

through at least two different prisms. Looked at in terms of legal validity, constitutional law is the law that is highest in the validity chain. It validates lower-level law. Just as an administrative law may be valid only if it is authorized by a statute, a statute may be valid only if it is authorized by the constitution. The constitution is the highest law there is, and is neither valid nor invalid but just accepted.

The second way to think of a constitution's being basic law is to think of it in terms of relative entrenchment against change. Typically, a constitution is more entrenched against change than a statute, an administrative rule, or a common law court decision.

Determinacy, required for settlement, entails that rules, no matter how ideally crafted, will inevitably diverge from what morality requires in a range of cases (the over-and under-inclusiveness problem). In such cases, those subject to the rules will be faced with a choice between complying with the requirements of the rules and complying with the requirements of morality as they perceive those requirements. Settlement requires that they believe complying with the rules trumps complying with morality as they perceive it; and, as previously stated, morality itself suggests that there be settlement. Yet, if moral reasons are those reasons for acting that are always overriding, then it looks as if following rules when they appear to conflict with morality is acting against reason. If that is true, then rules cannot settle what we are morally obligated to do, which in turn means that settlement, however morally desirable, is not rationally achievable. This problem —we morally must seek but cannot morally achieve settlement —is nothing other than the perennial problem of law's normativity, or whether there can ever be an obligation to obey the law because it is the law.

I view the problem of law's normativity as part and parcel of law's settlement function. But in this essay I assume the settlement function is possible and put aside the paradox that it engenders. That paradox is given exhaustive (but inconclusive) treatment in Alexander and Sherwin, *The Rule of Rules*, 53–95. This view is relatively orthodox, but there are dissenters. For example, Michael Seidman believes a constitution's function is to unsettle matters. See Louis Michael Seidman, *Silence and Freedom* (Stanford, CA: Stanford University Press, 2007).

Even if a constitution has not been ratified according to its terms, if it is accepted by the people as the highest law (minus its ratification provisions), then it is the highest law.

Usually the law that is highest in the validity chain is also the most entrenched. The reason for this is obvious. If lower-level laws like statutes were more entrenched than the higher-level constitutional laws that authorized such statutory entrenchments, one could repeal the entrenched statutes by the easier route of repealing the less entrenched constitution's authorization of the statutory entrenchment. So it makes sense to have higher-level law be more entrenched than lower-level law. Nevertheless, it is theoretically possible to have a lower-level law be more entrenched than the higher-level law that validates it.

Constitutions, as I said, lay down the ground rules for governance. They “constitute” the government. They set up structures, offices, and lawmaking procedures. Constitutions such as the U.S. Constitution and the Canadian Charter also entrench “rights.”

When a constitution promulgates the structures, offices, and procedures for governance—the rules about how laws are to be made, how offices are to be filled, and which level of government and