

ANDRÁS SZIGETI

Constitutionalism and Value Theory

1. Introduction

The theory and practice of constitutionalism is tightly interwoven with references and appeals to values. However, these references and appeals frequently remain undertheorized and are seldom connected directly to philosophical theories of value. This chapter will outline some ways in which such connections might be established.

I will first provide an introduction to current discussions about value in contemporary (analytical) philosophy. My aim is certainly not to provide an exhaustive overview in terms of the themes or authors discussed, but only to offer a selection of perhaps the most interesting and most intensely debated topics in value theory. The selection is also designed to reflect the special concerns of constitutional axiology which are taken up in other essays in this volume.

Thus the first part of the chapter presents what are arguably the three most controversial issues in value theory today: structure of value, plurality of value, and objectivity of value. The first issue concerns our relationship as human agents to value(s), the second is about the conflicts and potential incommensurability of values, while the third focuses on different senses in which values may or may not be objective.¹

Apart from being probably the most engaging controversies in value theory today, it is worth looking at these three issues because they are directly relevant to constitutional theory and practice. In the first part of this chapter, I shall indicate how they bear on the work of constitutional lawyers and theorists; in the second part, I will identify three *specific* challenges at the

¹ For reasons of space, I cannot discuss here a fourth issue which, according to some, competes in importance with the three mentioned above. This is the issue whether all genuine values are impartial, *i.e.*, whether all genuine values are or ought to be values for everyone.

heart of constitutionalism which, as I hope to show, value theory can help to answer. These challenges are the following: First, what makes a constitutional order valuable? Second, what values do constitutions embody, integrate or represent? Third, what values or goods does a constitution secure or deliver for people? In short, we are here asking about values *of* constitutions, values *in* constitutions and values *through* constitutions.

2. Topics in Contemporary Value Theory

2.1. The Structure of Value

Almost everyone would agree that the problem of value is crucial to our understanding of practical reason. What we have reason to do is intimately tied up with what we value. One way to put the connection is this: “A reason for action necessarily assumes that something is valuable. *A*’s reason to do *X* is based on the fact that *X* is valuable, either instrumentally or intrinsically.”² This formulation defines reasons in terms of values. A different way of conceptualizing the connection is to say that something has intrinsic or extrinsic value precisely because it gives us reasons for action. This would reverse the direction of the first formulation defining values in terms of reasons.³ Whichever concept – ‘values’ or ‘reasons’ – is the adopted field however, it is clear that because of the close relation between the two, values will play a central role in any domain concerned with what we have reason to do, hence especially in the normative domains of morality, law and aesthetics.

At the same time, there are at least two opposing views, or families of views, regarding what has value and how rational agents are to relate to value. The first of these, the so-called *teleological* conception, has dominated much of modern philosophy and the social sciences.⁴ According to this conception, the ultimate bearers of value are states of affairs or “over time, ways the world might go.”⁵ The end of rational action is the realization of valuable states of affairs. Alternative actions available to the agent are to be ranked on the

² A. Marmor, *Positive Law and Objective Values* 157 (2001).

³ The metaphysical, conceptual and epistemic relations between reasons and values can be thought of in different ways. These alternatives are discussed in U. Heuer, *Raz on Values and Reasons*, in R. J. Wallace, P. Pettit & S. Scheffler (Eds.), *Reasons and Value: Themes from the Moral Philosophy of Joseph Raz* 129, at 130-135 (2004). J. Gardner & T. Macklem, *Reasons*, in J. Coleman & S. Shapiro (Eds.), *Jurisprudence and Philosophy of Law*, 440 at 450-457 (2002) is another excellent summary of the same issues.

⁴ For a useful summary and thoroughgoing critique of the teleological conception, see T. Scanlon, *What We Owe to Each Other* (1998); E. Anderson, *Value in Ethics and Economics* (1993).

⁵ See Scanlon, *id.*, at 79.

basis of how much they contribute to bringing about the best possible state of affairs. In other words, one is to act so as to realize the state of affairs with the greatest value.⁶

The teleological conception goes hand-in-hand with a *consequentialist* account of morality. Consequentialists hold that an action is morally right if it maximizes impersonal value, that is, the good from an impartial point of view. In other words, what is added by consequentialist morality to the teleological conception of value is the idea of impartiality, i.e., the thought that everyone's pleasure or pain or desire-satisfaction or preferences matter to an equal extent and the reasons to maximize value apply to everyone in the same way.⁷

What considerations could lead one to reject the teleological conception? Consider the example of friendship.⁸ What kinds of reasons does one have if one values friendship? One has reason to behave loyally towards one's friends, to be concerned with their welfare, to spend time together, etc. Maximizing considerations are only marginally relevant, if at all. For instance, one does not properly value friendship if one is ready to betray a friend to make two other friends instead. In sum, it is not central to friendships that one promotes them by increasing the number of friendships in the world or by doing things for the sake of friendship in the abstract. That is to say, one does things for the sake of friends because one likes them, cares about them and not because one cares about friendship *per se*. One does not do these things in order for a friendship to continue to exist – at least this will not be one's principal reason, but rather the affection, appreciation or whatever one feels for one's friend (and only it is because of this affection, appreciation, etc., that one will want that friendship to continue to exist). So, as regards the case of friendship, the teleological account of value would seem to put the cart before the horse: what is centrally valuable about friendship is not that the world is a better place if there are more friendships in it. (True, the world is probably a better place if there are more friendships in it, but this is only a derivative benefit which results precisely because friendships are valuable in the first place.)

The teleological conception is opposed by all those who believe that states of affairs are not the ultimate bearers of value. If they are right, then the source of what we have reason to do is not only how the world should be. And if it is true that normativity is rooted not only or not primarily in states of affairs, then we too as agents may have different kinds of reasons for action than is

⁶ For an example of the teleological view, see A. Sen, *Rights and Agency*, in S. Scheffler (Ed.), *Consequentialism and its Critics* 187 (1988).

⁷ For a very useful summary of arguments for and against consequentialism, see S. Scheffler, *Introduction*, in S. Scheffler (Ed.), *id.*, at 1, and J. J. C. Smart & B. Williams, *Utilitarianism: For and Against* (1973). For a powerful exposition of some considerations in favor of consequentialism, see S. Scheffler, *Agent-Centered Restrictions, Rationality, and the Virtues*, in S. Scheffler (Ed.), *id.*, at 243.

⁸ I rely here on Scanlon, *supra* note 4, at 88-90.

assumed by adherents of the teleological conception. Our only truly rational relationship to what we value is no longer that of seeking to maximize it whenever possible.

If this is correct, then it is perhaps more appropriate to say that one expresses one's friendship by doing things for one's friends' sake. And indeed, an important member of the family of non-teleological views is the *expressive* theory of value.⁹ On this account, actions are ranked according to how well they express our rational valuations. While the states of affairs which come about as a result of one's actions continue to matter, the resulting states of affairs are only extrinsically valuable: they are assessed on the basis of whether or not they are expressive of rational valuations, and are not valued for their own sake. To return to the example of friendship, what this account seems perhaps better equipped to explain than the teleological conception is the fact that the state of affairs in which my friend fares better matters to me *because* the friend matters to me. It is my commitment to my friend that lends value to that state of affairs in which my friend fares better, and not the other way around.

But how are we to assess how well an action expresses a valuation of ours, say, our valuing of friendship? We can do so by citing norms which pertain to the relationship or situation in which one is to act. Thus, how to express one's friendship, how to be a friend, is regulated by norms. By the same token, there are norms pertaining to the ways in which we relate to aesthetic value. No matter how much we appreciate Beethoven's late string quartets, we tend not to think it appropriate to play them "in the elevators, hallways, and restrooms of an office building."¹⁰

So norms provide us with a "decision frame"¹¹ by which to evaluate alternative courses of action. What is more, once such a decision frame has been adopted certain courses of action become entirely irrelevant. For example, for the captain of a ship who behaves responsibly towards his passengers, taking off with the rescue boat on his own is not an option that will enter into his deliberation. It is an option that is 'silenced.' For a friend, as long as he is committed to our friendship, betraying me to gain some advantage or even to gain other friends will not be a deliberative option. Fleeing or betrayal may, of course, become such options – even legitimate ones – but then the captain or the friend is no longer deliberating within the decision-frame of responsible seamanship or genuine friendship. On the other hand, the adoption of a decision frame of responsible seamanship or genuine friendship generates a whole array of relevant reasons and considerations which would not be available outside it: reasons to care about the welfare of friends and

⁹ See Chapters 1 and 2 of E. Anderson, *Value in Ethics and Economics* (1993).

¹⁰ See Scanlon, *supra* note 4, at 100. See also Heuer, *supra* note 3, at 130-131.

¹¹ See Anderson, *supra* note 4, at 24.

passengers, and so on. At least that is the view presented by the expressive theory of value.

The appeal to norms points to two further important ideas which often play a central role in the expressive theory and other non-teleological conceptions of value. First, that the kinds of reasons values give us are to a large extent dependent on social practices. The norms pertaining to ‘how to be a good friend’ vary from one culture to another and can vary even from one social setting to another. And second, what such variations demonstrate is that the normativity of value frequently appears to be contingent, conditioned by convention, history or habit. This is because for the most part the historical background and other largely contingent factors will determine what we think our valuation of certain things will give us reason to do. Most cultures give pride of place to the value of good food. But how do we (and how should we) go about practicing our appreciation? The point is not only that the answer to this question varies from culture to culture, but even more importantly that valuing good food in itself will not provide us with a determinate answer to this question. This is precisely what permits the large degree of cultural, social and personal variety in our relationship to this value and others.¹²

Of course none of this so far will settle any of the debates concerning the proper role of values in or for a study of constitutionalism. However, it may give us *more options* in how we explain and justify the functions of legal norms, and especially of constitutional ones.¹³ That is to say, it may well be possible to provide a teleological or a non-teleological description and justification of our relationship to constitutional values at any level – i.e., of the good of having a constitution at the first place, and further, of the various values included in constitutions, and of the goods or values made accessible by constitutions. At the same time, the criticisms of the dominant teleological conception of the structure of value allow us to rethink the practical significance of constitutional values and the reasons for action they generate.

Thus those unpersuaded by the teleological conception can argue, first, that it is *not* true that the only acceptable or logically possible explanation for including values in a constitution is that those values stand for desirable goals or states of affairs. That is to say, committing oneself to these values does not necessarily entail (if indeed we are prepared to give up the teleological conception) that they are to be promoted or maximized. Nor is the value of having a constitution necessarily exhausted by the fact that having a constitution is a desirable state of affairs. Having a constitution may indeed be a desirable state of affairs, but the expressive theory of value would suggest

¹² On these points see especially J. Raz, *The Practice of Value* (2003).

¹³ On the theoretical and practical importance of having “more options” in our thinking about normative domains, such as ethics or (we may add) law, see D. Wiggins, *Needs, Values, Truth*, at viii (2002). The essays contained in this book are invaluable in showing us how to create and exploit such options.

that this may not be the end of the story: the desirable state of affairs realized by our having a constitution is of extrinsic significance only.

Second, the opponents of the teleological conception can also point out that some of our constitutional values, as well as the value of having a constitution itself, really function as decision frames. They specify, that is, a range of eligible and relevant reasons for action, while silencing other reasons and considerations. Once we embrace certain constitutional values or the constitution as a value, a “wider range of reasons comes into view,”¹⁴ and another range of reasons is excluded – similarly to the case of friendship or that of the responsible captain. If that is correct, then commitment to a constitutional value, or constitutionality as such, works like a normative perspective, rather than a goal to be realized.

Suppose, for example, that the equal moral and political status of all citizens is indeed a supreme constitutional value as many have argued.¹⁵ If we accept the expressive theory of value, it may be a more adequate description of the constitutional commitment to the value of equality to say that the acceptance of this value is not principally aimed at realizing any given state of affairs, but rather that it defines the range of eligible and ineligible reasons for legislators and judges and members of the political community. Thus for legislators, judges, etc. certain considerations are simply not eligible, namely those which presuppose or could result in the inequality of citizens in the relevant sense. On the other hand, embracing the value of equality also brings a wider range of reasons into the picture. For example, from the perspective of the value of equality, freedom of speech and religion acquire seminal importance since they are essential to guaranteeing equal concern for every citizen.

Or consider the example of the constitutional value of human dignity and whether torture is legally and morally permissible under certain extreme circumstances. It is sometimes argued that those who think torture is unacceptable under any circumstances because it violates human dignity contradict themselves because they cannot explain why torture is not permissible in cases in which it is used to prevent even greater violations of human dignity, such as mass murder or terror. Those who reject the teleological conception can respond, however, that this charge is based on a misunderstanding of their position. What they say is not that we should maximize human dignity, and *a fortiori* minimize the frequency of actions violating it. Rather, they insist that once human dignity is embraced as a value, i.e., as the relevant decision frame, considerations in favor of torture are excluded from the balance of reasons right from the outset. Of course, this value and this decision frame can be contested and abandoned as any other. But in that case we have shifted to a

¹⁴ Scanlon, *supra* note 4, at 90.

¹⁵ See R. Dworkin, *Freedom's Law* 7-8 (1996). Dworkin actually calls this an “abstract moral principle,” but the difference between values and principles is not significant for the purposes of the present discussion.

different decision frame rather than maximized the value of dignity under the given circumstances as adherents of the teleological conception would have it.

2.2. The Plurality of Value

The teleological conception is a *monist* conception of value because it assumes that there is a common currency in terms of which the relative value of any state of affairs can be cashed out, sufficiently at least for purposes of comparison. Therefore it is not surprising that the teleological conception is often coupled with hedonism, i.e., the notion that the common currency which allows us to compare the relative value of states of affairs is the amount of pleasure they generate. More recent proposals for the common currency include the relative potential of states of affairs to satisfy preferences or desires. The common idea to all of these proposals is that “goods differ in quantity, as they arouse more or less of the same response, but not in quality or kind.”¹⁶

The ambition of monists to find such a common currency has less to do with an interest in the psychology of human motivation and much more to do with the need to find support for a common, and (initially at least) highly plausible understanding of human rationality. The problem is as follows: We are all familiar with the deliberative situation of having to face conflicting reasons for action, some supporting course *A*, while others support course *B*. A conflict between *A* and *B* can arise because the reasons supporting either are of equal weight. This, however, is not yet a case of incommensurability, because additional information can tip the balance one way or another. By contrast, we will be dealing with genuinely incommensurable courses of action if no amount of additional information will tip the balance in favor of *A* or *B*.¹⁷

And now recall the close connection between reasons and values. At first, pointing to this connection appears to solve the difficulty of incommensurable reasons easily. After all, we all embrace many values: a great number of things can and do give us joy, elicit admiration, invite respect, or just tickle our fancy. But if values and reasons are so closely connected as previously suggested, then why should it be surprising that we are often faced with situations in which our commitment to different values generates conflicting reasons? The answer seems simple: we have many reasons for action and these come into conflict on occasion precisely because there are many different things we value.

However, the problem is that in order to act at all, more often than not (since sometimes we can refrain from acting when faced with such a choice), we have to choose among the conflicting courses of actions our values give us reasons to pursue. But on what grounds should we choose? It seems on

¹⁶ Anderson, *supra* note 4, at xii.

¹⁷ Gardner & Macklem, *supra* note 3, at 470-471.

second thought that the appeal to the pluralism of our values only postpones the problem. What our values give us are only *prima facie* or *pro tanto* reasons which will not tell us what we ought to do all things considered.¹⁸

So it seems – on the plausible assumption that all of us are committed to many different values – that on a great number of occasions, i.e., whenever our commitment to different values yields conflicting reasons, our choices and the resulting actions are arbitrary, lacking an ultimate rational foundation. It is this problem that monists try to solve by looking for a common currency of values.

And their proposal is not unattractive. We do decide such conflicts in the end and often without much hesitation or regret. If there was no such currency, how would we know what to do? Do we really want to say that these decisions are arbitrary, comparable to tossing a coin, and therefore ultimately irrational? Once we have found a way of weighing the relative significance of the values we embrace, the problem of arbitrariness appears to go away. We have found a way to resolve the conflict of reasons and simultaneously to give these resolutions a rational foundation too: we opt for the course of action which is more valuable in terms of the common currency because it better satisfies our preferences or our desires, or gives us more pleasure, as hedonists would put it.

Note that this solution presupposes the teleological conception of value. If it is true that the relative significance or weight of values is to be cashed out in terms of desire-satisfaction or pleasure or whatever common currency is proposed, then the goal of rational action must be a certain state of affairs, namely the one which is most pleasurable or desire/preference-satisfying. Moreover, only these states of affairs will have intrinsic value. The value of any other candidate will be extrinsic: it will be valuable because it causes pleasure or satisfies desires/preferences. And, as already remarked, the reverse is also true: the teleological conception of value presupposes monism. If it is true that a rational agent has most reason to perform the more valuable of any two actions, then there must be a measure by which to evaluate the relative weight of any two values.

One problem is that those who *reject* monism can point to experiences no less familiar and intuitions no less basic than those driving the arguments of monists. Most importantly, pluralists call attention to the fact that we relate to value in many different ways. Human dignity is to be valued by showing respect to people; tools are valued by using them in the right way.¹⁹ And it can be argued that there are not only two but in fact several different modalities of the pursuit of value.²⁰ As Joseph Raz puts it: “We do [engage with value] in

¹⁸ On the problem of *prima facie* reasons, see Chapter 2 of W. D. Ross, *The Right and the Good* (1930).

¹⁹ See I. Kant, *Groundwork of the Metaphysics of Morals* 42-43 (1997).

²⁰ See Anderson, *supra* note 4, at 10.

appropriate ways when we listen to music with attention and discrimination, read a novel with understanding, climb rocks using our skills to cope, spend time with friends in ways appropriate to our relationships with them.”²¹ Also, we will probably not be engaging with value in appropriate ways, we may add, if we try to bring the skills which are appropriate to climbing rocks to reading a novel, and conversely. Or even more specifically, we will probably not be engaging with value in appropriate ways if we try to listen to rock music in the same way as we listen to opera.

In general, it seems that understanding a value necessarily involves understanding *how* it is to be valued.²² If that is right, however, then the teleological conception misses an essential aspect of value. The fact that value gives us reasons to engage with it in certain ways means that the normativity of value certainly cannot be reduced to the requirement of promoting or maximizing it. And the same consideration makes monism appear equally wrongheaded. The fact that every distinct value, every human good, calls for a different mode of engagement shows that the property of being valuable is not reducible to a single feature, such as, say, the pleasure-giving potential of the valuable thing.

It is possible of course that I choose among two conflicting courses of action by comparing how much each is likely to increase my pleasure or satisfy my desires (or also, if I am moved to occupy an impartial point of view, how much it is likely to increase total or average pleasure or happiness overall). But note that this can happen essentially in two cases: those in which there are no reasons for or against a course of action apart from the fact that they satisfy a want, preference or desire (e.g., choosing vanilla ice cream over chocolate) and those in which the desires themselves answer to reasons (e.g., my desire to buy a new car as opposed to my desire to spend my holidays in Thailand). Choices of the first type are not susceptible to criticism or rational argument, nor are they expected to be, so they can hardly be used to explain the rationality of human choice, and it is questionable whether they can be called valuations in any sense. Choices of the second type are susceptible to criticism or rational argument precisely because the desires underlying them answer to reason (if they are not, they cannot be used as the basis for choice). It follows that weighing those desires against each other will involve investigating the reasons supporting them, and this in turn will involve investigating the value represented or expressed by the alternative courses of action.

If it is indeed true that very different and incomparable kinds of value-experiences are to be expected from our relation to different kinds of value which cannot be evaluated on a single scale of pleasure-generating potential or desire/preference-satisfaction, then it seems that we are back to the problem of pluralism and potential incommensurability of values. There will be no

²¹ J. Raz, *Value, Respect, and Attachment* 162 (2001).

²² See Scanlon, *supra* note 4, at 100.

common currency by which to weigh different values against each other. Our different values, in short, will give rise to different and often irreconcilable reasons. This plurality will also be reflected in the plurality of norms which in any given social context will govern the ways in which we relate to values.²³

At this point, monists can object that this understanding of pluralism commits us to accepting the ultimate irrationality of deliberation. If values and the reasons they generate are genuinely incommensurable, then on what basis should a rational agent decide what she is to do? To answer this question, pluralists need to offer a 'closure rule' to guide our choices among the conflicting reasons our values generate. But once they settle upon such a 'closure rule,' they are faced with the following dilemma: If the 'closure rule' is rationally grounded, then it must be based on something we value. In that case, however, radical incommensurability is false: values are commensurable in terms of the value which grounds the 'closure rule.' Or they can say that the 'closure rule' is itself not rationally grounded. In this case, however, our choices in deliberative conflicts generated by incommensurable values appear to be arbitrary.

Again, it would be premature at this stage to try to glean definitive conclusions with regard to the theoretical or practical problems of constitutionalism from this, as we have seen, inconclusive debate between monists and pluralists. Two points are nevertheless worth noting here.

First, value-pluralism and the incommensurability of values are often used as important arguments by those skeptics who hold that legal norms and their application lack a rational foundation. Such skepticism can go two ways. On the one hand, many have argued in this way: legal norms are dependent on moral and other values. If, however, moral and other values are incommensurable in the sense that we have no higher-order reason to choose among them, then legal criteria and their application must ultimately remain irrational, or at best, arational.²⁴

On the other hand, it is also possible to argue that even if legal norms are not dependent on moral and other evaluations, the plurality and conflict of legal values themselves is sufficient to render legal norms and their application irrational or arational. Legal reasons can conflict.²⁵ In such cases a certain kind

²³ See Anderson, *supra* note 4, at 12.

²⁴ See S. Fish, *Working in a Chain Gang: Interpretation in Law and Literature*, in W. J. T. Mitchell (Ed.), *The Politics of Interpretation in Law and Literature* 271 (1983); M. Tushnet, *An Essay on Rights*, 62 *Texas L. Rev.* 1363 (1984); and R. A. Posner, *The Problematics of Legal and Moral Theory*, 111 *Harv. L. Rev.* 1637 (1998) for such skeptical arguments. Andrei Marmor's reply to this type of skeptical argument is interesting because it denies both premises, *i.e.*, he does not think that legal norms or values are necessarily or crucially dependent on moral values *and* he also thinks that both legal norms/values and moral norms/values are sufficiently objective and rational, *see* Marmor, *supra* note 2, at 142. *See* also the discussion of objectivity in the following section.

²⁵ For an analysis of the type of legal gap that is due to the incommensurability of legal

of legal gap opens up which is irresolvable in a rational way. These legal gaps are of course dealt with in one way or another, but legal values will not provide a rational basis for doing so.²⁶

In my view, even without taking sides in the controversies between monists and pluralists, we can conclude from the above discussion that value-pluralism, within or outside the law, courts the danger of skepticism about the rationality of legal or other norms and their application *no more* than does value-monism. *Both* positions are faced with serious challenges, rest on basic intuitions about human rationality, and can appeal to experiences familiar to any deliberating human agent. For monists, the essential difficulty is, first, to explain that different goods are valued in widely differing ways, and second, to explain how, if the common currency of value is a subjective value-experience of some sort (pleasure, desire-/preference-satisfaction), our valuing of things can be a source of reasons and be subjected to rational criticism. For pluralists, by contrast, the chief problem is to come up with a ‘closure rule’ that allows us to choose among the conflicting reasons our values generate and is itself rationally grounded.

And this leads to my second point. Legal discussions about hard cases, constitutional or otherwise, frequently focus on the claim that judges should always make their decisions on the basis of all-things-considered or overriding reasons.²⁷ The claim is that if there is an all-things-considered reason, judges should decide as that reason dictates *and* they should not decide as long as no such all-things-considered reason is available. Hard cases arise because often it does not seem possible to establish an all-things-considered reason. Reasons for decision *A* and decision *B* appear to be both *undefeated* in such hard cases. This may happen because reasons for decision *A* and decision *B* both derive from incommensurable values (the situation discussed above) or for other reasons as well.

It seems that for pluralists there is a serious problem here because they reject the idea of a common currency of values. However, it should be noted that at least two ways have been proposed by pluralists to escape this dilemma. The first proposal is that it is not impossible to rationally ground the ‘closure rule,’ not at least as long as we remain within a specific normative domain such as law.²⁸ Such rational foundation could be the “functional need for a

reasons, see J. Raz, *Legal Reasons, Sources, and Gaps*, in *The Authority of Law: Essays on Law and Morality* 53, at 75 (1979). Raz denies that such gaps are irresolvable and that they (or the existence of other kinds of gaps for that matter) would lend support to skepticism about the rationality of legal values or norms.

²⁶ Thus in R. Dworkin, *No Right Answer?* in P. M. S. Hacker & J. Raz (Eds.), *Law, Morality, and Society* 58 (1977). Dworkin put forward the claim that ‘exclusive legal positivism’ is forced to embrace such a position and is therefore incoherent.

²⁷ See Gardner & Macklem, *supra* note 3, at 472, n.45.

²⁸ This solution is suggested by Raz, in *supra* note 25, at 75-77.

decision”²⁹ to settle legal cases and to resolve conflicts and indeterminacies (a similar functional need to decide may or may not exist in conflicts of moral or aesthetic values/reasons as well). Second, pluralists can also bite the bullet and say that there is *in general* nothing wrong with a judgment that does not defeat countervailing reasons as long as the judgment itself is also based on undefeated reasons.³⁰ Such a judgment, they could argue, is as rational as any.

2.3. The Objectivity of Value

The strongest form of objectivism rests on two pillars: metaphysical realism and cognitivism. The realist metaphysical thesis is that values are mind-independent facts, existing ‘out there,’ independent of people’s beliefs about value or of their experiences of value. Cognitivism breaks down into a semantic and an epistemological component. The semantic component is that value-statements, such as ‘X is valuable’ or ‘X is beautiful,’ typically have descriptive content: they are meant as assertions (of beliefs) about the valuable properties of things, states of affairs or actions. The epistemic component is that these assertions (or the beliefs they express) can be robustly true or false, they can be justified and (therefore³¹) that knowledge about value is possible.

The most radical challenge to the objectivity of values rejects both metaphysical realism and cognitivism. For example, *emotivists* claim that statements of value merely express subjective preferences or ultimately unfounded ideological convictions.³² Alternative approaches reject most or some, but not necessarily all of the tenets of objectivism about values. *Prescriptivists*, for instance, agree with emotivists that value statements are non-cognitive and serve to express the appraiser’s attitudes or commitments. However, they regard such statements as expressing imperatives rather than emotions (e.g., ‘killing is evil’ means ‘do not kill!’). Further, and more importantly, these statements are seen as *universalizable* imperatives applying to any relevantly similar situation. This means that although prescriptivists certainly do not accept metaphysical realism, unlike emotivists, they do think

²⁹ On the normative significance of the imperative to decide in legal cases, see R. Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *Philosophy and Public Affairs* 87, at 137-139 (1996).

³⁰ This is the solution preferred by Gardner and Macklem. See Gardner & Macklem, *supra* note 3, at 472, n.45.

³¹ This ‘therefore’ is optional because some people deny that knowledge is justified true belief. Denying that, however, need not imply a rejection of realism.

³² The classical and arguably most interesting statement of emotivism can be found in the works of Charles L. Stevenson.

that values are objective at least insofar as it is possible to spell out objective criteria of justifiability for statements of value. These objective criteria will be the criteria of universalizability.³³

There are many other theoretical options of course. An interesting and highly influential combination is the *error theory of value*. The error theory rejects metaphysical realism. Error theorists point out that science has not discovered evaluative facts or properties of things in the physical world which would correspond to our value judgments. Nor do we appear to possess an organ or faculty capable of tracking value 'out there.' Error theorists also point out that "if there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe,"³⁴ because, unlike ordinary constitutive elements of the natural world, they would have to motivate us or provide us with reasons for action even against our desires and inclinations.³⁵ So when we ascribe value to things in the world and talk and act as if certain things, events or states of affairs were right or wrong, valuable or not, we are systematically in error (hence the label for this position). At the same time, the error theory does accept cognitivism. What it says is not that ascriptions of value cannot be true or false, but rather that they are false.

Needless to say, numerous other positions have been put forward as regards the objectivity of values: quasi-realism,³⁶ norm-expressivism,³⁷ etc. I would like to discuss yet another approach here, however, because this may be of particular interest to legal theorists. One could say that this approach is the pendant of the error theory: it also rejects metaphysical realism about values and it is also cognitivist but, contrary to error theorists, it denies that metaphysical realism is required for the objectivity of values.³⁸

To see what is distinctive about this position, we briefly have to return to the idea that was first broached in connection with the expressive theory, namely that values generate norms regulating how we are 'normally' to relate to them. For example, there are norms telling us how to be a good friend or how to appreciate classical music. These norms are, of course, all contestable and allow for individual variation and creativity. We may find unsatisfying the norms of friendship customary in a certain social setting permitting only too stilted or, on the contrary, too intimate exchanges with our friends. So we may look for or develop different norms that better express or represent our commitment to the value of friendship.

Now, the crucial insight for the 'objectivity without metaphysical realism' position is that for certain practices the conventions establishing that practice

³³ The *locus classicus* of prescriptivism is R. M. Hare, *The Language of Morals* (1952).

³⁴ J. Mackie, *Ethics: Inventing Right and Wrong* 38 (1977).

³⁵ *Id.*, at 50.

³⁶ See S. Blackburn, *Essays in Quasi-Realism* (1993).

³⁷ See A. Gibbard, *Wise Choices, Apt Feelings: A Theory of Normative Judgment* (2003).

³⁸ See Marmor, *supra* note 2, at 142.

will create the values and norms endemic to that practice. Consider the example of chess. The rules of chess are such that they will define certain actions which did not preexist the rules. For instance, only once the rules of chess are in place will it be possible for you to perform the action referred to as ‘checkmate.’³⁹

But what is more important, once the practice has been defined through such rules, values and norms emerge which are only truly at home within the framework of this practice, for example the value of a beautiful combination and the norms according to which the beauty of a combination is assessed, or the value of a good chess player and the norms according to which the skills of a player are assessed. The case of opera is another illuminative and frequently cited example. Consider concepts such as ‘overture’ and values such as ‘magnificent countertenor.’ These all appear to be largely endemic to the genre of opera.

It follows that rules of such practices are properly called constitutive conventions. They are conventional because they are fixed by tradition and/or by the largely arbitrary agreement of those taking part in the practice. And they are constitutive in the twofold sense of defining certain actions *and* generating values by which to assess these actions.

It seems to be only a small step from here to the claim that constitutions are themselves such constitutive conventions or at least very important parts of the constitutive conventions which define the practice of law and the values and norms endemic to it. That step, however, is not such an easy one to take since it relies on much-debated assumptions concerning the autonomy of legal and constitutional practices and values. Also, before that step is taken, one has to show that the values and norms of law can be treated analogously to the constitutive conventions of chess, say, even though many of the decisive legal values and norms do not seem to be arbitrary or even conventional at all.

But whether or not that step can be taken, it is worth emphasizing that the position ‘objectivity without metaphysical realism’ may be seen to offer a way to hold on to the objectivity of values without the need to defend metaphysical realism. There is an objective fact of the matter as to whether a certain position on the chessboard is or is not checkmate or as to whether moving your rook diagonally is an illegal move. But these objective facts are established solely by the constitutive conventions of chess. And, although opinions naturally divide over what constitutes a brilliant attack in a chess game or what qualities are required in a ‘magnificent countertenor,’ it is clear that all the parties in disagreement will refer to the constitutive conventions of chess and opera,

³⁹ In fact, based on this insight, some have argued that there are two concepts of rules. There is a concept of rules according to which rules function as heuristic tools, “rules of thumb,” helping to save time or guide action in recurrent similar cases. But there is another concept of rules in terms of which rules “define a practice,” J. Rawls, *Two Concepts of Rules*, in S. Freeman (Ed.), John Rawls: Collected Papers 20, at 36 (1999). The rules of chess belong to the latter type of rules.

respectively, rather than to some putative facts about the ultimate fabric of reality. If so, then this solution would enable one to sidestep the thorny issue of how evaluative properties supervene on or otherwise relate to facts about the physical world and yet claim that value-statements have a cognitive component, that they can be true or false and that they can be justified and be the object of knowledge.

This is at least what the 'objectivity without metaphysical realism' position promises to deliver. Whether it really is capable of meeting this promise is another question. One important worry is that it remains a highly contentious issue whether the facts supposedly established by constitutive conventions really are sufficiently robust to ground objective judgements. And we may not be in a position to resolve this issue as long as we remain agnostic about metaphysical realism.

Finally, it may be thought that no discussion, however summary, of the objectivity of values can be complete without addressing the problem of vagueness. Specifically, some believe that the problem of vagueness poses a special threat to the objectivity of legal values. It is certainly a problem that has received considerable attention in recent legal theory.⁴⁰

Vague terms appear to involve genuine indeterminateness in the sense that "no amount of information can decide their applicability."⁴¹ What causes the headache is that the concepts of different values are all unquestionably vague and therefore the applicability of normative statements, which refer to such values, appears to be disturbingly indeterminate or even undecidable. This difficulty extends not only to such abstract notions as 'justice,' 'harm,' 'equality' or 'fairness,' but also to more concrete legal terms such as 'responsibility,' 'liability' or 'property.' And so, one may ask, doesn't the vagueness of legal values and the norms they give rise to undermine their objectivity as well as that of the judgments which refer to them? How can any value be objective if we do not know when to apply it or what particulars fall under it?

Three points must be noted in response to this challenge.

First, the problem of vagueness is not specific to legal or moral values, and not even to values or normative terms as such. Vagueness is not restricted to terms used in certain specialized contexts. Bertrand Russell argues that vagueness is ubiquitous in natural languages⁴² and Joseph Raz goes as far as saying that "all, and not only some, nouns, verbs, adverbs, and adjectives of a natural language are vague."⁴³ To see this, consider the vagueness of such terms as 'being near' or 'bald.' So if there is a problem with vagueness it spreads to all contexts in which natural languages are used.

⁴⁰ See H. L. A. Hart, *The Concept of Law* 124-136 (1961); J. Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, in *Freedom and Fulfillment* 175, at 189-194 (1992); and J. Feinberg, *Doing and Deserving* 25-37 (1970).

⁴¹ R. Keefe & P. Smith, *Vagueness* 2 (1997).

⁴² See *id.*, at 4-5.

⁴³ See Raz, *supra* note 25, at 73.

Second, it is a mistake to assume that the presence of vagueness would exclude access to a robust notion of truth. None of the main theories of vagueness hold that the problem of vagueness would imply wholesale skepticism about truth. There are non-classical theories (e.g., supervaluationism) which do concede that the truth-value of borderline predications is indeterminate or strange or that they do not have a truth-value and that as a result many-valued logic may be a more feasible option. However, even these theories allow for the existence of *some* straightforwardly true or false predications.

Third, even if there were true-value gaps occasioned by vagueness, legal gaps are not likely to be instances of them. It is quite possible to argue that when “we face a legal gap, the appropriate conclusion is that it is objectively the case that there is no settled law on the particular issue.”⁴⁴ In such cases, closure rules come into operation such that there is no valid legal prescription applying to the case or it is simply assumed that

[...] every present practical question or coordination problem has, in every respect, been so ‘provided for’ by some such past juridical act or acts (if only, in some cases, by provisions stipulating precisely which person or institution is then to exercise discretion to settle the question, or defining what precise procedure is then to be followed.⁴⁵

3. The Relevance of Value Theory to Constitutionalism

I will now proceed to the discussion of three questions central to constitutional jurisprudence and practice. The aim of this discussion will be mainly to show that value theory can make a substantial contribution to answering these questions, rather than to take a stand on how to answer them. Arguably, these questions correspond to the three levels at which the problem of value manifests itself most poignantly for constitutionalism. It is worth addressing these levels one by one, especially because they are not always clearly separated in debates about constitutional values.

The first question is what makes a constitutional order valuable? Is a constitution and the fundamental order it stands for a good in itself? If so, why?

The second question is what values do constitutions embody, integrate or represent? This is a question about the values more or less explicitly embraced by constitutional texts, i.e., the values in constitutions in the thin sense of the word ‘constitution.’ It is also a question about the values more or less explicitly embraced by constitutions in the thick sense, i.e., in the sense in which the word ‘constitution’ is used to cover all the norms constituting ‘the supreme Law’ of the land as well as the norms of legal culture and social practices and

⁴⁴ Marmor, *supra* note 2, at 142.

⁴⁵ J. Finnis, *Natural Law and Natural Rights* 269 (1990).

beliefs distinguishing constitutionalism in a country.⁴⁶ For example, it is in this context that one can ask whether it is right to include specific social values in the constitution, such as values answering “the demands of social justice.”⁴⁷

The third question is about the specific values or goods a constitution provides for people. These include the goods directly secured by institutional arrangements defined in the constitution, e.g., minority-protection or citizenship. The values to be discussed under this heading also include, however, the goods indirectly provided by constitutionalism. These are goods which do not result directly from constitutional arrangements or from direct obedience to constitutional prescriptions and regulations, but rather from the knowledge that such arrangements, prescriptions and regulations are in place. For example, a constitution may actively uphold the value of privacy, but by doing so it can also indirectly contribute to cementing a culture of respect for privacy in everyday social interactions.⁴⁸

3.1. Values of the Constitution

Is having a constitutional order a good thing? What this question asks is not whether the goods secured by the constitution, e.g. the protection of liberal and personal rights such as freedom of expression or the separation of powers, are really valuable or not. What the question asks rather is whether it is in itself valuable to provide these goods by means of a constitution.

Some of the essential characteristics of constitutions are particularly relevant to this question. These are the following. First, constitutions are entrenched. That is, it is difficult to change them. Second, constitutions are stable, or at least meant to be so. Third, the constitution is superior law. It is the “closing argument of a legal system.”⁴⁹ Fourth, constitutional prescriptions and arrangements are safeguarded and implemented through special institutions and institutional procedures, most frequently by means of judicial review.⁵⁰

⁴⁶ For the distinction between the ‘thick’ and ‘thin’ senses of constitution, see J. Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in L. Alexander (Ed.), *Constitutionalism* 152, at 153-154 (1998), and M. J. Perry, *What is “the Constitution”?* (and *Other Fundamental Questions*), in L. Alexander (Ed.), *Constitutionalism* 99, at 99-100 (1998) where Perry distinguishes between *Constitution1*, i.e., the text of the Constitution of the United States, and *Constitution2*, i.e., “the norms that constitute ‘the supreme Law.’”

⁴⁷ A. Sajó, *Limiting Government: An Introduction to Constitutionalism* 37 (1999).

⁴⁸ Compare the distinction between the direct and indirect functions of the law as drawn by J. Raz in *The Functions of Law*, in *The Authority of Law* 163, at 167-168 (1979).

⁴⁹ Sajó, *supra* note 47, at 39.

⁵⁰ There are other important characteristics of constitutions, see Raz, *supra* note 46, at 153-154. It is frequently noted that a written, canonical formulation of the constitution is not absolutely necessary for constitutionalism to function properly.

What then is the point of having such an institution? And what is the point of delivering whatever this institution delivers through *this* institution and not by some alternative means?

One answer to this question, which also connects to the discussion of values above, is that such an institution is a good thing to have because constitutions coordinate. And they do so precisely because they have at least the four basic features listed above.

This answer was developed as a critical response to the view that constitutions are really social contracts backed by tacit or explicit agreement.⁵¹ As against this view, it was observed that constitutions are not contracts, but rather enable the institution of contracting at the first place. In general, constitutions regulate long-term interactions, it is claimed, by establishing conventions making it easier for us to cooperate in social-exchange situations.

It is this general coordinating role that renders constitutions valuable. It is also because of this coordinating role that people choose to interact on the order that the constitution has brought about: the constitution makes possible numerous arrangements (such as the institution of contracting, for example) “to coordinate in the production of great gains.”⁵² In fact, it is less important what the actual arrangement is because any constitutional arrangement among a greater number of available options suffices to solve the coordination problem.⁵³ The simple fact of its being a solution to this problem is what makes the constitutional order – whichever is chosen at the outset – a good thing to have.

The difference between contracts and constitutions is also revealed in the different factors that help them remain in place. A contract is ultimately enforced by the threat of sanctions. Non-compliance with a constitutional order may or may not entail the imposition of sanctions, but what really makes non-compliance with a constitutional order prohibitive is the cost of renegotiating another coordinative arrangement.

It follows from this that the longer the constitution has survived, the more effectively it will be able to perform its coordinating role. The longer the constitution survives, the more people will be confident in their expectations that it will do so in the future too because the more likely it is that others will comply with it. Hence, the less sense it makes for them to try to rally support for an alternative arrangement for coordination. Or so it is argued.

⁵¹ This paragraph summarizes the argument put forward by Russell Hardin in R. Hardin, *Why a Constitution?*, in B. Grofman & D. Wittman (Eds.), *The Federalist Papers and the New Institutionalism* 100 (1989). The argument itself may be seen as an application of the analysis of conventions by David Lewis in D. Lewis, *Convention: A Philosophical Study* (1968). Lewis held that conventions are in essence solutions to coordination problems.

⁵² Hardin, *id.*, at 107.

⁵³ See *id.*, at 108.

This conception compares interestingly with another widespread explanation of why a constitutional order is valuable. I will call this alternative view the Fear Thesis.

According to the Fear Thesis, the establishment and maintenance of a constitutional order is motivated principally by fear. Fear of conflict and loss as well as fear of the return of the past, whether that past be a Hobbesian state of nature or an oppressive regime of some sort.⁵⁴ The Fear Thesis fits in rather well with a common perception of what constitutions serve to do, namely limit the power of government and restrain the will of the majority. Constitutionalism, it is said, “[i]s the set of principles, manners, and institutional arrangements that were used traditionally to limit government. [...] The function of constitutions is to tame democracy and popular and state sovereignty.”⁵⁵

It is an important shortcoming of the coordination theory that it hardly pays any attention to this function of constitutions. On the other hand, the coordination theory of constitutions rightly criticizes the Fear Thesis on the grounds that constitutions are not created in a situation of pure conflict, but rather with the prospect of mutual gain.⁵⁶ In the language of game theory, the preference orderings of the parties creating and maintaining a constitutional order are not strictly opposing but rather are to a large extent overlapping, making a number of coordination outcomes possible.⁵⁷ Critics may retort that this overlooks the fact that constitutions can function as powerful instruments for resolving conflict and for handling widespread and enduring disagreement.⁵⁸ Advocates of the coordination theory may grant this, but point out that this is only possible as long as there is some overlap among the preferences of the parties concerned.⁵⁹

Can reflection on the nature of values shed any light on this controversy? Perhaps it can, by leading us to the following observation: The coordination theory and the Fear Thesis agree that the parties to establishing and maintaining a constitutional order *converge* for some reason on that order. Those who defend the coordination theory believe that the principal reason for creating a constitutional order is the prospect of mutual gain, and the principal reason for maintaining it is the cost of re-coordinating on an alternative arrangement.

⁵⁴ See Sajó, *supra* note 47, at 1-9.

⁵⁵ See *id.*, at xiv-xv.

⁵⁶ Note, however, that the Fear Thesis is not strictly incompatible with the coordination theory. After all, one of the things people may be afraid of is the lack of a coordinating order and the unpalatable consequences thereof. Having said that, non-constitutional arrangements can perform a coordinating role with great efficiency as well. And, as the Fear Thesis makes it sufficiently clear, it is certainly not only the lack of coordination people are afraid of, but conflict, oppression, loss of liberty, etc.

⁵⁷ See Hardin, *supra* note 51, at 104-105 and 106-107.

⁵⁸ See, e.g., C. Sunstein, *Designing Democracy: What Constitutions Do* 8-9 (2001).

⁵⁹ See *id.*, for the danger that “group polarization” poses for constitutional democracies.

Adherents of the Fear Thesis, by contrast, think that the motivation for establishing and maintaining a constitutional order is to protect oneself against conflict and against the abuse of power.

What both theories have some trouble explaining is our sense that what renders the constitutional order valuable is not that the parties converge on it, but rather, they converge on it *because* that order is valuable. To hark back to the discussion of friendship in the first part of the paper and the terminology used there, it is the value of the constitutional order that generates our reasons for choosing it – and not that our reasons for choosing it are what make it valuable.

The problem seems particularly clear in the case of the coordination theory. Let us set aside the issue already noted that many constitutional arrangements and prescriptions do not seem to be geared towards solving coordination problems at all. More important for our present purposes is the fact that the choice of the constitutional arrangement does not seem to be just one option among many possible ones. The choice of a constitutional arrangement is not comparable in this sense to the convergence of a linguistic community on arbitrary linguistic signs as vehicles for meaning. Rather, the choice is driven by political and moral preferences.⁶⁰ What is more, the fact that the constitutional arrangement meets at least some of these political and moral preferences is precisely why its creators, the Founding Fathers or whoever, accepted it and why it continues to be maintained.

The Fear Thesis seems better suited to explaining why, despite considerable variety, there is significant convergence on certain specific constitutional arrangements. For example, it is because we fear the abuse of government power and state sovereignty that we use constitutions to institute some form of separation of powers. It is because we fear the tyranny of the majority that we provide constitutional protection for certain basic rights, thus insulating them as much as possible from quickly changing political interests and the meddling of the democratically elected executive.⁶¹

At the same time, the Fear Thesis can also be charged with, first, underestimating *what* we want protected by a constitutional order. Thus it may be argued that it is not only fear of loss, suffering, or inequality that we seek constitutional protection *against*. We also want special protection *for* certain common values or more or less shared beliefs. Second, apart from providing such protection, the constitutional order may be equally important as the expression of commitment to certain moral principles and values. It is also because the constitutional order is a particularly adequate mechanism for representing and advancing this commitment that we converge on not just any constitutional order, but the very kinds we have. And it is because the constitutional order is such a vehicle for expressing this commitment that we value it. Or so one could argue.

⁶⁰ See Marmor, *supra* note 2, at 9-10.

⁶¹ See J. Raz, *The Morality of Freedom* 255-263 (1986).

3.2. Values *in* the Constitution

We can now turn our attention to the values represented, expressed or integrated in the constitution. It can be argued that these values can be divided into two groups. First, there are values – moral, political, social or cultural – which are ‘written into’ the constitution in order to recognize their special importance and because it is “deemed instrumentally useful”⁶² to protect these values by giving them a special status and subject their implementation to special institutional procedures, most notably the procedure of judicial review. Second, the constitution may also embrace some special values which are specific to law and the legal culture of constitutionalism. The significance and normative force of these special values will depend on how autonomous a practice law is taken to be.

Most importantly, of course, constitutions establish the structure of government, that is, define its main organs and their mode of operation. Although in this sense every legal system includes a constitution,⁶³ in classical constitutionalism the submission of state institutions to the law by means of the constitution is explicitly intended to protect the value of freedom.⁶⁴ The most important means to this end are the separation of powers, the rule of law⁶⁵ and the institution of constitutional adjudication. However, there is a good case to be made that even these three institutional components do more than just protect the freedom of individuals and that of the community against despotic encroachments of various sorts. This is because these components also define “a certain quality of association and interaction between ruler and ruled,”⁶⁶ which “quality of association” is itself a positive good. So even if constitutionalism consisted of nothing but these three components it would be true that it is not only “the lawyers’ law, but also the people’s law [...] held to be the (or part of the) common ideology that governs public life in the country.”⁶⁷

In any case, even classical liberal constitutionalism goes beyond these three institutional components. One of the most typical ways of granting specific values constitutional protection is to include them in the constitution as rights. Accordingly, the value of freedom is protected through the constitutional incorporation of various liberties or civil rights such as the right to free expression, the right to vote, the right to property, etc. Although these rights are sometimes portrayed as mere articulations of the basic value of freedom, they themselves stand for concrete value judgments and priorities. As such,

⁶² See *id.*, 261.

⁶³ See Raz, *supra* note 46, at 153.

⁶⁴ See Sajó, *supra* note 47, at 32.

⁶⁵ A broader definition of the rule of law will be given at the end of this section which is not limited to institutional arrangements.

⁶⁶ Finnis, *supra* note 45, at 272.

⁶⁷ Raz, *supra* note 46, at 154.

the actual list of rights in a constitution will inevitably reflect the values of the constitution's drafters. By the same token, how the scope and meaning of these rights are interpreted during the constitution's history will inevitably be influenced by the changing values of constitutional judges, legislators, politicians and society at large.

In modern constitutions, the values of non-intervention limiting state power and defining the boundaries of the individual's security and immunity are often complemented by values answering the demands of social justice, and other social values. There has been increasing pressure in the twentieth century to include in constitutions concrete economic and social rights corresponding to these values, such as the right to minimum welfare, housing, food, etc. Other social values have found their way into some constitutions as well, including values of religion and national culture.

There are well-known objections to including in the constitution such concrete social values, whether or not they appear in the guise of rights. One general problem is that once constitutions are extended or amended in this way, fundamental limiting values restricting the power of the state can clash with the social values calling for active state intervention. As regards welfare rights, a further problem is that their inclusion in the constitution can entangle the judiciary in managerial issues and policy-making which courts are not well suited to handle.⁶⁸ As regards other cultural and political values, their inclusion in the constitution, even if originally backed by social consensus, isolates them from public debate and renders them unresponsive to future change.⁶⁹

This is all familiar and relatively uncontroversial terrain. Somewhat more controversial is the characterization of the special legal values, if any, which can be directly linked to the theory and practice of constitutionalism. The most important such value is certainly the rule of law. Although strictly speaking the rule of law is logically imaginable without constitutionalism, constitutional arrangements make an essential contribution to maintaining the rule of law. So the rule of law is a specific excellence of constitutional legal systems. As such, it is a good, and access to it is made possible by these systems.

The most concise formulation of the principle underlying the rule of law is that "people should obey the law and be ruled by it."⁷⁰ However, for this principle to be applicable in practice, the legal system must display a number of important normative features: legal rules must be prospective, not retroactive, they must be clear, consistent and stable, applying to state organs as well and allowing for only limited discretion by the executive and the administration. Finally, these rules must be promulgated and adjudicated according to rules

⁶⁸ See Raz, *supra* note 61, at 258-259 and Sunstein, *supra* note 58, at 9-10.

⁶⁹ See Sajó, *supra* note 47, at 36-37.

⁷⁰ J. Raz, *The Rule of Law and its Virtue*, in *The Authority of Law* 210, at 212 (1979).

which themselves meet the same requirements.⁷¹ Typically, these features are explicitly affirmed in constitutions.

There is little discussion concerning the fact these are indeed the key features of the rule of law. Nor is it disputed that taken together they are essential to the predictability, stability and proper functioning of the legal system. It is furthermore agreed that by virtue of these features the rule of law is a value because it protects people from arbitrariness and allows them to govern their lives as autonomous rational persons.

By contrast, much controversy surrounds the issue whether the rule of law is an instrumental or an intrinsic good. The ‘knife-metaphor’ is frequently invoked in this connection. A legal system’s conformity to the rule of law is like the sharpness of a knife, it can be used both for good and evil purposes – say those who regard the rule of law as an instrumental value.⁷² Those who believe that the rule of law is an intrinsic value, object that adherence to the rule of law will necessarily restrict an evil government since it “systematically restricts the government’s freedom of manoeuvre.”⁷³ It is therefore valuable in itself. This argument is used by some to demonstrate the existence of a necessary connection between law and morality.⁷⁴

Of course, value theory in itself may not contribute much to the outcome of this debate beyond supplying the conceptual apparatus for conducting it. On the other hand, the rule of law debate may well have important implications for value theory. The common supposition of both sides in the debate was that the rule of law is a specific virtue of the legal domain, particularly of constitutional systems. This supposition may well be read as lending support to a pluralist theory of value. As will be recalled, that theory holds that every value is to be engaged with in a different way. As we have seen, the rule of law as a value defines the way it is to be pursued by calling for quite specific institutional arrangements. This could be taken as providing some evidence in support of the broader thesis that values to a large extent determine how we are to engage with them.

3.3. Values *through* the Constitution

Finally, one of the functions of the constitution is to provide specific goods or make accessible specific values to members of the political community or the community as a whole. It is through this function that constitutional provisions and arrangements contribute most directly to “organizing and guaranteeing the basic institutions of the social structure.”⁷⁵

⁷¹ See *id.*, at 214-219. See also Finnis, *supra* note 45, at 271-272.

⁷² See Raz, *supra* note 70, at 225-226.

⁷³ Finnis, *supra* note 45, at 274.

⁷⁴ See L. Fuller, *The Morality of Law* (1969).

⁷⁵ See Sajó, *supra* note 47, at 32.

The first subgroup of these values or goods is realized or made accessible *directly* through constitutional provisions and arrangements. For example, the protection of minorities or the creation of the institution of citizenship are goods which many constitutions directly provide to members of the political community. In these cases, the affirmation of these specific values also involves the creation of certain institutions or the provision of constitutional protection for such institutions, as when a constitution expressly declares the right of an ethnic minority to use its own language. Similarly, the specification of the criteria of citizenship in a constitution does not only assert the human right to citizenship but also sets up a distinct social and political institution.⁷⁶

The second subgroup of values is not directly effected by constitutional provisions and arrangements. Rather, these values are made available *indirectly* by constitutionalism. What yields these values is the knowledge that constitutional arrangements, prescriptions and regulations are in place and the knowledge that they tend to be complied with and enforced. The fact that these values emerge indirectly need not mean that they were not originally intended or hoped for by the makers or interpreters of constitutions.

These ‘indirect values’ can be further subdivided according to whether they are generated by the existence of the constitutional system itself or by specific constitutional arrangements and provisions. We can assign to the former category the trust and self-confidence engendered by the knowledge that a stable constitutional system is in place and that it works relatively well. As a number of authors remind us, constitutions have a “life of their own”⁷⁷ and can play an important “creative role”⁷⁸ in cementing the social cohesion, identity and autonomy⁷⁹ of the political community. One tends to have these effects in mind when speaking of the “underlying social conventions of US constitutionalism” as “America’s ‘civic religion.’”⁸⁰ It should also be noted that these effects can also enhance the performance of the direct legal, political and social functions of constitutionalism, so we can say in this sense too that “use will consolidate a constitution.”⁸¹

Specific constitutional arrangements and provisions can also make certain values indirectly accessible. Thus the constitutional recognition of the right to privacy can indirectly contribute to affirming the value of privacy in everyday social interactions also, making respect for privacy a touchstone of, say, responsible behavior in business, media and politics. Similarly, the constitution’s commitment to fundamental human rights can help to inculcate respect for human rights as a basic moral value in society.

⁷⁶ See *id.*, at 25-29.

⁷⁷ *Id.*, at 13.

⁷⁸ B. Ackerman, *The Future of Liberal Revolution* 3 (1992).

⁷⁹ Autonomy understood as self-government, see Dworkin, *supra* note 15, at 21-26.

⁸⁰ Marmor, *supra* note 2, at 146.

⁸¹ Sajó, *supra* note 47, at 43.