assume, that is, that we can identify (at least some extreme) laws in a descriptive, morally detached way, independently of considerations of justice. But this is to adopt the very two-system positivist separation between law and morality that he attacks in the rest of his work.[24]

What are we to make of this analysis? From the point of view of the interpretative purist, Allan must be right to say that considerations of justice are necessarily among the determinants of the law, rather than standards external to it.[25] As Dworkin himself argued in his early critique of legal positivism, judges have a legal *duty* rather than a 'strong' discretion to bring *all* relevant moral principles to their judgments of law.[26] Nonetheless, I think this is a good example of where the inclusive, conciliatory protestant attitude I defend in this chapter should come into play. Take Dworkin's claim that Congress

> was sufficiently legitimate so that its enactments generally created political obligations. The structuring principles that make law a distinct part of political morality – principles about political authority, precedent, and reliance – gave the slaveholders' claims more moral force

[17] Allan, 'Paradox' (n 15) 707.

[18] 'Even when fundamental rights are not formally entrenched against legislative interference, the judge may treat them as implicit features of enacted rules or necessary limitations on executive powers': Allan, 'Interpretation' (n 15) 62.

[19] ibid 59.

[20] ibid 64.

[21] ibid.

[22] ibid 68. Allan does contemplate a third option in the quotation: namely that an interpreter refers to the provisions of the system he has rejected as 'law' in a 'pre-interpretive' or 'sociological' sense: a shadow of law.

[23] 'Conventionalism' is Dworkin's moralised recasting of legal positivism. See Dworkin, *Law's Empire* (n 3) ch 4.

[24] For Dworkin's early statement of this position, see Dworkin, *Taking Rights Seriously* (n 5) ch 2 'The Model of Rules I' and ch 4 'Hard Cases'.

[25] For particularly clear arguments to this effect, see M Greenberg, 'How Facts Make Law' in S Hershovitz (ed), *Exploring Law's Empire* (Oxford, Oxford University Press, 2008) and Stavropoulos, 'Legal Interpretivism' (n 2).

[26] Dworkin, *Taking Rights Seriously* (n 5) ch 2 'The Model of Rules I'.

> that they would otherwise have had. But their moral claims were nevertheless and undoubtedly undermined by a strong moral argument of human rights. So the law should not have been enforced.[27]

Putting to one side the question of whether Dworkin flouts the strict logic of interpretivism, these claims clearly tap into host of moral concerns – indeed *interpretative* concerns – about how best to interpret the unfolding narrative of US constitutional history and practice.[28] His position is not the parodied view of interpretivism attributed to him by many critics – that law is constituted by *whichever* set of 'principles', no matter how wicked, underlie the legal system.[29] It is a nuanced view about how true[30] principles of political legitimacy, including the federalist principles structuring the US Constitution, properly interact with substantive considerations of justice to determine the content of the law and the duties of judges.[31] On a more abstract level, he asks whether the 'circumstances of integrity' may obtain in situations where a wicked law is anomalous within the broader constitutional settlement, as opposed to one where wickedness is systematic and persistent.[32] Did the Act lie 'at the heart' of the settlement, draining it of any residual legitimacy?[33] Would integrity have been best served by isolating the Act and minimising its impact on other parts of the law, rather than rejecting the legal system as a whole?[34] Would repudiating a legal order on the basis of isolated wicked laws entail rejecting most legal systems around the world and through history as illegitimate?[35]

I list these questions and concerns as no more than an unruly brainstorm of the types of considerations underlying Dworkin's position. I shall make no attempt to organise them or engage with them here.[36] My point is simply this: the complex of moral and philosophical arguments underlying Dworkin's position in this debate is very far from the stark, brute fact, two-system analysis of Herbert Hart,[37] or even the

[27] Dworkin, *Justice for Hedgehogs* (n 16) 411.

[28] For Dworkin's chain novel metaphor see R Dworkin, *A Matter of Principle* (Cambridge, Harvard University Press, 1985) ch 6 'How Law is Like Literature'.

[29] See eg HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford, Oxford University Press, 1982) 150.

[30] On the importance of true moral principles, see N Stavropoulos, 'Why Principles' at papers.ssrn.com/sol3/papers.cfm?abstract_id=1023758.

[31] Compare Dworkin's speculation (well before the decision in *Dobbs v Jackson Women's Health Organization*, No 19-1392 (2022)) about whether 'leaving the abortion issue to individual states to decide differently if they wish is coherent in principle with the rest of the American constitutional scheme'. See Dworkin, *Law's Empire* (n 3) 186. cf J Waldron, 'Denouncing Dobbs and Opposing Judicial Review' (June 10, 2022) NYU School of Law, Public Law Research Paper No. 22–39, at ssrn.com/abstract=4144889.

[32] For Dworkin's differentiation between the antebellum situation surrounding the Fugitive Slaves Act and the Nazi order, see Dworkin, *Justice for Hedgehogs* (n 16) 411. cf J Waldron, *Law and Disagreement* (Oxford, Clarendon Press, 1999) 192–24, arguing that the circumstances of integrity no longer obtained at the time of the Fugitive Slaves Act and slavery.

[33] Dworkin, *Law's Empire* (n 3) 203.

[34] See R Dworkin, 'Reply to Critics' in J Burley (ed), *Dworkin and His Critics* (Malden, Wiley-Blackwell, 2004) 386 (responding to Postema, 'Justice in Workclothes' (n 6)).

[35] See D Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge, Cambridge University Press, 2022). See also the chapter by Dyzenhaus in this volume.

[36] For an excellent discussion, see Dyzenhaus, *The Long Arc of Legality* (n 35) ch 1 'The Puzzle of Very Unjust Law 1'.

[37] HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) essay 2 'Positivism and the Separation of Law and Morals'.

relatively shallow moral position of Fuller.[38] His is a thoroughly moral inquiry, one that potentially bridges the imperatives of fairness, settlement and clarity underlying positivist legal theory, with the considerations of justice underlying the natural law theory argued for by Allan and others.[39] In these respects, Allan is mistaken, I think, to focus in this debate and elsewhere on whether Dworkin's arguments are properly categorised as interpretivist or conventionalist, internal or external. This misses the more pressing responsibility on interpreters to understand and meet each other's views as good faith moral arguments.

A. Interpretation across the Whole Gamut of Political Morality

This brings me to a larger point to take from the preceding discussion of wicked laws. There is a sense in this discussion and elsewhere, I think, that Allan *assimilates* interpretative argument to his justice-centric, judge-centric theory of the rule of law. This forces him to characterise arguments of the type that Dworkin offers above as *ineligible* understandings of law and the constitution: as *non*-interpretations. Now, before I develop this criticism, it is important to stress that Allan is perfectly entitled to argue for his theory of legitimacy from his own protestant convictions. These are deeply humane views which very plausibly have a strong foothold in British and US constitutional practices. I take no position on whether Allan gives a more *morally* persuasive account of the Fugitive Slaves Act than Dworkin or others. My argument is simply that there is no basis on which he can *privilege* his justice-centric view as the only one available to interpretivists. In so far as Allan is guilty of this charge, I think he unduly restricts the scope of interpretative argument.

Let us now attempt to de-privilege justice and judges from Allan's arguments, and open up the possibility for a more inclusive style of protestant argument. As Allan himself often says, interpretative argument takes place in the situation of disagreement not just about justice (the content of the law) but also fairness (who should decide on questions of justice) and procedural due process (by what procedures should decision-makers make their decisions). This is a judgment that Dworkin's famously puts in terms of 'fit' and 'substance':[40]

> [C]onvictions about fit contest with and constrain judgments of substance, and how convictions about fairness and justice and procedural due process contest with one another. The interpretative judgment must … meld these dimensions into an overall opinion; about which interpretation, all things considered, makes the community's legal record the best it can be from the point of view of political morality.[41]

[38] LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630. As Hart comments of Fuller's 'inner morality' of law, such principles were 'unfortunately compatible with very great iniquity'. HLA Hart, *The Concept of Law* 2nd edn (Oxford, Clarendon Press, 1994) 207.

[39] This bridging is characteristic of the work of Kyritsis. See, eg the discussion in Kyritsis, *Shared Authority* (n 13) ch 1.

[40] For a full statement of these different values, see Dworkin, *Law's Empire* (n 3) 164–65.

[41] ibid 410–411. See further, R Dworkin, *Justice in Robes* (Cambridge, Harvard University Press, 2006) 183–86.

Once we zoom out from Allan's justice-centric theory to the broader range of political values available to an interpreter, we see that there is no a priori reason why the law must specifically track justice, or indeed any other single dimension of political morality, less still any particular theory nestled in any particular value. Take the 'assurance' model of legitimacy argued for by Dimitrios Kyritsis.[42] In the circumstances of deep disagreement about justice, and the ever present risk of moral lapses on the part of the state, we do better to explain legitimacy in a 'systemic' way over time, rather than – as Allan contends – in retail terms of the justice of the law taken decision by decision.[43] The best way to secure people's long term allegiance, he argues, is in the assurance that the community will act according to a reliable model of the separation of powers, one that assigns the right decisions to the right institutions, according to the extant model of separation within that system.[44] With this assurance, Kyritsis argues, people will be likely to keep faith with their system 'warts and all'. As he puts it:

> Structural considerations [i.e. separation of powers considerations] … are meant to give an assurance that the agents of governance of a political society will on the whole tend to act justly and efficiently …. A government that is structured in the right way strengthens [the standing disposition to obey]. Even when it enacts a policy with which I disagree or inflicts an injustice on me (albeit one, for which it has a moral warrant for obedience), my faith is not undermined.[45]

I offer this theory as an intriguing illustration of how an interpretivist may 'meld' together the various dimensions of political morality in a very different way to Allan. Differences in emphasis abound. Kyritsis agrees with Allan that 'equal concern and respect are conditions of democratic legitimacy',[46] but he and Allan disagree about what this means for institutional rights protection. For Allan, democracy necessarily *entails* the judicial protection of fundamental rights. It cannot be the case, he says, that a legislature whose political authority depends on democracy may act undemocratically, whether by infringing fundamental rights or some lesser form of morally sub-optimal law.[47] For Kyritsis, by contrast, it is a contingent matter whether courts should have a power of constitutional review; and, as we have seen, treating people

[42] Kyritsis characterises his assurance approach as one of *legitimacy* rather than justice: '[considerations of legitimacy] have to do with the conditions under which an actual political regime has a moral warrant to bind those subject to it or exercise coercive power over them given its moral imperfection and the existence of pervasive and ineradicable disagreement about moral issues that it must contend with': D Kyritsis, 'Constitutional Law as Legitimacy Enhancer' in Kyritsis and Lakin (eds), *Methodology* (n 13) 217.

[43] On the 'systemic' character of legitimacy, see Kyritsis, *Shared Authority* (n 13) 104–105.

[44] ibid chs 3 and 4. See further D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017) *passim*.

[45] Kyritsis, *Shared Authority* (n 13) 109.

[46] Kyritsis, *Where Our Protection Lies* (n 44) 124–25.

[47] '[S]ince the ideal of the rule of law is fulfilled only in a democracy, whereby every citizen is empowered to participate in establishing those conditions of freedom, adapted to the needs of time and place, an elected legislature cannot lawfully repudiate its own democratic basis': Allan, *Sovereignty of Law* (n 10) 293. See further, Allan, 'Paradox' (n 15) 717 endorsing Ronald Dworkin's constitutional conception of democracy. See R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford, Oxford University Press, 1996).

with equal concern may still allow for moral lapses on the part of the government, provided that a political community adopts *some* stable form of separation of powers over time.[48]

Allan has an arsenal of powerful responses ready to counter such opposing views. He often says, for instance, that to reject a judicial power to ensure justice in the law is a failure to appreciate that 'legal theory is deeply and resolutely interpretative, in the manner of law as integrity',[49] or a failure adequately to mine the 'rich resources of the common law and constitution',[50] or a failure to take the 'internal, interpretative viewpoint … closer to the attitude of the judge',[51] or the 'perspective of any conscientious lawyer'.[52] But each of these and other such strategies beg the question against theorists who, like Kyritsis and Dworkin, advance different, bona fide theories of legitimacy. Dworkin's analysis of the Fugitive Slaves Act is 'resolutely interpretative' but in a way that argues for an interplay between fairness and justice that Allan rejects.[53] Neither Allan nor Kyritsis may say that the other has misunderstood the *true meaning* of equal concern and respect, or the *true meaning* of democracy,[54] or that '*any* eligible interpretation of law must reflect [the] constraints [for which they argue]'.[55] (emphasis added) To the contrary, it is a matter of substantive moral disagreement which is the better view. Similarly, how far a judge should 'mine' the common law depends on the theory in question. For some theorists, the value of integrity itself demands that a political community must face up to imperfect laws, rather than view them in the light of rigid common law principles of justice.[56] Finally, in answer to Allan's oft used device of the judicial perspective, we must reply that the perspective of judge or lawyer is that of one voice of conviction among many in a community deeply divided on its moral commitments. It is not the perspective of a single moral theory. Or at least that is the position I am defending in this chapter.

Does Kyritsis's claim that his account of legitimacy 'resonates better with political reality'[57] and with the circumstances of 'actual political regimes' than the natural-law style of interpretative theory offered by Allan undermine his interpretivist credentials? As we shall see below, Allan is deeply suspicious of any resort to the descriptive reality of what happens in practice. He rejects such manoeuvres as being 'external' to the

[48] Kyritsis, *Where Our Protection Lies* (n 44) 124. Kyritsis notes here that Dworkin is not committed by his constitutional conception of democracy to constitutional review. As Dworkin says: 'I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they may not have it': Dworkin, *Freedom's Law* (n 47) 7.

[49] Allan, 'Paradox' (n 15) 706.

[50] Allan, 'Interpretation' (n 15) 77.

[51] ibid 58.

[52] Allan, 'Paradox' (n 15) 713.

[53] '[T]he political judgment [of an interpreter] is … complex and will sometimes set one department of political morality against another: his decision will reflect not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete': Dworkin, *Law's Empire* (n 3) 256.

[54] Allan, 'Interpretation' (n 15) 77.

[55] ibid 65.

[56] See Postema, 'Justice in Workclothes' (n 6) 296.

[57] Kyritsis, 'Constitutional Law as Legitimacy Enhancer' (n 42) 213.

practice.[58] Importantly, for the purposes of this discussion, this criticism does not sting Kyritsis. His theory, he says, is

> a thoroughly moral inquiry, but one that directs us to pay attention and give effect to political decisions that defined the institutional fundamentals of the regime in question. [Interpretivism] thereby bridges the moral force of the constitution and its contingent character as a political settlement.[59]

This is the right order of analysis. Moral values determine the relevance of empirical facts, not the other way round.[60] Of course, Kyritsis cannot (and does not) beg the question against Allan by arguing that Allan's justice-centric theory pays no attention, or insufficient attention, to actual practice.[61] As both Kyritsis and Allan are at pains to emphasise, the practice is what one's moral theory makes it. There are no brute facts which any eligible theory must fit.[62]

B. Collaborative Interpretation and British Constitutional Orthodoxy

I have argued above that Allan wrongly privileges his justice-centric, judge-centric moral theory in his account of interpretivism, leaving no space for rival theories of legitimacy. Perhaps I have got this wrong. A recurrent theme in Allan's work is the idea of 'collaborative' interpretation.[63] As he puts it:

> The courage of one's moral convictions must be tempered by respect for those other interpreters, equally charged to strive for harmony between private conscience and public practice. There is an important *collaborative* dimension to interpretation, requiring arguments to be framed and presented in the manner most likely to elicit a favourable response from other practice-participants.[64]

On its face, this is precisely the inclusive form of protestantism for which I argue in this chapter. Seeking harmony between the 'private conscience' and 'public practice' chimes with my attempt to reconcile the responsibility of an interpreter to their own convictions, with their responsibility to argue with, and on behalf of, their community. How does Allan propose that we square the circle? He says:

> While a protestant interpreter may challenge even a firmly entrenched paradigm, if necessary to sustain her own commitment to a morally acceptable practice, she should not do so when

[58] See section B below.

[59] Kyritsis, 'Constitutional Law as Legitimacy Enhancer' (n 42) 212.

[60] For a robust argument against theories that purport to be anti-positivist, but violate this order of analysis, see TRS Allan, 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65 *American Journal of Jurisprudence* 1.

[61] For arguments to the contrary, see the chapters by Peter Cane and Paul Craig in this volume.

[62] 'A threshold test of fit … mainly serves to distinguish a morally decent legal order, susceptible to the interpretive demands of integrity, from a wicked legal system resistant to integrity's embrace': Allan, 'Interpretation' (n 15) 69. See further the discussion in Kyritsis, *Shared Authority* (n 13) ch 3.

[63] For Allan's theory of constructive interpretation in statutory interpretation, see generally Allan, *Sovereignty of Law* (n 10) ch 5.

[64] Allan, 'Interpretation' (n 15) 17–18, citing GJ Postema '"Protestant" Interpretation and Social Practices' (1987) 6 *Law & Philosophy* 283.

> it is unnecessary – when a more orthodox interpretation is consistent with her convictions about the fundamental demands of justice.[65]

I am afraid that this way of unpacking the idea of collaboration does no more than pay lip service to practice-participant harmony. It suggests that an interpreter should only tolerate rival interpretations of a practice, including settled orthodoxy, in so far as they align with their individual view of justice. As I shall argue in the next part of the chapter, achieving harmony between interpreters requires much more than this. An interpreter must respect – if not embrace – moral theories of their practice even if fundamentally at odds with their own convictions.

Other parts of Allan's work tend to support my doubts about his collaborative instincts. In his sustained assault on standard textbook accounts of the British constitution, Allan finds it 'necessary' to challenge just about every established paradigm and orthodox interpretation one can think of. For instance, he charges those who defend parliamentary sovereignty as a Hartian Rule of Recognition as 'taking refuge in a bland sociological notion of law'.[66] He describes the grounds of review in administrative law as 'empty vessels' with no content.[67] He rejects the distinction between 'weak' and 'strong' review, appeal and review, substance and procedure, *Wednesbury* unreasonableness and proportionality, and a host of other bread and butter concepts and distinctions for English public lawyers.[68]

Take the grounds of judicial review. Allan offers a rich account of how a single value of 'due process' accounts for the full panoply of orthodox grounds and sub-grounds of judicial review enumerated in administrative law textbooks.[69] But why challenge orthodoxy here? We need not understand the invocation of heads of review as 'empty vessels' in the manner of an exclusionary rule. To the contrary, they may function as useful shorthands for a cluster of moral concerns common to both views. Allan himself seems to support this conclusion when he says:

> Even if common law rules, in particular, are only summary generalisations concerning the balance of moral principle in certain types of case, they are entitled to the respect of any lawyer who values the tradition in which she works … such rules should not be too readily modified or overridden.[70]

Furthermore, if, as Craig has argued, Allan's understanding does not lead to significant differences in reasoning or outcome to the orthodox understanding, then one might again wonder whether it is necessary to challenge it.[71]

Consider instead the doctrine of deference. Allan insists that there is no space for an independent *doctrine* of deference (or indeed doctrines of any kind).[72] But he

[65] Allan, 'Interpretation' (n 15) 65.

[66] Allan, *Sovereignty of Law* (n 10) 38.

[67] See TRS Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *PL* 429 and TRS Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *OJLS* 563. See, generally Allan, *Sovereignty of Law* (n 10) ch 7.

[68] See Allan, *Sovereignty of Law* (n 10) *passim*, but especially ch 7.

[69] ibid ch 7, especially 242–44.

[70] Allan, 'Interpretation' (n 15) 74.

[71] See eg PP Craig, 'Legislative Intent and Legislative Supremacy: A Reply to Professor Allan' (2004) 24 *OJLS* 585.

[72] See eg TRS Allan, 'Common Law Reason and the Limits of Judicial Deference' in D Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Hart Publishing, 2004) 289 and TRS Allan 'Human Rights and Judicial Review:

readily accepts that the considerations people associate with deference – democratic legitimacy and institutional competence – are already built into ordinary interpretative legal reasoning.[73] One might again say: plus ça change. Indeed, as with the grounds of review, we might make a positive case for doctrine without detracting from the principled substance of the debate. As Kyritsis argues, there may be moral and epistemic reasons to determine, in advance of particular decisions, the proper way to assign decisions to different branches of government.[74] As he sees it, doctrines of deference may strengthen the necessary assurance within a political community of 'more or less stable and systematic' principles of separation of powers.[75]

Allan's readiness to challenge orthodox understandings is symptomatic, I think, of his exclusive style of protestant argument. It is not obvious that his defence of collaborative interpretation does much to temper that style of argument. To close this section, I shall allow Allan himself to provide the best argument for treating even the most desiccated canons of constitutional orthodoxy as morally engaged views. As he puts it, there is no

> neutral, detached, descriptive ground on which a lawyer may stand in drawing conclusions about the requirements of English (or Scottish or European) law, in general, or the content of the British constitution, in particular … any statement or law is always a matter of interpretation, and … interpretation is (in the present context) necessarily normative: it draws on moral and political ideas and values to support one reading rather than another.[76]

This is the correct view. It is, as Allan suggests, *not possible* for a lawyer (or anyone else) to stand outside of their practice.[77] To adapt Dworkin's celebrated aphorism, morally engaged arguments are 'silent prologue to *any* decision at law'(emphasis added).[78] But Allan cannot have it both ways. If he subscribes to the view just put, then he cannot, consistently with that view, seek to disqualify views on the law and constitution here, there and everywhere as being external and detached.[79] I do not deny that it is often far from straightforward to make moral sense of theories whose advocates either vehemently resist such moral recasting, or who seek to recast in a questionable way.[80] But there is already plenty of impetus and inspiration for this endeavour. Kyritsis's emphases on political settlement, mutual responsiveness among branches of government, and

A Critique of Due Deference' (2006) 65 *CLJ* 671. For a wider argument against doctrine, see Allan, *Sovereignty of Law* (n 10) ch 7.

[73] ibid.

[74] See Kyritsis, *Where Our Protection Lies* (n 44) ch 7.

[75] Kyritsis gives the example of the principles laid down in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728. See Kyritsis, *Where Our Protection Lies* (n 44) 163.

[76] Allan, *Sovereignty of Law* (n 10) 9.

[77] cf the 'Archimedean' position rejected by Ronald Dworkin: Dworkin, *Justice in Robes* (n 41) ch 6.

[78] Dworkin, *Law's Empire* (n 3) 90.

[79] I think Allan and Dworkin differ on this point. A willingness to 'recast' positivist theories is central to Dworkin's work. See eg Dworkin, *Law's Empire* (n 3) ch 4 (recasting positivism as 'conventionalism'); R Dworkin, *Justice in Robes* (n 42) ch 7 'Thirty Years On' (arguing for 'interpretive positivism'); and 198–212 and 227–331 (recasting Joseph Raz's 'hard' positivism). I explore these possibilities in S Lakin, 'Defending and Contesting the Sovereignty of Law: The Public Lawyer as Interpretivist' (2015) 78 *MLR* 549.

[80] For an attempt in the latter category, see J Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford, Clarendon Press, 1999) 254. I criticise this attempt in S Lakin 'Why Common Law Constitutionalism is Correct (If It Is)' in Kyritsis and Lakin (eds), *Methodology* (n 13) 149.

the need for stable separation of powers doctrines, are redolent of many positivist-style claims within orthodox constitutional theory. Others have offered similarly rich moral stories about Diceyan orthodoxy to rival the views of Allan.[81] To my mind, this is conciliatory protestantism *par excellence*.

3. The Inclusive British Constitution

At the start of this chapter, I posed a conundrum: How may an interpreter argue from their own convictions about their community's moral commitments, while simultaneously arguing with, or on behalf of, the many other interpreters with whom they may deeply disagree? I have argued at length above about *how* we might reconcile these two perspectives. An interpreter, I have said, must adopt an inclusive and conciliatory attitude towards other interpreters or interpretations. We shall need to say more about this below. Before doing so, it is worth briefly pausing to consider *why* we should seek to reconcile these two faces of protestant argument. Is an inclusive, conciliatory attitude merely a matter of good manners, or does it capture something of moral importance about the rule of law? We may take our lead from Ronald Dworkin who describes an 'expressive' value of integrity:

> [T]he expressive value of integrity is confirmed when people in good faith try to treat one another in a way appropriate to common membership in a community … and to see each other as making this attempt even when they disagree about exactly what integrity requires in particular circumstances.[82]

This is to say that an attitude of good faith – or, as I have put it, inclusion and conciliation – towards each other's interpretations is itself *partly constitutive of political community*.[83] We treat people as equals precisely when we respect their arguments about legitimacy: when we treat no one's convictions about the moral commitments of their community as being any less genuine than anyone else's. The exclusive protestantism I have attributed to Allan I think fails in this regard. It views protestant argument as 'each person for himself' – a cudgel with which to beat a path for his vision of the constitution over all others. It is this style of protestantism, I suggest, that explains the troubling tendency in contemporary legal and political argument to 'cheer or boo' a decision, rather than view (opposing) winning or losing arguments as good faith interpretations of a common practice.

In the remaining space in this chapter, I shall attempt to sketch the sense of inclusiveness, conciliation and collaboration that, as I see it, is necessary for legal and constitutional practice to flourish. Or to put this in more solemn terms: the conditions

[81] See, for instance, M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford, Hart Publishing, 2015).

[82] Dworkin, *Law's Empire* (n 3) 190. cf GJ Postema's value of 'fidelity', closely allied to integrity: 'Duties of fidelity are owed to *people*, not to theories, principles, rules or events. Fidelity is a matter of keeping faith with our common past as the appropriate way of keeping faith with each other as comembers of the community to which we are committed': Postema, 'Justice in Workclothes' (n 6) 308.

[83] '[T]he general acceptance of [political integrity], even among people who otherwise disagree about political morality, [is] constitutive of political community': Dworkin, *Law's Empire* (n 3) 211.

under which we may co-exist in an interpretative community of principle. I emphasise the word 'sketch'. My limited ambition for this part of the chapter is to explore some tentative directions in which the arguments above might proceed.

I begin with the premise, defended at length above, that people within the same community (including judges in the higher courts) may interpret their community's history and practice in radically different but no less 'resolutely interpretative' ways. It follows from this assumption, I suggest, that judges and other interpreters must in some sense be *receptive* to the reasonable interpretations of others. They must actively *respect* others' moral views as rival but *concurrent* visions of law and the constitution.[84] As Allan puts it, they must see their collective views as a 'consensus of independent *conviction*'.[85] How do these responsibilities bear on the freedom of an interpreter to challenge entrenched paradigms or orthodox understandings? My (tentative) answer is that the interpreter should not challenge a decision or argument if it is *reasonable*, in the sense that it expresses or presupposes some plausible moral reading of their community's record. This is so *even if* they fundamentally disagree with it from the point of view of their own theory.[86]

This may all sound, at first blush, like a call for interpreters routinely to suppress their own convictions and defer to the arguments of others. That is not my position. The interpreter must maintain their responsibility to argue from their convictions for the correct understanding of their community's public, moral commitments; but they must do so in a way appropriate to being a member of a community whose members disagree deeply about the nature of those commitments. They must not compromise on the full rigour of their moral theory, but must compromise on *how they pursue* that theory. They will not, like the exclusive protestant, readily treat decisions, paradigms or understandings at odds with their theory as 'mistakes', obscuring the true natural Law underlying the practice. Their vehicle for pursuing their own moral vision is to convince judges and others of their aspirations for the practice, while accepting that rival moral theories will prevail along the way. They plant their convictions through arguments in and out of court, in the hope that they take seed in legislation, judicial decisions and dissenting judgments. Of course, the attitude I defend must have its limits. An interpreter does not owe their allegiance to a regime simply because there are some who defend it. They owe allegiance *in so far as* they judge there to be reasonable scope for moral argument about the community's past practice and history. They may think with Dworkin, then, that post-bellum US allowed for such disagreement; but will surely think that Nazi Germany did not.

[84] For a fascinating realisation of the inclusive style of interpretivism defended here and throughout this chapter, see MD Walters, 'Toward the Unity of Constitutional Value – Or, How to Capture a Pluralistic Hedgehog' (2017) 63 *McGill Law Journal* 419, especially 434–38. Walters argues that an interpretive theory of law must be pluralistic and 'circular' about value. As he puts it at 435: 'The unity of value to emerge through interpretation must accept all differences that are necessary to accept in order to make a coherent sense of a world full of diversity'. For Walters's very original notion of 'circular' interpretation, see MD Walters, 'The Unwritten Constitution as a Legal Concept' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, Oxford University Press, 2016) 33.

[85] Allan, 'Paradox' (n 15) 706.

[86] For an intriguing defence of this type of approach in the context of Northern Ireland, see A Schwartz, 'Patriotism or Integrity? Constitutional Community in Divided Societies' (2011) 3 *OJLS* 503, 522.

I now come to a stage in the argument that will no doubt leave many people behind (assuming that any were with me until now). If interpreters (including senior judges) adopt this type of receptive attitude to diverse, reasonable interpretations, then I think we must be prepared to expect and accept that *different theories will take root in the practice*. Our practice is likely to be something of a 'patchwork quilt' of competing moral theories, with orthodoxy, common law constitutionalism, and perhaps other theories vying for supremacy. Now many will see immediate difficulties with this view, some of which I shall attempt to anticipate and meet below; but I think this is the natural way for an inclusive protestant interpreter to understand their practice. Indeed, I think this is an intuitive, common understanding of contemporary constitutional practices. It is widely thought, for instance, that the British constitution reflects two or more competing visions.[87] The Human Rights Act gestures towards Allan's common law constitutionalist view of democracy, rights and adjudication in section 3, but towards a political constitutionalist, republican view in section 4.[88] Decisions of the higher courts plausibly oscillate between the robust judicial protection of fundamental rights and deference to Parliament.[89] Allan is determined to refute this bipolar understanding of the constitution. He says:

> It is important to rescue a 'natural law' understanding of the common law from Dworkin's errors; our view of common law reasoning will otherwise remain obscured by its legal positivist characterisation, giving pride of place to posited rules. Parallel to Dworkin's unstable 'third theory' of law, as it has been dubbed, lies the erratic behaviour characteristic of judges when required to interpret statutes consistently with common law or human rights principles. Veering from bold affirmations of the rule of law, on one hand, to obsequious invocations of absolute parliamentary sovereignty, on the other, their attempted reconciliations of justice and 'legislative intent' appear to reflect insecure foundations in constitutional theory. Just as we must resolve any fundamental conflict within legal and constitutional doctrine, so we must also reject any muddled combination of theoretical viewpoints in our analysis of the common law.[90]

The argument here is that orthodox constitutional doctrines (such as the so-called 'principle of legality')[91] presuppose the flawed, positivist-leaning legal theory of Ronald Dworkin. Just as Dworkin's 'third theory' of law allows that some features of a constitution may obtain as a matter of brute-fact, so British constitutional orthodoxy takes some features to be brute facts. If we replace Dworkin's theory with Allan's natural law account of the common law then, Allan implies, we can peel away the confused, orthodox parts of constitutional practice to reveal a coherent scheme of justice. We need not reject

[87] See eg D Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64 *CLJ* 329. cf Allan, *Sovereignty of Law* (n 10) 1–4.

[88] As Allan puts it, the Human Rights Act 'actually enshrines the ambivalence that [contrasting accounts of the constitution] engender': *Sovereignty of Law* (n 10) 4.

[89] A particularly good example, often used by Allan, is the contrasting reasoning of the Court of Appeal and House of Lords in *R (Prolife Alliance) v British Broadcasting Corporation* [2002] WECA Civ 297, [2003] UKHL 23. Allan says of these decisions: 'The competing approaches reflect rival interpretations of British constitutionalism, which in turn embody rival conceptions of law …': Allan, *Sovereignty of Law* (n 10) 25.

[90] Allan, 'Interpretation' (n 15) 60 (footnotes omitted). See further, Allan, *Sovereignty of Law* (n 10) ch 5.

[91] As articulated, for instance, in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 131.

Dicey's celebrated account of the constitution in doing so, says Allan.[92] Properly understood, Dicey was himself a full-blooded common law constitutionalist.[93]

I hope I have said enough in this chapter to expose the problems with these arguments. Briefly, Dworkin's theory of law is not, as Allan claims, a confused hybrid between positivism and natural law; it is an interpretative theory about how the different branches of political morality interact at different times, and in different places and contexts. On one plausible view of how these principles interact within British constitutional practice, political fairness takes priority over justice. That type of view, I have suggested, is apt to supply the interpretative underpinnings for any number of claims within orthodox constitutional theory. This is to say that the two 'theoretical viewpoints' of orthodoxy and common law constitutionalism co-exist, not as a 'muddled combination', but as *rival*, concurrent, interpretations.[94]

Allan may object at this point that we cannot just leave

> the conflict [between these two interpretations] unresolved. Any decent theory must show how principles of legislative supremacy and legality are properly reconciled and brought into harmony. It would otherwise be a theory of two competing constitutions, leaving us without any guidance about how to choose between them.[95]

I disagree. I have offered an argument as to why we can and should embrace competing moral visions of the constitution rather than seek to resolve them into a single theory – even if such a thing were possible.[96] There is nothing in the nature of interpretivism to require a univocal view as to the scheme of principle underlying a practice.[97] It may be true that interpreters should *imagine* that the government speaks with one voice; but this is, as Postema says, no more than a heuristic device.[98] *How* a community speaks with one voice, I have argued, depends on widely practised attitudes of inclusion, conciliation and collaboration. It is this 'expressive' dimension of integrity that binds us together as community, rather than the scheme of principle which *in fact* underlies our practice.[99]

[92] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London, Macmillan, 1964).

[93] For Allan's common law constitutionalist interpretation of Dicey, see Allan, *Sovereignty of Law* (n 10) passim, but especially chs 3 and 5. For similar treatment of Dicey, see MD Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, Cambridge University Press, 2020) especially ch 10. cf Goldsworthy's chapter in this volume and, generally, Goldsworthy, *Sovereignty of Parliament* (n 80) and J Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (Cambridge, Cambridge University Press, 2010).

[94] See further Lakin, 'Why Common Law Constitutionalism is Correct' (n 81).

[95] Allan, *Sovereignty of Law* (n 10) 23.

[96] 'We know that our own legal structure constantly violates integrity in this less dramatic way … We cannot bring all the various statutory and common law rules our judges enforce under a single coherent scheme of principle': Dworkin, *Law's Empire* (n 3) 184.

[97] It should be emphasised that Dworkin's 'right answers' thesis does not so require. See Dworkin, *Taking Rights Seriously* (n 5) 216. As Waldron says, moral objectivity 'underwrites' the arguments we make. Indeed, it makes disagreements between interpreters who espouse different moral theories intelligible. The protestant interpreter will hardly engage his fellow interpreters simply by dressing his theory as the true, objectively correct one. See J Waldron, 'The Rule of Law as a Theatre of Debate' in J Burley (ed), *Dworkin and His Critics* (Hoboken, Wiley-Blackwell, 2004) 326, J Waldron, *Law and Disagreement* (n 32) ch 8, R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87, and Walters, 'Pluralistic Hedgehog' (n 84) 435–38.

[98] Postema, 'Justice in Workclothes' (n 6) 294.

[99] The expressive value of integrity 'is not exhausted … when citizens disagree about which scheme of justice is *in fact embedded* in the community's explicit decisions. For the expressive value is confirmed when people in

We are just about in a position to close the argument of this chapter. Before doing so, I briefly want to explore a possible parallel between what I have been saying, and the arguments that Dworkin makes in the last chapter of *Law's Empire*. In that chapter Dworkin distinguishes between 'inclusive' and 'pure' integrity. As he says:

> The law we have, the actual concrete law for us, is fixed by inclusive integrity. This is the law for the judge, the law he is obliged to declare and enforce. Present law, however, contains another law, which marks out its ambitions for itself; this purer law is defined by pure integrity. It consists in the principles of justice that offer the best justification for the present law seen from the perspective of no institution in particular and thus abstracting from all the constraints of fairness and process that inclusive integrity requires.[100]

Dworkin's distinction here supposes that we can separate, with at least some certainty, the theory of justice and fairness *actually instantiated* in the law, from the aspirational visions of justice that different philosophers may have for the law in abstraction from separation of powers considerations. He says of these visions of justice: 'We cannot defeat these other visions by measuring out and comparing the tracts of law that fit ours and theirs. None fits well enough to dominate present law overall; all fit well enough to claim a base within it'.[101]

Like Dworkin, I am taken with the image of there being different moral visions or 'dreams' pushing their way to the surface of legal and constitutional practice. But, in my view, such dreams or visions represent the *sum total* of legal argument for inclusive protestants. There is no separate 'actual concrete law' – at least at the level of our day to day arguments and disagreements – checking the many different ways in which interpreters may 'meld' together the different branches of political morality.[102] Here we see a further difference. The dreams of inclusive protestants are not just dreams of *justice*. They are dreams of how justice and separation of powers properly interact. In my opinion, this is how we must view the various interpretative theories considered in this chapter (and others besides). Allan's judge-centric vision jostles with Kyritsis's assurance vision, which jostles with Bellamy's political constitutionalist's vision,[103] and so on. No vision 'dominates' present law overall; each plausibly has a base within it. Each vision aspires to colonise the practice.

4. Conclusion

I shall not attempt to rehearse the different stages of argument in this chapter. I have argued for a particular understanding of protestant argument within an interpretative

good faith try to treat one another in a way appropriate to common membership in a community … and to see each other as making this attempt even when they disagree about exactly what integrity requires in particular circumstances' (emphasis added): Dworkin *Law's Empire* (n 3) 190.

[100] ibid 406–407.

[101] ibid 408.

[102] cf Allan, 'Paradox' (n 15) 709. This recalls the point made about 'fit' above.

[103] R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, Cambridge University Press, 2007).

theory of law, one that demands an inclusive, conciliatory and collaborative attitude on the part of each interpreter. I have argued further that if this attitude successfully holds among interpreters, then we should expect and embrace an inclusive constitution, one in which different moral theories justify different parts of the practice. Indeed, I suggest that this is a plausible way to understand the British constitution.[104] I have advanced these arguments for inclusion and reconciliation by way of a refutation of an exclusive form of protestantism found in the work of Trevor Allan. This latter form of interpretivism, I have argued, is non-inclusive in that it fixates on one moral vision to the exclusion of all others. It is non-conciliatory in that it seeks to bar opposing views from the interpretative arena. In my view, only the inclusive form of protestantism can live up to the collaborative ideals to which both forms are wedded, and to which a political community of principle must aspire.

[104] I think my argument bears some relation to Dworkin's account of law and disagreement in the US constitution, but I shall not pursue that point here. See, for instance, R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, Princeton University Press, 2006).