1

Constitutionalism beyond Manicheanism

1 Introduction

In twentieth-century constitutional theory, scholars divided deeply about who should protect rights in a democracy. In one corner, the *champions of courts* portrayed judges as Herculean heroes in a 'forum of principle',[1] valiantly defending our most basic liberties against the inevitable encroachments of a rights-infringing legislature. In the opposite corner, *defenders of democracy* lionised the legislature as the supremely dignified, diverse and deliberative forum in which everyone's rights would get their due.[2] Far from being the heroes in law's empire, the courts were now cast as 'the enemies of the people',[3] storming the citadel of our most precious democratic ideals, riding roughshod over the principle of political equality, and foisting their elite views on the unwilling masses in a deeply disrespectful and disempowering manner. In a battle between saints and sinners, heroes and villains, the debate was framed in starkly Manichean terms.

The argument of this chapter is that in order to establish who should protect rights in a democracy, we need to move 'beyond Manicheanism'.[4] Whilst the Manichean narrative dramatises the tension between constitutionalism and democracy, I argue that it has engendered an unduly polarised, dichotomised and distorted picture of the key institutional questions at stake.[5] In place of a Manichean narrative of 'courts versus legislature' and 'constitutionalism versus democracy', this chapter points towards a *shared responsibility* between all three branches of government, where each branch has a valuable, though limited, role to play. Instead of pitting Herculean heroes against power-hungry politicians - or enlightened legislators against 'the enemies of the people' - we should accept

[1] Dworkin (1985).
[2] Waldron (1999b); Webber et al. (2018).
[3] Slack (2016); Rozenberg (2020).
[4] Hilbink (2006).
[5] Kavanagh (2019).

https://doi.org/10.1017/9781108680929.003 Published online by Cambridge University Press

that all institutions are 'imperfect alternatives'.[6] Whatever virtues courts and legislatures possess, they are necessarily 'partial virtues which must be integrated into an institutionally diverse constitutional order'.[7] Once we leave the Manichean battlefield behind us – and abandon the siege mentality which takes hold there – we can better appreciate the complexity of litigation and legislation under Bills of Rights. In order to do so, we need to move beyond the binaries of good versus evil and heroes versus villains.

This chapter begins with an analysis of the iconic debate between Ronald Dworkin and Jeremy Waldron, who, together, have staked out the most influential, insightful and, at times, ingenuous positions in the Manichean narrative.[8] Since Dworkin and Waldron have emerged as the theoretical Titans in the field, I open the chapter with a 'clash of the Titans'. Part 3 broadens out the analysis to consider 'the terror of the twin tyrannies' which lie at the heart of the Manichean narrative: the *tyranny of the majority* on the one hand, and the *tyranny of juristocracy* on the other. I argue that these twin tyrannies give expression to overstated and partly distorted concerns. Indeed, I argue further that we *need* counter-majoritarianism in democratic constitutional government, not only in the name of rights but in the name of democracy as well. Finally, I turn to the long-running schism in British public law theory between political and legal constitutionalism.[9] Whilst this oppositional dialectic has numerous affinities with the broader Manichean narrative, it possesses some distinctive and illuminating features which shed light on the broader debate about how constitutionalism and democracy combine and interact. I conclude with a plea to move beyond Manicheanism, thus paving the way for more measured and realistic accounts of the institutional division of labour in a constitutional democracy.

2 Clash of the Titans

In Ronald Dworkin's canonical constitutional analysis, the courts are revered as the 'forum of principle'[10] and the supreme custodians of

[6] Komesar (1994).
[7] Whittington (2000) 698.
[8] Sadurski (2002) 277 (describing Dworkin and Waldron as 'canonical points of reference against which most of the participants in this debate define their own views').
[9] For a detailed analysis of this debate, see Kavanagh (2019).
[10] Dworkin (1985), chapter 3.

rights in a democracy. In order to divide the labour between the courts and the legislature, Dworkin posited a distinction between principle and policy, where principle was defined as a 'requirement of justice or fairness or some other dimension of morality',[11] and policy was characterised as 'a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community'.[12] Whilst legislatures were confined to the grubby machinations of majoritarian politics, Dworkin argued that judges were uniquely positioned to deal with questions of justice and rights. Not only were judges peculiarly adept in dealing with 'matters of principle',[13] their insulation from 'the demands of the political majority'[14] allowed them to stand firm against the incoming tide of majoritarian prejudice and political self-dealing, thus rescuing rights 'from the battleground of politics'.[15]

If judges are the heroes in Dworkin's drama, the legislature is the unequivocal villain of the piece. By defining constitutionalism as 'the theory that the majority must be restrained to protect individual rights',[16] the clear implication is that we need the courts to issue the restraining orders to keep the democratic delinquents in check.[17] Throughout his writings, Dworkin revealed a deep distrust of democratically elected institutions, at times assuming political hostility to rights on grounds of majoritarian bias.[18] Dworkin also argued that allowing politicians to check legislation for compliance with rights was procedurally unfair, because it would make the legislature a 'judge in its own cause'.[19] As he observed, 'decisions about rights against the majority are not issues that in fairness ought to be left with the majority'.[20] Enter Hercules the hero

[11] Dworkin (1977) 22.
[12] Dworkin (1977) 22, 85; Dworkin (1985) chapters 1–3.
[13] Dworkin (1985).
[14] Dworkin (1977) 85.
[15] Dworkin (1985) 71.
[16] Dworkin (1977) 142–3, 147.
[17] Political scientist Keith Whittington pulls no punches when he describes Dworkin's account of democratic politics as 'empirically overstated, analytically confused, and normatively ungrounded', see Whittington (2002) 818; see also Komesar (1994) 256–70.
[18] Dworkin (1977) 143 (describing the US government's attitude towards rights throughout the twentieth century as 'homogenous and hostile'); Dworkin (1985) 70.
[19] On *nemo iudex in causa sua*, see Dworkin (1985) 24–5; Dworkin (1986) 375–7; Ely (1980) 103; cf. Waldron (1999a) 297.
[20] Dworkin (1977) 142.

to save us from the democratic depravities of a majoritarian legislature.[21] When rights are adjudicated in court, 'the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice'.[22]

In contrast to Dworkin's hagiography of Hercules as the bulwark of principle, Waldron puts the legislature in the limelight, issuing a passionate paean to the legislature as the unsung hero of constitutional theory.[23] Nobody puts the legislature in a corner. Instead of casting Parliament as a pantomime villain or as a 'monolithic entity in the grip of a desire to do down our rights',[24] Waldron made the legislature the star of the show, imbuing it with the dignity, discernment, and moral superiority which Dworkin had reserved for the Herculean judge.[25] For Waldron, the key problem with giving judges the power to make final decisions on rights was that we disagree about what rights require.[26] The only way of respecting those disagreements was to allocate decisions about rights to a majoritarian method of decision-making where 'we, in our millions'[27] can 'participate on equal terms in social decisions on issues of high principle and not just interstitial matters of social and economic policy'.[28]

By taking decisions about rights away from elected institutions and placing them in the hands of an unelected and unaccountable legal elite, Waldron argued that rights-based review constituted an unjustifiable 'disempowerment of ordinary citizens on matters of the highest moral and political importance'.[29] To add insult to injury, it evinced a profound distrust of our fellow citizens,[30] dubious disregard for their political equality,[31] and disdain for the dignity of legislation.[32] Since legislatures are clearly superior to courts in terms of democratic legitimacy and, *pace* Waldron, are fully capable of protecting rights in practice, there is no

[21] For an account of 'Hercules on Olympus', see Dworkin (1986) chapter 10; Sunstein (2015) 5–10 (on the constitutional persona of 'the hero-judge').
[22] Dworkin (1985) 71.
[23] For similar laments that the legislature is overlooked in constitutional scholarship, see Bauman & Kahana (2006); Webber et al. (2018); Weis (2020b) 622.
[24] Waldron (2004) 27.
[25] Waldron (1999b) 2.
[26] Waldron (1999a).
[27] Waldron (2016) 5 (parenthesis omitted); Waldron (2006) 1349.
[28] Waldron (1999b) 213.
[29] Waldron (1993b) 45.
[30] Ibid 27–8; Waldron (2016) 141; Kyritsis (2006) 740.
[31] Waldron (1999a); cf. King (2012) 154–6.
[32] Waldron (2003b) 374; cf. Kyritsis (2006) 740.

justification for letting unelected judges second-guess or overrule legislative decisions about rights. The upshot is clear: democratic decisions about what rights require should be treated as 'dispositive'[33] and rendered immune from judicial override.

If the debate about the legitimacy of rights-based review is a clash of the Titans, then Dworkin has surely met his match. The prophet of the American 'civic religion'[34] meets the high priest of participation. But regardless of whether judges are 'princes in law's empire'[35] delivering us from all evil, or 'robed roulette wheels'[36] wreaking havoc with the dignity of legislation, these radically opposed narratives nonetheless have a number of features in common. First, both Dworkin and Waldron pose the question about who should protect rights in stark, dichotomous terms, presenting us with a *binary choice* between either the courts or the legislature as our chosen champion of rights.[37] Second, they both present the institutions *in isolation*. When Hercules decides questions of rights, he does so in splendid isolation, oblivious to the goings-on elsewhere in the constitutional system.[38] When the Waldronian legislature deliberates about rights, it does so in the manner of a moral philosophy seminar, untroubled by what the courts or the Executive might have to say.[39] Third, Dworkin and Waldron present the courts and legislatures *in opposition*. They presuppose an adversarial paradigm where each branch of government is 'locked in an embrace of eternal and inevitable opposition',[40] each vying for supremacy to get the last word on what rights require.

Finally, Dworkin and Waldron succumb to what Adrian Vermeule described as 'the nirvana fallacy'[41] – that is, a tendency to compare an idealistic view of one institution with a dystopian picture of its perceived rival. Idealisation begets polarisation, and polarisation begets exaggeration.

[33] Waldron (2006) 1371.
[34] Mashaw (1997) 51 (noting that the American constitutionalism is often described as a 'civic religion').
[35] Dworkin (1986).
[36] Mashaw (1997) 181.
[37] Dyzenhaus (2009) 48; Stephenson (2016) 57; McLachlin (2019) 2.
[38] Mendes (2013) 91–2; Fallon (2001) 28; Michelman (1986) 76 (describing Hercules as a 'loner', an insular character whose narrative constructions are monologues).
[39] Waldron (1993b) 31; Waldron (1999a) 224–30.
[40] McLachlin (1999) 35 (though former Chief Justice McLachlin observed, but did not endorse, this conflictual narrative); McLachlin (2019) 2.
[41] Vermeule (2006) 10; see also Dyzenhaus (2009) 50; Gyorfi (2016) 141; Whittington (2002) 847.

The result is an imbalanced and distorted discourse where both sides are pressed into the trenchant defence of idealised positions, problematically detached from the complex institutional realities on the ground. Though Dworkin and Waldron each champion a different branch of government as the sole and supreme guardian of rights, they nonetheless share an institutionally insular, oppositional, and antagonistic narrative about how rights should be realised in a constitutional democracy.

Let us consider each of these issues in turn, starting with the binary framing of the question as an institutional either/or. When we look at how rights are protected in constitutional democracies, it is clear that the idea of a binary choice between the courts and the legislature as the sole and supreme guardian of our rights, radically oversimplifies the constitutional options we face. In order to make rights real in a constitutional democracy, we need both courts and legislatures to play different roles in upholding rights, whilst working alongside each other in multiple ways.[42] For example, we need the legislature to enact detailed regulatory frameworks to specify particular entitlements and impose duties on public authorities and administrative agencies.[43] Once legislated, we then need independent courts to interpret the legislation and resolve disputes about its meaning. Rights need legislatures as much as – if not more than – they need courts. Indeed, they also need a committed Executive to initiate rights-respecting legislation, to implement legislative frameworks, and specify the requirements of rights in multiple ways.[44] By presenting us with a binary choice between either the courts or the legislature, Dworkin and Waldron overlook the possibility that protecting rights is a joint institutional enterprise, where the branches of government play distinct but complementary roles. They fail to appreciate the protection of rights as a 'multi-institutional'[45] rather than single-institutional endeavour.

Second, Dworkin and Waldron view the courts and legislature *in opposition*, presenting the relationship between them in fundamentally antagonistic terms. Whilst Dworkin perceives legislatures as the aggressors of rights, Waldron views the courts as the destroyers of democracy. Either way, the binary alternatives become emboldened antagonists.

[42] McLachlin (2019) 2.
[43] King (2012) 41–4; Webber et al. (2018) 17–19.
[44] King (2012) 44–8; Endicott (2020b) 597ff.
[45] Komesar (1994); Schacter (2011) 1411; King (2012) 41; Roach (2015) 405; McMorrow (2018) 103.

The branches of government are locked in combat, hardwired to attack each other and undermine the values they each hold dear. But this relentlessly oppositional narrative ignores the fact that courts and legislatures in well-functioning democracies often engage with each other in mutually respectful and even mutually supportive ways.[46] Rather than vying with the legislature to seize the last word, the courts often leave space for democratic deliberation and defer to legislative decisions out of respect for the competence, expertise and legitimacy of the democratically elected legislature.[47] By the same token, the political actors often comply with court rulings rather than defy them.[48] As I show in Chapter 12, democratically elected politicians sometimes welcome 'adverse' court rulings on rights, supporting judicial decisions on their merits.[49] Moreover, there is a documented phenomenon across multiple jurisdictions where key political actors invite and actively encourage the courts to resolve controversial issues concerning rights in order to obviate further legislative intervention.[50]

This is not to deny that there can be friction and competition between the branches at times. As I argue in Chapter 3, a degree of interbranch contestation is an inevitable and constitutive feature of the relationship between the branches of government. My point here is simply that the observable dynamic of mutual respect and restraint complicates the assumption underpinning the Manichean narrative that the relationship between the branches of government is one of unbridled antagonism or conflict all the way down. In place of a uniformly confrontational struggle for supremacy, constitutional practice across multiple jurisdictions reveals a more complex and composite institutional environment, where comity and conflict, contestation and collaboration each have a role to play.[51]

[46] Levinson (2005) 957 (challenging the 'government-as-empire-building-Leviathan' image with widespread empirical counter-examples in the US context, where the picture of 'stubbornly passive Congresses bears only a very partial resemblance to the mutually rivalrous, self-aggrandising branches imagined by separations of powers law and theory').

[47] Kavanagh (2015a) 844; Kavanagh (2009a) chapter 7 (documenting the dynamics of judicial deference under the HRA); Hunt (2015) 17–19; Levinson (2011) 734 (arguing that in the American context, 'open defiance of the [Supreme] Court has been the exception rather than the rule', with the court normally remaining 'safely within the bounds of political tolerance'); Schauer (2006a).

[48] Levinson (2011) 724 ('In the real world, we often observe government units choosing to surrender power to, or cooperate with, their supposed competitors').

[49] Chapter 12 in this vol.; O'Regan (2019); Leckey (2015) 195.

[50] Graber (1993); Whittington (2005a); Katzmann (1988) 4; Leckey (2015) 88.

[51] Leckey (2015) 195.

If we want to make sense of the subtleties of the relationships between the branches of government, therefore, we must encompass the complexity of inter-institutional engagement, not just focus on the confrontational dimension alone.

Third, by pitting the legislature against the courts in a battle of 'competing supremacies',[52] there is a tendency to treat courts and legislatures not only as rivals, but also – ironically – as equivalents.[53] By focusing on which institution is 'superior' or 'better' than the other, Dworkin and Waldron use uniform criteria of assessment across the different branches of government. But this elides the institutional differences between these institutions, occluding the different roles they play in the constitutional scheme.[54] As Christoph Möllers observed, 'every critique of constitutional review that treats constitutional courts as somewhat illegitimate substitutes for parliaments misses the procedural differences between the two'.[55] We can agree with Waldron that courts lack 'the democratic representative credentials required for [enacting] legislation'.[56] But this is only a problem if the courts are expected to enact legislation as part of their institutional role – which they are not. Instead, they are tasked with a different role in the constitutional scheme, namely that of applying, interpreting, and reviewing legislation in the context of a bivalent legal dispute. By the same token, legislatures typically lack the institutional independence and legal expertise possessed by the courts. That is only a problem if legislatures are asked to adjudicate individual cases – which they are not. Just as it is futile to assess the courts against the standards we would expect of legislatures, it is equally misguided to assess the legislature against the standards we would expect of courts. What we need are differentiated, role-specific standards which are sensitive to the nature, limits and functions of particular institutions, not a monolithic demand for democratic or electoral legitimacy across the board.[57]

The most significant problem with this oppositional dialectic is that both Dworkin and Waldron succumb to 'the nirvana fallacy',[58] namely, the tendency to compare an idealistic picture of one institution with a dystopian picture of its perceived rival. The fact that Dworkin models his

[52] Dyzenhaus (2006) 10.
[53] Whittington (2000) 698; Mendes (2013) 77.
[54] Landau (2014) 1536.
[55] Möllers (2019) 250.
[56] Waldron (2016) 135.
[57] Kavanagh (2009b) 303; Kavanagh (2019) 58; Elliott (2013) 234, 258; Gyorfi (2016) 37.
[58] Vermeule (2006) 10; Kavanagh (2017) 70–1; Komesar (1988) 717; Lovell (2003) 22–3.

judge on a mythical demi-god of unrivalled moral and intellectual prowess alerts us to the fact that some idealisation is afoot. Even granting that Hercules is a heuristic, the invocation of a superhero sets the tone for how we should understand the division of labour between courts and legislatures in a constitutional democracy. Once Herculean judges are pitted against morally depraved political schemers, we know who to choose as the guardians of our rights. Mesmerised by the Dworkinian drama, we are primed to believe that Hercules should never defer to the decisions of the democratically elected legislature. After all, why would a mythical demi-god with a pipeline to truth ever defer to a bunch of moral degenerates hell-bent on violating rights?

Waldron rightly takes Dworkin to task for naively glorifying judges as platonic guardians whilst denigrating legislators as horse-trading egotists and self-serving schemers.[59] Now, you might think that the best way of countering Dworkin's Manichean narrative would be to provide a more accurate and realistic comparative account of both institutions, eschewing either starry-eyed glorification or cynical condemnation of either branch.[60] But Waldron decided to 'apply the canon of symmetry in the other direction'[61] presenting

> a rosy picture of legislatures and their structures and processes that matched, in its normativity, perhaps in its naivety, certainly in its aspirational quality, the picture of courts – "forum of principle" etc. – that we present in the more elevated moments of our constitutional jurisprudence.[62]

Hammering home the vices of courts and the virtues of legislatures, Waldron proposed a 'normative or aspirational model of legislation',[63] bestowing upon the legislature the aura of 'dignity and standing in the political community that we associate with . . . the judicial process'.[64]

Now, it may be that Waldron perceived himself to be ambushed on all sides by an army of judge-worshippers. Therefore, he believed that he had no other option but to come out all guns blazing, armed with a litany of legislative virtues and a 'parade of [judicial] horribles'.[65] But it is not

[59] Waldron (1999b) 2.
[60] Whittington (2000) 692–3.
[61] Waldron (1999a) 32; Waldron (2016) 220.
[62] Waldron (1999b) 2; Waldron (1999a) 32, 90; cf. King (2012) 156–8; Posner (2000) 590–1.
[63] Waldron (1999b) 1.
[64] Ibid 31.
[65] Komesar (1994) 6, 140; Jackson (2016) 1734; Waldron (2016) 248, 220, 43–4, 269; Waldron (1999a) 31; Waldron (1999b) 1; Waldron (2014) 164.

clear that trading 'one optimistic picture for another'[66] is the best approach to tackling the court-centrism and far-fetched idealisation of judges which Dworkin advances and Waldron abhors. Sanguine judge-worship should certainly be avoided. But legislative romanticism is likewise unhelpful.[67] By giving legislatures the rose-tinted treatment and lambasting the courts at every turn, Waldron does not counteract the 'nirvana fallacy'.[68] He merely replicates it in the opposite direction.[69] This drives the debate into a 'dead end of polarised positions'[70] where opposing camps engage in mutual accusations of false idealisation and 'inappropriate demonisation'[71] of rival institutions. Either way, the 'nirvana fallacy' embraces a dystopian delusion which bears only a tentative relationship with institutional reality on the ground.[72]

What is needed to advance this debate is not more rosy pictures paired with excoriatingly caustic critiques but a more realistic portrait of both courts and legislatures, appreciating their relative strengths and weaknesses as part of a more holistic constitutional analysis. In short, we need clear-eyed 'comparative institutional analysis' not wide-eyed 'nirvana solutions'.[73] Most likely, elected legislatures in established democracies are not as uniformly hostile to rights as Dworkin dreads. But nor are courts as democratically deviant and institutionally aggressive as Waldron fears. In order to capture the truth about what these institutions do – and, crucially, what they *ought* to do as part of their constitutional role – we need to move 'beyond Manicheanism'.[74] Removing the rose-tinted spectacles, we need to look reality in the eye. Viewed in the cold light of day, we can see that all institutions are 'imperfect alternatives',[75] each with their fair share of pros and cons. Whatever virtues courts or legislatures possess, they are necessarily 'partial virtues that should be integrated into an institutionally diverse constitutional order'.[76]

[66] Waldron (2016) 220, 248.
[67] Green (1986) 1041; Kavanagh (2019) 71.
[68] Vermeule (2006) 3.
[69] Dyzenhaus (2009) 50; O'Donnell (2017) 205.
[70] Hunt (2015) 9; Kinley (2015) 29; Roach (2015) 405.
[71] Jackson (2020) 93.
[72] Webber et al. (2018); cf. Trueblood (2019) 577.
[73] Komesar (1994) ix; Young (2012) 3.
[74] Hilbink (2006).
[75] Komesar (1994).
[76] Whittington (2000) 693.

Whilst Dworkin waxes lyrical about the unsurpassed intellectual and moral prowess of the Herculean judge, he is stunningly silent about the epistemic and institutional limitations of judges in grappling with polycentric policy issues which come before the courts in disputes about rights. Similarly, whilst Waldron eulogises the legislature as a supremely dignified, deliberative forum with unsurpassed moral reasoning, he is remarkably reticent about the influence of electoral politics and representative responsibilities on legislative reasoning about rights.[77] In fact, it is striking that the greatest defenders of 'the dignity of legislation'[78] in contemporary legal theory studiously ignore the central role of representation and electoral accountability in the 'central case'[79] of what legislatures are expected to do in a representative democracy.[80] In these theoretical renderings, legislative reasoning is modelled on how we 'do philosophy'[81] in our philosophy colloquia, rather than how elected politicians do politics in a legislative assembly, in full view of the voting public to whom they are accountable.

In order to develop a credible role-conception for legislatures and courts, we need to 'take institutions seriously',[82] not just as expressions of abstract principles we cherish but as concrete practices, purposes, norms, and institutional constraints, situated within an interactive institutional setting. For legislatures, that means grappling with the role of electoral accountability in the working life of elected representatives. For courts, it means grappling with the doctrinal details, the institutional and epistemic limitations of adjudicative institutions, and the scope and limits of the judicial role in a collaborative constitutional scheme. Putting institutional flesh on the bare bones of Dworkin's and Waldron's diametrically opposed accounts, this book argues that the truth lies somewhere in between.

[77] Though see Waldron (2016) 134–43.
[78] Waldron (1999a).
[79] Finnis (2011a) 3–19.
[80] Webber et al. (2018); cf. Jackson (2020) 79–80; Kelly (2020) 104–6; Tsarapatsanis (2020) 617–20.
[81] Waldron (1993b) 31; Waldron (1999a) 224–30.
[82] Whittington (2000) 697; Komesar (1984).

3 The Terror of the Twin Tyrannies

Lying at the heart of the Manichean narrative are the twin fears of the tyranny of the majority on the one hand and the tyranny of juristocracy on the other. Whilst the 'tyranny of the majority' inclines some to support 'judicial supremacy', the 'tyranny of juristocracy' leads others to 'take the constitution away from the courts'.[83] The aim of this section is not to establish which is the most terrifying tyranny, but rather to expose the exaggerations embedded in both. Once shorn of their most hyperbolic expressions, we can move forward to explore more measured and moderate responses to the valid concerns which lie at the root of these rival fears.

Let us start with the 'tyranny of the majority'.[84] Dworkin is right that democratic government is vulnerable to the risk that elected officials will give undue weight to short-term concerns at the expense of long-term interests and guaranteed rights, particularly when those rights attach to unpopular and vilified minorities.[85] Even with the best will in the world, elected legislatures may enact legislation which is contrary to the public interest or violates rights. But those who are terrorised by the 'tyranny of the majority' and rush to the courts for solace, overlook one obvious and commonplace solution: we can structure the Executive and legislature in ways which reduce the likelihood of unjust decisions by instituting checking mechanisms from within.[86] Executives and legislatures are typically large, complex institutions comprising an array of actors with multiple motivations, some of which are specifically designed to curb majoritarian excess and limit the temptation of elected politicians to pander to popular demands.[87] Examples of such checks are documented in Chapter 5. They include vigilant oversight from the Loyal Opposition, the Upper House of a bicameral legislature, Select Committees, and meaningful policy input from independent civil servants, legal advisers, parliamentary drafters, and the Attorney General, to name but a few.[88] Thus, whilst the Government may be elected by a majority of voters at the polls, the legislative process is replete with an array of counter-majoritarian checks and balances, which allow non-majoritarian

[83] Tushnet (1999).
[84] Tocqueville (1835 [2003]) 292.
[85] Kavanagh (2009a) 348–52.
[86] Komesar (1994) 204.
[87] Ibid 204.
[88] See Chapters 4 & 5, in this vol.

concerns to be raised and addressed.[89] The question, then, is whether such checks are sufficient to counter the risk which democratically responsive politics undoubtedly creates or, alternatively, whether we need a judicial 'second-look mechanism'[90] activated by individual claimants who believe that their rights have been violated.

But once we mention the prospect of rights-based review enforced by the courts, the 'tyranny of juristocracy' rears its ugly head. As Alexander Bickel observed, if courts are allowed to review, and then strike down, legislation which violates rights, this 'thwarts the will of the representatives of the actual people of the here and now . . . exercis[ing] control, not in behalf of the prevailing majority, but against it'.[91] In short, the fear is that the 'second-look mechanism' will become the supreme view, supplanting and suffocating democratic decision-making endorsed by a majority at the polls. So framed, the threat of a rising 'juristocracy' looms large in a constitutional landscape dominated by the 'counter-majoritarian difficulty'.[92]

However, if democratic decision-making includes counter-majoritarian elements at its very core, then constitutional review by the courts looks a lot less difficult – and a lot less 'deviant'[93] – than the 'counter-majoritarian difficulty' would have us believe.[94] The rhetorical charge of the counter-majoritarian difficulty rests on the premise that rights-based review by the courts is a gross deviation from a system of 'pure democracy',[95] where we all have an equal say on matters of principle.[96] But representative democracy is not the purist's heaven of direct, egalitarian, participatory decision-making where we all have a say 'under the auspices of political equality'.[97] Instead, it is an indirect, mediated, and constrained system of government, which combines responsiveness to popular will with independence from that will. Although representative democracy contains majoritarian

[89] Mashaw (1997) 71.
[90] Vermeule (2011).
[91] Bickel (1986) 17.
[92] Ibid 16.
[93] Ibid 16.
[94] Sherry (2001) 922.
[95] Mashaw (1997) 201.
[96] Kyritsis (2006) 748. For close examination of the counter-majoritarian difficulty as a 'pathology' and 'obsession' of US constitutional scholarship, see Friedman (2001); Friedman (2002).
[97] Waldron (2016) 38.

components, it is a *mediated majoritarianism* in service of a disciplined democracy.

Consider the fact that in a representative democracy, we typically do not get to decide matters of principle directly. Instead, we get to vote for one representative in a single constituency, based on a restricted set of candidates pre-selected within the higher echelons of a political party.[98] Moreover, all democratic systems strive to ensure that the elected government has an adequate period of elected office – four years in many countries – precisely so that it can implement its policy agenda with a degree of detachment from the pressures of majoritarian, popular will. In doing so, representative democracy creates some 'deliberative distance'[99] between the people and their elected representatives, so that elected politicians have sufficient opportunity to discern and devise policies in the 'true interest of the country',[100] unshackled by the acute pressures of electoral politics. In this way, representative democracy seeks to avoid the corrosive effects of electorally hypersensitive government where elected politicians are 'running scared',[101] perennially tethered to the 'permanent campaign'.[102] In short, representative democracy creates a significant gap between what people want and what legislators decide. To think otherwise is to succumb to the 'populist error that democracy means the direct determination of government policy by the people'.[103]

This has enormous consequences for the twin tyrannies at the heart of the Manichean narrative. First, if the worry about 'the tyranny of the majority' rests on the belief that democracy involves a 'simple-minded mapping of majority preferences onto statutory commands',[104] it is sorely mistaken. Legislation is not 'the plaything of a univocal majority'.[105] Instead, it is the product of a complex, deliberative, mediated, filtered set

[98] Crewe (2021) 37 (analysing the role of the party 'selectorate' in framing the choices made by the popular electorate); Mashaw (1997) 13. In Westminster systems, voters do not even get to elect the government directly. Instead, the government is a 'career oligarchy, appointed from within a . . . partly elected Parliament', Gardner (2010).

[99] Kyritsis (2012) 308; Sabl (2002) 151.

[100] Madison (1788), Federalist Paper 10.

[101] King (1997) (arguing that short electoral cycles in the United States explain why 'America's politicians campaign too much and govern too little', with deleterious consequences for democratic government).

[102] On the 'permanent campaign', see Pildes (2014) 814; Ornstein & Mann (2000); Heclo (2000); Ignatieff (2013b) 71; Gutmann & Thompson (2014) chapter 4.

[103] Weale (2018) xi; Pettit (1999) 186; Mashaw (1997) 105, 201; Kuo (2019) 554, 574.

[104] Mashaw (1997) 69; Webber et al. (2018) 112, 92.

[105] Webber et al. (2018) 108.

of decision-making procedures designed, in part, to distance democratic decision-making from popular will in meaningful ways.[106] Second, whilst the rhetorical purchase of the counter-majoritarian critique rests on a contrast between 'we, the people' and 'they, the judges', what in fact exists is two different types of 'they', each making decisions on our behalf, albeit in different institutional settings and responsive to different institutional incentives.[107] Third, if the legitimacy concern underpinning the counter-majoritarian difficulty rests on a 'lost populist-majoritarian ideal',[108] this bears little resemblance to the indirect and mediated form of representative democracy we actually possess. Representative democracy is a complex alloy of different components, including majoritarian and counter-majoritarian, electoral and non-electoral elements, popular and independent elements. Not only does this reduce the counter-majoritarian difficulty, it also tempers the fear about 'the tyranny of the majority' by presenting the problem in less apocalyptic terms.[109]

In order to assess the threat of a rising 'juristocracy' poised to undermine democratic government, we need to put judicial power in perspective. In constitutional democracies, where courts have the power to invalidate legislation for violation of rights, typically only a tiny fraction of legislative decision-making is ever reviewed by the courts, let alone struck down or declared invalid for failing to comply with judicial understandings of rights.[110] Courts do not get to touch – never mind 'thwart'[111] – the vast majority of legislation enacted by a democratically elected legislature.[112] The 'gargantuan'[113] scale of governmental and legislative activity compared to the 'relatively miniscule judiciary'[114] with heavily circumscribed powers of constitutional review, means that the judicial ability to review governmental action 'is simply dwarfed by the capacity of

[106] Manin (1997) 2; Urbinati (2000) 760; Stoker (2006) 137.
[107] Sager (2004) 198; Lain (2017) 1612; Kumm (2010) 166–7.
[108] Mashaw (1997) 201.
[109] Sherry (2001) 922; Barrett (2017).
[110] Ferejohn & Kramer (2002) 1033 (referring to the 'microscopic fraction of cases' which present constitutional issues); Hiebert (2004b) 1986; Sathanapally (2012) 70; Hiebert & Kelly (2015) 7–9; Garrett & Vermeule (2001) 1283; Schauer (2006b); Jowell (2006) 4; Barrett (2017) 79–80.
[111] Bickel (1986) 16.
[112] Komesar (1988) 659.
[113] Garrett & Vermeule (2001) 1283.
[114] Ibid 1283.

governments to produce such action'.[115] Across vast swathes of the policy agenda, including taxation, healthcare, housing, unemployment, education, crime control, policing, immigration, social security, foreign policy, inflation, and economic growth – in short, all the issues most people care about, most of the time – it is the Government and legislature, not the courts, that drive and control the policy-making agenda.[116] In those crucial areas, the legislative first word is the last word – rightly so, because the judiciary has neither the competence nor the legitimacy to make overarching policy decisions in these fraught fields.

Even within the tiny percentage of legislative output which courts get to adjudicate for compliance with rights, judges typically only find against the Executive or legislature in a small subset of that already narrow range. In over two centuries of constitutional review by the American Supreme Court, it has 'invalidated less than one congressional statute per year . . . and in most cases the ruling of unconstitutionality affected only some, often correctable, provision of the statute, and interfered only modestly with Congress's power to work its will'.[117] For all the hand-wringing about the counter-majoritarian difficulty, 'the fact of the matter is that [US] courts usually *approve* the work of legislative and executive officials'.[118] Relatively low rates of strike-down are evident across many other jurisdictions, including those commonly identified as being the strongest constitutional courts in the world.[119] The reality is that courts empowered to

[115] Komesar (1994) 252, 268; Komesar (1988) 659; Garrett & Vermeule (2001) 1283; Wiseman (2006) 518.

[116] Komesar (1994) 53–150, 259; Hilbink (2006); Schauer (2006b) 9ff (providing an empirically grounded argument that the UK Supreme Court 'operates overwhelmingly in areas of low public salience' at a considerable 'distance from the centre of gravity of the nation's policy portfolio'); Levinson (2011) 735–6; Graber (2004) (demonstrating that de Tocqueville's famous claim that 'most political questions become legal questions' was demonstrably false both in de Tocqueville's time and in contemporary American politics).

[117] Mashaw (1997) 50.

[118] Friedman (1993) 591; Ferejohn & Kramer (2002) 964, 997–1035 (canvassing 'the full panoply of institutionalised forms of judicial restraint' in US jurisprudence, noting the 'remarkable' degree of judicial restraint, and the 'ubiquity' of the light touch 'rational basis scrutiny' at US Supreme Court level).

[119] Whittington (2014) 2226–8 (United States); Hogan, Kenny & Walsh (2015) (Ireland); King (2015a) 171 (Canada, Germany, the UK); Justice Kate O'Regan (2012) 122–3 (South Africa); Kingreen & Poscher (2018) 358 (observing that the Federal Constitutional Court of Germany invalidates legislation in less than 2 per cent of the constitutional complaints brought before it); see also Determan & Heinzten (2018); Official Annual Report of the FCC 2021, available at www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=6 41 (observing that the success rate of constitutional complaints has averaged at about 1.85 per cent over the last ten years).

invalidate legislation for compliance with rights typically *uphold* legislation rather than strike it down.[120] Indeed, when we examine cases in context, we see that judges in many jurisdictions employ a variety of doctrinal devices, including the presumption of constitutionality, doctrines of judicial deference and restraint, and 'rational basis' or 'reasonableness' standards of review, precisely in order to limit court interference with democratically determined priorities, and to hold back from striking down.[121]

This is not to deny the significant power of apex courts in a constitutional democracy. Far from it. It is simply to highlight the point that in order to assess the legitimacy of rights-based review in a democracy, we need to put judicial power in a broader institutional perspective. Whilst the high-octane theoretical debates on the counter-majoritarian difficulty present rights-based review as a 'strong and final veto'[122] which 'completely displaces'[123] legislative judgment in an affront to democratic values, empirical evidence suggests that this 'affront' is not as frequent, as forceful, nor as final as those debates would have us believe.[124] Instead of being a roadblock which bars legislative entry or an absolute brake on desirable social policy, rights-based review 'is often more of a speed bump or detour'[125] which does not prevent our elected representatives from reaching their ultimate policy goal.[126] As Kent Roach observed, the subtle remedial and adjudicatory practices of courts in systems of so-called strong-form review are 'frequently more nuanced than the story of judicial supremacy suggests'.[127]

When Alexander Bickel first coined the catchphrase 'the counter-majoritarian difficulty',[128] he acknowledged that it was a 'highly simplistic',[129] 'indiscriminate',[130] and 'very gross statement of the matter'.[131]

[120] Carolan (2016b); Whittington (2014) 2228; Schauer (2006b); Lain (2017) 1642.
[121] Lain (2017) 1621–31; Roach (2016a) 271–2; Barrett (2017) 73–4; Ferejohn & Kramer (2002) 997ff.
[122] Tushnet (2008b) 247.
[123] Ibid 247; cf. O'Regan (2019) 431–2.
[124] Schauer (2006b) 53.
[125] Pickerill (2004) 31; Whittington (2005b) 1138–40; Hogg & Bushell (1997); Roach (2016b) chapter 10.
[126] Devins (2017) 1548; O'Donnell (2017).
[127] Roach (2016a) 273.
[128] Bickel (1986).
[129] Ibid. 18.
[130] Ibid. 235.
[131] Ibid. 34.

His aim was to articulate the democratic worry as forcefully and 'indiscriminately'[132] as he could 'for analytical purposes',[133] before showing how it could be resolved. The main burden of his iconic book was actually to *counter* the counter-majoritarian difficulty, in part by showing that the courts possessed a sophisticated array of doctrinal tools and techniques which rendered rights adjudication more 'responsive'[134] to democracy than may have at first appeared.[135] As Bickel reminded us in the title of his book, the courts were *The Least Dangerous Branch*,[136] recalling Alexander Hamilton's famous insight that without the power of 'the sword or the purse', the courts 'will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them'.[137] Without the help and support of the other branches of government, judges are effectively impotent. Therefore, we should beware of presenting the weakest branch of government as the Leviathan itself.[138]

When we look around the world today, we are reminded that the most formidable and frightening usurpers of democracy are not unelected judges brandishing Bills of Rights, but rather the military, the moneyed, and megalomaniac authoritarians, all of whom possess the raw physical and financial force to bend people and institutions to their brutal will.[139] Gavels are no match for guns. Once we add to the picture 'the puppet-masters of global finance'[140] – the bankers, transnational corporations, and media conglomerates – the threat of a rising 'juristocracy'[141] determined to protect minority rights, looks decidedly less tyrannical. In fact, scholars who analyse the rise of populist authoritarianism all agree that what these countries sorely lack is *not* the right to participate on equal terms in popular elections (which they typically possess), but rather the independent, counter-majoritarian institutions designed to keep an

[132] Ibid. 33.
[133] Ibid. 34.
[134] Ibid 19.
[135] Friedman (1993) 587; O'Donnell (2017) 208.
[136] Bickel (1986).
[137] Hamilton (1788) 78th Federalist Paper ('The Judges as Guardians of the Constitution').
[138] Lain (2017) 1653–6; Devins & Fisher (2015) 67.
[139] Green (2014); Elster (2018).
[140] Holmes (2018) 401.
[141] Hirschl (2004).

aggrandising Executive in check.[142] Before resorting to loaded rhetoric about judges in Western democracies being 'a nine man junta dressed in black clothes',[143] we should spare a thought for the real juntas around the world – both elected and non-elected – which still pose the most devastating threats to democratic government in the twenty-first century. [144]

The key problem with the 'counter-majoritarian difficulty' is that it narrows 'the legitimacy register'[145] to electoral credentials alone, thereby averring that all public officials in a democracy must be elected and accountable in order to make legitimate decisions.[146] But to criticise the courts for being unelected is to criticise them for possessing the key institutional characteristic which underpins their legitimate role in the constitutional scheme. The truth is that we *want* independent or 'counter-majoritarian' judges in a well-functioning democracy, and we abhor the idea of elected judges.[147] Once we recognise that representative government involves the exercise of independent political judgement at some remove from 'popular will', it makes sense to inquire into how to check the decision-making power of our elected representatives.[148] Periodic election is one such check, but rights-based review may be another.[149] Even accepting that the legislature should play the lead law-making role in the constitutional scheme, this does not preclude a meaningful role for courts in checking legislation for compliance with rights.[150]

A final word on the right to participate in democratic decision-making. Whilst popular participation in public decision-making is intrinsically important in a democracy, I conceive of the courtroom as a valuable participatory forum, complementary to democratic decision-

[142] Sadurski (2018); Levitsky & Ziblatt (2019) 2, 22–4, 39, 79; Müller (2017) 3, 9; Ginsburg & Huq (2018) 8, 95, 150, 186; Gardbaum (2020b) 1, 28–59; Issacharoff (2018) 449–50; Sunstein (2018b) 78–80.

[143] Waldron (1999b) 309.

[144] Hilbink (2008) 229.

[145] Kyritsis (2020) 1.

[146] Kavanagh (2020) 1488; Lovell (2003) 19.

[147] On the 'unique history' of elected judges in some US states, see Pildes (2014) 810; Croley (1995).

[148] Kyritsis (2006) 746.

[149] The fact that we disagree about what rights require does not undermine the legitimacy of rights-based review, because that argument is 'contingently self-defeating', see Raz (1998a) 47; Kavanagh (2003b) 467–8; Christiano (2000) 520.

[150] Jackson (2020) 79.

making but responsive to different criteria for access, influence and success.[151] Access to rights-based review can empower individuals and groups to challenge decisions made by the Executive and legislature – especially those who might otherwise be 'vulnerable to majoritarian bias or neglect'[152] – in a forum where their claim is adjudicated 'without fear or favour'. This is not the naïve claim that the most excluded and downtrodden people in society can simply walk into court to get their rights protected. Problems with access to court are too well-known to recount here. My point is simply that the criteria for access to court differ in substantial ways to the challenge of leveraging momentum in electoral politics, such that excluded groups can sometimes achieve success they could not hope for in ordinary politics, especially when supported by strategic litigators and human rights NGOs.[153] Far from perceiving judicial decisions as a form of insult, dishonour and disempowerment on questions of rights, many of the most marginalised members of our society may welcome independent rights-based review as their only hope of getting the recognition and respect they deserve.[154]

4 Political versus Legal Constitutionalism

Although UK courts do not possess the power to strike down legislation enacted by the democratic legislature, the UK debate about the 'democratic deficit'[155] of judicially enforced rights rages with a ferocity which matches, if not exceeds, the broader Manichean narrative.[156] Why so? The main reason is that there is a long-standing and deep-seated

[151] Kavanagh (2003b) 456–65; Gardner (2010) 15; Raz (1995b) 43–4; Raz (1998b) 45; King (2013) 143–6; Peretti (2001) 232; Hilbink (2008) 232.

[152] King (2012) 166–8 (making the sobering point that extreme poverty and social exclusion are often directly linked to low levels of civic engagement and voting in elections).

[153] For analysis of the way in which rights-advocacy groups typically pursue political advocacy alongside strategic litigation, see Duffy (2018) 244, 265–6; Schlanger (1999) 2013; King (2013) 148. For an iconic account of this dual strategy, see Martin Luther King (2000) [1964] 28–9 ('Direct action is not a substitute for work in the courts and halls of government . . . Indeed, direct action and legal action complement one another; when skilfully employed, each becomes more effective').

[154] Pettit (1999) 181, 185.

[155] Hunt, Hooper & Yowell (2015).

[156] Campbell, Ewing & Tomkins (2001); cf. Hunt (2015); Kavanagh (2019); Dyzenhaus (2015); Roach (2015).

scepticism about judicial power in the British constitutional culture.[157] Precisely because the UK has relied on inherited traditions of responsible government for centuries without the need for a codified constitution, there is an acute sensitivity in the UK constitutional culture to the creeping encroachments of an unelected judiciary in the domain of democratic politics.[158] Often described as 'the political constitution',[159] the British constitution has long embodied a preference for constitutional self-regulation within the political system, instead of looking to the courts to impose legally enforced checks from without.[160] Given this tradition, there is fierce resistance to any legal development which seems to threaten the unwritten constitutional order, which is an undeniably impressive achievement of stable constitutional government stretching over centuries. Any rise in judicial power touches a constitutional nerve.[161] Even as the ideological colouration changes from Left to Right – as it seems to be in contemporary times – the underlying fear of 'government by judiciary' remains stable over time.[162]

This explains why the HRA elicited such a visceral and vehement response amongst some UK public lawyers, despite the fact that it did not give the courts the power to strike down or invalidate legislation found to violate rights.[163] Rallying to the cry of the political constitution, these scholars feared an impending judicialisation of politics and a tragic undermining of the 'matchless constitution'.[164] In previous work, I argued that these fears were largely exaggerated.[165] The HRA did not lead to an unbridled 'juristocracy'.[166] Nor did it 'suffocate'[167] political modes of accountability, notwithstanding political rhetoric to that effect.

[157] Bentham famously described rights as 'nonsense upon stilts', in Bentham (1843) 501; Kavanagh (2009b) 102–3; Dyzenhaus (2004b) 61; Dyzenhaus (2004c) 10–11.
[158] Kavanagh (2019).
[159] Griffith (1979). For an attempt to disambiguate the multiple meanings of the 'political constitution', see Kavanagh (2019); Gee (2008); Gee & Webber (2010).
[160] Barendt (1998) 49; McHarg (2008) 856; McLean (2016) 121–2.
[161] Thornhill (2016) 210.
[162] The scholarship on the political constitution stemming from John Griffith's scholarship was on the Left of the political spectrum, its contemporary iterations fit more easily within a right-wing political agenda, see Gee (2019).
[163] For a key set of essays encapsulating this visceral scepticism, see Campbell, Ewing & Tomkins (2001); cf. Feldman (2002a); Kavanagh (2019) 72–3; Dyzenhaus (2015).
[164] Loughlin (2013) 6; Kavanagh (2019) 53–63.
[165] Kavanagh (2009a) chapter 13; Kavanagh (2009b).
[166] Ewing (2004) 831; Hirschl (2004).
[167] Tomkins (2001) 9; cf. Kavanagh (2009a) 396–400.

But my concern here is with the form and tenor of the scholarly debate which ensued, not with the accuracy or veracity of the substantive claims.

In launching a crusade against the HRA, 'political constitutionalists' waged war on so-called legal constitutionalists, claiming that the latter wished to 'throw away the British political constitution, give up on Parliament, and turn instead to the courts'.[168] Presenting us with a stark choice between the 'political constitution' where Parliament reigns supreme, and a 'legal constitution' where unelected judges call all the constitutional shots, political constitutionalists presented the two institutions at the heart of this dispute – Parliament and the courts – as vying for supremacy and pole position 'at the heart of the constitutional control room'.[169] In a 'bipolar contest between political and legal constitutionalism',[170] scholars sparred about 'where supremacy lies – with the legislature, as political constitutionalists desire, or the judiciary, as legal constitutionalists wish'.[171] For political constitutionalists, the answer to that question was as clear as it was emphatic: 'democratic legislatures prove superior to courts'.[172] In the early twenty-first century, UK public law theory became dominated by the discourse about the 'competing models of political and legal constitutionalism'.[173] With the unassailable virtue of democracy in one corner and the unequivocal evil of 'juristocracy' in the other, rival scholars 'battled for the soul of the British constitution'.[174]

But by framing the debate as 'a public law of competing supremacies',[175] the UK debate was afflicted by the same problems which marred the broader Manichean narrative.[176] It led to an unduly polarised, dichotomous, reductivist, and ultimately distortive picture of constitutional governance in the British constitutional order.[177] The key problems were as

[168] Tomkins (1998) 271.
[169] Tomkins (2003) 19.
[170] McHarg (2008) 877; Phillipson (2014) 271; Dyzenhaus (2015); Gardbaum (2013b) 23.
[171] Bellamy (2011) 89.
[172] Ibid 91–2.
[173] Gardbaum (2013b) 23.
[174] McHarg (2008) 853.
[175] Hunt (2003) 337; Dyzenhaus (2006) 7.
[176] In fact, the two narratives are interconnected because many UK political constitutionalists relied heavily on Waldron's arguments in making their case against rights-based review, see in particular Bellamy (2011). As Jeff King observed, the parallels between Waldron's and John Griffith's arguments are closer than is often appreciated, see King (2015b) 114.
[177] Kavanagh (2019) 57ff.

follows. First, the contrast between political and legal constitutionalism rested on a false dichotomy.[178] The UK constitution – like all other constitutions – envisages a role for both Parliament and the courts in holding the Executive to account, thus relying on a combination of political and legal modes of accountability.[179] In fact, judicial review of executive action has been a keystone of the traditional English constitution since medieval times.[180] The real question, then, is not whether to choose between *either* a political *or* a legal constitution but to establish which modes of accountability are suitable for which kinds of governmental decision within a composite, multi-institutional constitutional framework.[181]

Second, by casting Parliament and the courts as rivals for constitutional supremacy, political constitutionalists overlooked the fact that parliamentary and judicial controls can – and often do – work in combination rather than in combat, complementing and reinforcing each other in mutually supportive ways.[182] Political and legal forms of accountability are neither mutually exclusive nor mutually destructive.[183] Nor are they necessarily a 'zero-sum game',[184] where increased legal accountability in the courts entails a diminution of legislative control. In fact, many commentators have argued that the enhanced judicial powers under the HRA led to an increase, not a decrease, in parliamentary engagement with human rights issues.[185] Instead of a situation where judicial decisions necessarily diminish parliamentary modes of accountability, there are a number of high-profile examples – the *Miller* decision on Brexit prominent amongst them[186] – where the courts actively supported and strengthened Parliament's ability to hold the Executive to account.[187] Thus, by presenting Parliament and the courts as inveterate rivals for constitutional supremacy, the Manichean

[178] Kavanagh (2009a) 339, 396, 405, 414; Hunt (2010) 602; Hunt (2015) 17; Phillipson (2016) 1089; Allan (2013) 15, 84, 287, 302; Allison (2007) 35–6; Dyzenhaus (2015) 430; Gardner (2012) 94ff.
[179] Gee (2008) 29–30.
[180] Endicott (2003) 210–11; Joseph (2004) 322; Kavanagh (2019) 65.
[181] Cohn (2007).
[182] Kavanagh (2019) 63–9; Sales (2016a) 457; Phillipson (2016) 1089.
[183] Dyzenhaus (1998) 98; Oliver (2013) 310; Thornhill (2016) 207.
[184] Leigh (1999) 308; Allan (2006b) 174; Craig (2010) 26; Endicott (2003) 210–11; Hilbink (2006) 26.
[185] Hunt (2010).
[186] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5.
[187] Phillipson (2016); Craig (2017).

narrative occluded the deep interdependence and constructive engagement between the branches of government.[188]

Third, by presenting Parliament and the courts as rivals vying for prime position 'at the heart of the constitutional control room',[189] the Manichean narrative deflected attention away from the most powerful branch of government, namely, the Executive.[190] Eclipsing the Executive is a serious blind spot in any account which seeks to make sense of the British constitutional order, especially given the pivotal role of strong government in the Westminster system.[191] But it is particularly problematic for political constitutionalists whose *credo* was to emphasise, prioritise, and celebrate the political dimensions of the British constitutional order.[192] Trying to understand parliamentary democracy without the Executive is like trying to understand a car without its engine.[193] The remarkable exclusion of the Executive from the domain of the political constitution is another indicator that viewing constitutional issues 'through a binary optic may oversimplify, and so distort'.[194]

All told, the dichotomy between political and legal constitutionalism led to an unfortunate polarisation of the academic debate, presenting us with two exaggerated alternatives which bore little relation to constitutional practice and institutional realities on the ground.[195] Political constitutionalists became so consumed by a jeremiad against judges that they failed to develop a positive conception of constitutionalism which could articulate and accommodate the inherent normativity of the British constitutional order.[196] Determined to prove that political accountability in Parliament was superior to legal accountability in the courts, they overlooked the fact that any constitution needs both political and legal modes of accountability, albeit in different ways and for different purposes.[197] Once the key issues were framed as a stark either/or choice

[188] Harlow (2016) 154–6, 172–4; Bamforth (2013) 266; Rawlings (2005) 409.
[189] Tomkins (2002a) 157; Bellamy (2011) 89.
[190] Kavanagh (2019) 58; Carolan (2011) 188.
[191] Griffith (2001) 46; Amery (1964) 4.
[192] Dyzenhaus (2004b) 24–6, 29. For the argument that leading defenders of 'legislated rights' overlook the pivotal role of the Executive branch, see Endicott (2020b); Weis (2020b) 621; Trueblood (2019) 580.
[193] Kyritsis (2015) 160.
[194] Elliott (2015c) 95.
[195] Carolan (2016b) 115.
[196] See further Kavanagh (2019).
[197] Kavanagh (2019); Endicott (2003).

about whether we favour democracy on the one hand or 'juristocracy',[198] on the other, all participants were pressed into one side of a false dichotomy between two extreme positions.[199] The binary optic distorted our vision, blinding us to the multi-institutional nature of the constitutional order and obscuring the more complex institutional reality on which constitutional government depends.[200]

5 Conclusion: A Farewell to Arms

In contemporary constitutional theory, there is a growing realisation that the 'bipolar contest'[201] between political and legal constitutionalism is reaching a dead end.[202] Recognising the ever-decreasing returns of a polarised debate between courts and legislatures locked in a battle for supremacy, political constitutionalists have started to lay down their arms, accepting that constitutional government combines both legal and political dimensions which should be viewed in the round rather than positing a disjuncture or dichotomy between them.[203] Once they are freed from the strictures of the antagonistic narrative, they can begin to imagine a constructive role for the courts in supporting and 'nourishing' the political constitution.[204] In the broader theoretical landscape, too, the most caustic critics of courts are opening their minds to the value of allowing courts to uphold minority rights, whilst simultaneously vindicating the underlying democratic values of equality, participation, representation, and inclusion.[205] As Jeremy Waldron observed, those who are marginalised, excluded, and vilified in the competitive forum of mass electoral politics 'may need special care that only non-elective institutions can provide'.[206]

Now that the fiercest warriors have left the battleground and the remaining members of the academic community see no point in continuing the war, it is time to move on. In place of either judicial or legislative

[198] Hirschl (2004).
[199] Hickman (2005a) 311.
[200] Elliott (2015a) 95.
[201] McHarg (2008) 877; Roach (2015) 405.
[202] Hunt (2015) 9–10; Kavanagh (2019) 71–2; Dyzenhaus (2015); Roach (2015).
[203] Campbell, Ewing & Tomkins (2011) 10; Tomkins (2013); Hunt (2015) 9–10; Dyzenhaus (2015).
[204] Tomkins (2013) 2281.
[205] Waldron (2016) 1401–6; Webber et al. (2018).
[206] Waldron (2016) 1403; Roux (2018) 205ff; Dyzenhaus (2009).

romanticism, what is urgently needed to advance this debate is a more realistic view of all three branches of government – one which acknowledges their respective institutional strengths and weaknesses as part of a suitably differentiated role-conception for each branch of government.[207] Turning away from the gladiatorial contest between 'democracy' and 'constitutionalism', many scholars are reaching towards a more constructive and collaborative understanding of the relationship between the branches of government.[208] The aim of this book is to contribute to that broader effort by articulating the collaborative ideal in detail and in depth. Instead of 'prizing law by denigrating politics, or ... prizing politics by denigrating law', this book imagines 'law and politics as respectfully coexisting, as they often do'.[209] The challenge, then, is to articulate the terms of that 'coexistence' whilst mapping out the modes of engagement, interaction, and counterbalancing between them.

Between the dramatic extremes of 'taking the constitution away from the courts'[210] on the one hand, or elevating the courts to a position of solitary supremacy on the other, this book imagines the more measured and variegated possibility of giving the legislature the lead law-making role in the constitutional scheme whilst accepting a significant, but subsidiary, role for the courts in upholding rights. Instead of casting the legislature as a shady character lurking in the wings or the invariable and inveterate villain of the piece, I give the legislature credence as a 'pro-constitutional'[211] actor. Indeed, I broaden out the constitutional *dramatis personae* to include the most powerful and 'least examined branch'[212] of all, the Executive. Not only does this variegated institutional landscape chime more closely with the complex reality of constitutional government on the ground, it also captures the key principles of democracy and constitutionalism which underpin the Manichean narrative, albeit reframing them in more measured, realistic and constructive ways.

[207] Kavanagh (2019) 71.
[208] See e.g. King (2012) 11–13; Carolan (2016a); Joseph (2004); Tourkochoriti (2019) 7, 12–15; Leigh & Masterman (2008) 16–18; Dyzenhaus (2006) 3, 11; Hunt (2015) 9; Fredman (2013) 111, 123; Webber et al. (2018) 14, 18, 25; Allan (2013) 327; Phillipson (2014) 272–4; Sager (2004) 5–7, 21; Fallon (2001) 5; Roach (2015) 405ff; Kinley (2015) 32–3; Fowkes (2016b) 221.
[209] Post & Siegel (2003b) 20; Dyzenhaus (2006) 3ff.
[210] Tushnet (1999).
[211] Jackson (2016).
[212] Bauman & Kahana (2006).

If protecting rights is a shared responsibility amongst all three branches of government, then the key theoretical and practical challenge is to articulate the ways in which the branches combine, interact and counteract in a variegated institutional landscape. This book takes up that challenge. The farewell to arms is, therefore, a call for collaboration – not only within and between the branches of government, but also between scholars who perceive themselves as embracing rival positions. Protecting rights is not the solitary task of an omniscient super-judge. Nor is it the sole preserve of an enlightened legislature. Instead, it is a collaborative enterprise where all three branches of government must work together in a way which takes both rights and democracy seriously.