Richard Bellamy

Political Constitutionalism

A Republican Defence of the Constitutionality of Democracy

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POLITICAL CONSTITUTIONALISM

Judicial review by constitutional courts is often presented as a necessary supplement to democracy. This book questions its effectiveness and legitimacy. Drawing on the republican tradition, Richard Bellamy argues that the democratic mechanisms of open elections between competing parties and decision-making by majority rule offer superior and sufficient methods for upholding rights and the rule of law. The absence of popular accountability renders judicial review a form of arbitrary rule which lacks the incentive structure democracy provides to ensure rulers treat the ruled with equal concern and respect. Rights-based judicial review undermines the constitutionality of democracy. Its counter-majoritarian bias promotes privileged against unprivileged minorities, while its legalism and focus on individual cases distort public debate. Rather than constraining democracy with written constitutions and greater judicial oversight, attention should be paid to improving democractic processes through such measures as reformed electoral systems and enhanced parliamentary scrutiny.

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POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY

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In Memory of my Father

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PREFACE AND ACKNOWLEDGEMENTS

A written, justiciable constitution, incorporating a bill of rights, is widely accepted as a necessary safeguard against the abuse of power by democratic governments. This book challenges that common view and the often unexamined and erroneous assumptions about the workings of democracy on which it rests. Far from guarding against a largely mythical tyranny of the majority, the checks imposed by judicial review on majoritarian decision-making risk undermining political equality, distorting the agenda away from the public interest, and entrenching the privileges of dominant minorities and the domination of unprivileged ones. As such, legal constitutionalism can produce rather than constrain arbitrary rule, detract from the rights protection of weak minorities, and damage the rule of law in both the formal and the substantive senses of treating all as equals. By contrast, the workings of actually existing democracies promote the constitutional goods of rights and the rule of law. Party competition and majority rule on the basis of one person one vote uphold political equality and institutionalise mechanisms of political balance and accountability that provide incentives for politicians to attend to the judgements and interests of those they govern and to recruit a wide range of minorities into any ruling coalition. From the republican perspective adopted here, the procedures and mechanisms of established democracies offer adequate, if not perfect and certainly improvable, safeguards against domination and arbitrary rule. Most kinds of legal constitutionalism subvert these democratic protections, creating sources of arbitrariness and dominance of their own in the process. In sum, democracy provides a form of political constitutionalism that is superior both normatively and empirically to the legal constitutional devices that are regularly proposed as necessary constraints upon it.

In developing this thesis, I have incurred numerous debts. While controversial within the legal and political theory communities that I habitually frequent, it is far less so among political scientists. I owe much to the Government Department at Essex, where this project was originally conceived and partly written, for providing an environment where you seem to absorb the latest research on political systems and behaviour simply by walking along the corridor. Colleagues in the Political Theory group nonetheless ensured I addressed certain central normative issues, and I am particularly grateful to Albert Weale for written and verbal comments on Part I and to Sheldon Leader in the Law Department for likewise reading drafts of those chapters and judiciously reminding me that not all legal constitutionalist objections could be dealt with quite as cavalierly as I might have hoped. At University College London (UCL), I have received a similar stimulus from colleagues in Political Science, Philosophy and Laws. I am especially grateful to Cécile Laborde for her supportive and incisive comments on the chapters in Part II which provided much needed advice and encouragement. The general republican orientation of my argument incurs a deep indebtedness to Quentin Skinner and Philip Pettit, to whom I owe inspiration and support over a long period. Initially, the book had been planned as a joint monograph with Dario Castiglione, with whom I have co-authored numerous pieces exploring constitutionalism in the EU that gave rise to many of the key ideas of this work. Unfortunately, other projects prevented Dario from being a co-author on this occasion but he has been so generous in reading and discussing drafts of the book that I almost feel he has been so nonetheless. I am also grateful to many others who have read, heard or simply discussed various parts of the argument and offered helpful observations, criticisms and guidance. With apologies to any I have inadvertently forgotten, these include Larry Alexander, Luca Baccelli, Rodney Barker, John Bartle, Ian Budge, Tom Campbell, Alan Cromartie, John Dryzek, Andrew Gamble, Jason Glynos, Bob Goodin, Ross Harrison, Janet Hiebert, David Howarth, Peter John, Anthony King, Christian List, Martin Loughlin, Neil MacCormick, Peter Mair, Andrew Mason, John McCormick, Glyn Morgan, Danny Nicol, Aletta Norval, Emilio Santoro, Niamh Nic Shuibhne, Adam Tomkins, Jim Tully, Richard Vernon, Jeremy Waldron, Neil Walker, the late Iris Marion Young and Danilo Zolo. John Haslam and Carrie Cheek have been long suffering in awaiting the delivery of the manuscript and extremely helpful in seeing it though to completion. They arranged exceptionally helpful referees' reports, and I am especially grateful to Jeremy Waldron for his detailed comments on the original proposal and draft chapters. Needless to say, all the usual caveats apply, with I alone responsible for the errors and misunderstandings these friends and colleagues have valiantly struggled to save me from. The one delay that was not of my own doing resulted from my father's death in the Autumn of 2005. It's a sad truth that you often do not appreciate how important certain people are to you until they are no longer there. I really do not know how to express what I owe to Louise and Amy for helping me through that difficult period and keeping me focused on other things, not least this book. Though my father always dutifully promised to read each one of my books, it was a sobering fact that his eyes would start to droop somewhere around page 3 – if he got that far. However, I greatly miss the support and love he showed me in proudly displaying them alongside his own very different publications. Now his adorn my shelves, I'm proud in my turn to stack this one next to them and to dedicate it to him.

INTRODUCTION: LEGAL AND POLITICAL CONSTITUTIONALISM

This book is about constitutions and democratic politics. The increasingly dominant view is that constitutions enshrine and secure the rights central to a democratic society. This approach defines a constitution as a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system.[1] It contends that a constitution of this kind, not participation in democratic politics *per se*, offers the basis for citizens to be treated in a democratic way as deserving of equal concern and respect.[2] The electorate and politicians may engage in a democratic process, but they do not always embrace democratic values. The defence of these belongs to the constitution and its judicial guardians. As Cherie Booth, the barrister wife of the former British Prime Minister Tony Blair, neatly put it: 'In a human rights world . . . responsibility for a value-based substantive commitment to democracy rests in large part on judges . . . [J]udges in constitutional democracies are set aside as the guardians of individual rights . . . [and] afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness . . . in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy.'[3]

That the wife of a democratically elected political leader should express such a condescending view of democratic politics may be a little surprising, but it all too accurately reflects the prevailing opinion among legal constitutionalists. As Roberto Unger has remarked, 'discomfort with democracy' is one of the 'dirty little secrets of contemporary jurisprudence'. This unease is manifest in:

1 E.g. J. Raz, 'On the Authority and Interpretation of Constitutions', in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, 1998, pp. 153–4.

2 R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press, 1996, 'Introduction: The Moral Reading and the Majoritarian Premise', pp. 24, 32–5.

3 C. Booth, 'The Role of the Judge in a Human Rights World', Speech to the Malaysian Bar Association, 26 July 2005.

> the ceaseless identification of restraints on majority rule . . . as the overriding responsibility of . . . jurists . . . in the effort to obtain from judges . . . the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room . . . [and] in the . . . treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies.[4]

Ms Booth, like the writers criticised by Roberto Unger, has in mind not the obviously sham democratic regimes of autocratic dictators, but working democracies like the United Kingdom and the other twenty-two countries around the world where democratic practices have been firmly established for at least fifty years, and in some cases much longer. Of course, these are also the countries with the longest traditions of judicial independence, rights protection and a stable system of law. However, that is because the one leads to the other. After all, not all these countries have, or have always had, written constitutions, and only three have strong systems of constitutional judicial review.[5] In fact, the rule of law, in the sense of all being equal under the law, emerged from the self-same processes of economic development and social pluralism that gave rise to democracy,[6] and has only survived and developed in those societies where the democratic control of power and the socio-economic conditions that support it persist.[7] I shall argue that in such countries the concerns of legal constitutionalists about democracy and their proposed judicial and other counter-majoritarian remedies prove at best misconceived, at worst subversive of the very democratic basis of the constitutional goods they seek to secure. The legal constitutionalist's attempts to constrain democracy undercut the political constitutionalism of democracy itself, jeopardising the legitimacy and efficacy of law and the courts along the way. For a pure

4 R. Unger, *What Should Legal Analysis Become?*, London: Verso, 1996, p. 72. See too J. Waldron, 'Dirty Little Secret', *Columbia Law Review*, 98 (1998), pp. 510–30 and his *Law and Disagreement*, Oxford: Oxford University Press, 1999, pp. 8–10.

5 These figures come from R. A. Dahl, *How Democratic Is the American Constitution?*, New Haven: Yale University Press, 2002, pp. 164–5, who also notes only four have that other counter-majoritarian check, a strongly bicameral legislature.

6 On the relationship of polyarchy to democracy, on the one hand, and modern dynamic conditions, on the other, see R. A. Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, Part 5.

7 See chapter 2 section 3 below and the essays in J. M. Maravall and A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge: Cambridge University Press, 2003.

legal constitutionalism, that sees itself as superior to and independent of democracy, rests on questionable normative and empirical assumptions – both about itself and the democratic processes it seeks to frame and partially supplant. It overlooks the true basis of constitutional government in the democratic political constitutionalism it denigrates and unwittingly undermines. To see why, let's briefly examine and compare the legal and political constitutionalist approaches.

Two related claims motivate legal constitutionalism. The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the democratic process at identifying these outcomes. This book disputes them both.

The desire to articulate a coherent and normatively attractive vision of a just and well-ordered society is undoubtedly a noble endeavour. It has inspired philosophers and citizens down the ages. But though all who engage in this activity aspire to convince others of the truth of their own position, none has so far come close to succeeding. Rival views by similarly competent theorists continue to proliferate, their disagreements both reflecting and occasionally informing the political disagreements between ordinary citizens over every conceivable issue from tax policy to health care. The fact of disagreement does not indicate that no theories of justice are true. Nor does it mean that a democratic society does not involve a commitment to rights and equality. It does show, though, that there are limitations to our ability to identify a true theory of rights and equality and so to convince others of its truth. Such difficulties are likely to be multiplied several fold when it comes to devising policies that will promote our favoured ideal of democratic justice. In part, the problem arises from the complexity of cause and effect in social and economic life, so that it will be hard to judge what the consequences of any given measure will be. But as well as the difficulty of specifying what policies will bring about given values, disagreements about the nature of these values also mean it will be difficult to identify those political, social and economic conditions that best realise them. For example, both types of difficulty are in evidence when philosophers or citizens debate the degree to which market arrangements are just or the modifications that might be necessary to render them so. How far they can or should reflect people's efforts, entitlements or merits, say, are all deeply disputed for reasons that are both normative and empirical. Similar difficulties bedevil discussions over which electoral system best embodies democratic principles so as to ensure an equal influence over government policy.

These problems with the first claim of legal constitutionalism raise doubts regarding its second claim about the responsibilities of constitutional judges. If there are reasonable disagreements about justice and its implications, then it becomes implausible to regard judges as basing their decisions on the 'correct' view of what democratic justice demands in particular circumstances.[8] There are no good grounds for believing that they can succeed where political philosophers from Plato to Rawls have failed. At best, the superior position legal constitutionalists accord them must rest on courts providing a more conscientious and better informed arbitration of the disagreements and conflicts surrounding rights and equality than democratic politics can offer. However, this shift in justification moves attention from outcomes to process and suggests a somewhat different conception of the constitution within a democratic society. Instead of seeing the constitution as enshrining the substance of democratic values, it points towards conceiving it as a procedure for resolving disagreements about the nature and implications of democratic values in a way that assiduously and impartially weighs the views and interests in dispute in a manner that accords them equal concern and respect. Rather than a resource of the fundamental answers to the question of how to organise a democratic society, the constitution represents a fundamental structure for reaching collective decisions about social arrangements in a democratic way. That is, in a way that treats citizens as entitled to having their concerns equally respected when it comes to deciding the best way to pursue their collective interests.

A political constitutionalist elaborates this second approach and makes two corresponding claims to the legal constitutionalist's. The first is that we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. The second is that the democratic process is more legitimate and effective than the judicial process at resolving these disagreements. Judicial claims to exemplify a form of public reasoning that is more inclusive and impartial than democracy proper are disputed in both theory and practice. It is only when the public themselves reason within a democratic process that they can be regarded as equals and their

8 For this sort of bold claim by a leading British judge, see J. Steyn, *Democracy Through Law: Selected Speeches and Judgments*, Aldershot: Ashgate, 2004, p. 130.

multifarious rights and interests accorded equal concern and respect. A system of 'one person, one vote' provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; and party competition in elections and parliament institutionalises a balance of power that encourages the various sides to hear and harken to each other, promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself.

Four senses of the political underlie these claims. First, a constitution offers a response to what Jeremy Waldron and Albert Weale, among others, have termed 'the circumstances of politics'.[9] That is to say, circumstances where we disagree about both the right and the good, yet nonetheless require a collective decision on these matters. Consequently, the constitution cannot be treated as a basic law or norm. Rather, it offers a basic framework for resolving our disagreements – albeit one that is also the subject of political debate. Second, the constitution is identified with the political rather than the legal system, and in particular with the ways political power is organised and divided. This approach harks back to the republican tradition and its emphasis on self-government, on the one hand, and the balance of power, on the other, as mechanisms to overcome domination through the arbitrary rule of others.[10] Third, it draws on work in the field of public law political science, what Michael Shapiro has called 'political jurisprudence',[11] and sees law as functioning as politically as democratic politics. Finally, it offers a normative account of the democratic political system. In particular, it shows how real democratic processes work in normatively attractive ways so as to produce the constitutional goods of a respect for rights and the rule of law by ensuring legislation is framed in ways that treat all as equals.

There are elements of both legal and political constitutionalism in most constitutions. The bulk of any constitutional document is usually given over to a detailed description of the political and legal system, setting out the electoral rules, enumerating the powers and functions of different levels and agencies of government, and so on. These clauses lay out the

[9] Waldron, *Law and Disagreement*, pp. 107–18, A. Weale, *Democracy*, Basingstoke: Macmillan, 1999, pp. 8–13.

[10] See C. H. McIlwain, *Constitutionalism: Ancient and Modern*, revised edition, New York: Great Seal Books, 1958, ch. 2 and G. Maddox, 'A Note on the Meaning of "Constitution"', *American Political Science Review*, 76 (1982), pp. 807–8.

[11] M. Shapiro, 'Political Jurisprudence', *Kentucky Law Journal*, 52 (1964), pp. 294–345.

processes whereby citizens decide their common affairs and settle their disputes. In the first modern constitutions, bills of rights formed a mere preamble or appendix to this procedural constitution. Yet, in recent times the importance of political and legal procedures has been eclipsed by concentration on bills of rights. As the quote from Cherie Booth illustrates, it is this substantive part of the constitution that legal constitutionalists believe truly encapsulates the essence of both democracy and constitutionalism. They regard the rules describing the form of government as having no independent weight as constraints on the system they describe.[12] They fail to see how these rules structure the way decisions are taken and that procedures themselves have constitutional value as constraints upon arbitrary rule.[13] That said, I am also critical of the ways some of those sympathetic to a more processual view have been tempted to constitutionalise these procedures in a legal way.[14] Not only do such accounts have a tendency to collapse into the substantive, rights-based view, with a 'due process' becoming defined in terms of conformity with constitutional rights, but they also overlook the constitutive as well as constitutional aspect of democracy.

Legal constitutionalists acknowledge that no constitution will survive long unless citizens can identify with it. Joseph Raz remarks how a constitution must serve 'not only as the lawyers' law, but as the people's law', its main provisions commanding general consent as the 'common ideology' that governs public life.[15] In a similar vein, Jürgen Habermas talks of the members of a democratic society being bound together and to their country by means of a 'constitutional patriotism'.[16] However, once again these theorists locate this moral glue in the 'thin' constitution of rights as determined by judicial review, rather than the 'thick' constitutional processes of democratic law-making. But if we disagree about the basis and bearing

[12] Raz, 'On the Authority and Interpretation of Constitutions', p. 153 and G. Sartori, 'Constitutionalism: A Preliminary Discussion', *American Political Science Review*, 56 (1962), p. 861.

[13] For brief accounts of the historical antecedents of political constitutionalism as a form of government, see W. H. Morris-Jones, 'On Constitutionalism', *American Political Science Review*, 59 (1965), p. 439. See too Maddox, 'A Note on the Meaning of "Constitution"', p. 807.

[14] E.g. J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, MA: Harvard University Press, 1980 and, in a different way, J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity, 1996, both of whom are discussed in chapter 3.

[15] Raz, 'On the Authority and Interpretation of Constitutions', p. 154.

[16] J. Habermas, Appendix II: 'Citizenship and National Identity', *Between Facts and Norms*, p. 500.

of rights, then the imposition of such a view is more likely to divide than unite citizens – witness the divisions created in the United States by the judicial determination of abortion rights. By contrast, political constitutionalism addresses the task of building a democratic public culture by viewing all citizens as equal participants in the collective endeavour to frame a just social order. Citizens are far more likely to identify with laws in which they have had some say. Of course, that say may be very small and be outweighed by what most others say. But the entitlement to have as equal a say as everyone else is the essence of being viewed as a bearer of rights. In sum, a democratic society in the inclusive, rights and equality respecting sense desired by legal constitutionalists comes from the political constitution embodied in democracy itself.

The following chapters elaborate this critique of legal constitutionalism and defend political constitutionalism. The critique occupies Part I. Chapter 1 explores the constitutional rights project at the heart of legal constitutionalism. It indicates why and how rights belong to the 'circumstances of politics' through being subject to reasonable disagreements. It then details the weaknesses of judicial review as a fair process for resolving these disputes. Courts turn out to suffer from many of the same vices legal constitutionalists criticise in legislatures, though with fewer of the compensating virtues these bodies possess for overcoming them. Meanwhile, many of the advantages claimed for courts are revealed as bogus.

Chapter 2 turns to the rule of law. Though sometimes straightforwardly if mistakenly identified with rights, the defence of the integrity and equity of law provides a distinct argument for a legal constitution. However, there is no canonical form law can take that ensures that it is 'good' or 'just' law, nor can law *per se* rule. Law too lies within the 'circumstances of politics' and requires appropriate processes to certify that persons frame it in ways that treat citizens with equal concern and respect. While judges play a necessary role in upholding legality, so that those laws that are so enacted are applied in consistent and equitable ways, they cannot ensure the laws themselves are not arbitrary. That only comes through a system of popular self-rule in which all citizens enjoy an equal status. Only then can they determine as equals the ways laws will treat them alike or unalike.

Chapter 3 then enquires whether it might not be necessary nonetheless to protect the preconditions of democracy within a constitution. I start by examining the substantive version of this thesis, evident in the above quote from Cherie Booth, whereby a bill of rights is seen as encapsulating democratic values. I then look at arguments that seek to defend equitable democratic processes. Both are found wanting. The second collapses into the first, which returns to the already criticised constitutional rights thesis. I then investigate whether it makes a difference for the constitution itself to have been democratically enacted. I cast doubt on the democratic credentials of such self-binding constitutional moments and contrast unfavourably the populist constitutional politics most proponents of this thesis espouse to the genuinely constitutional and constitutive qualities of normal politics.

This critique sets the scene for defending a democratic political constitutionalism in Part II. Chapter 4 outlines the normative case for a political constitutionalism in terms of the republican notion of freedom as non-domination. Following other republican theorists,[17] I dispute the coherence of the liberal view of negative liberty whereby constitutional government is identified with limited, in the sense of less, government. Rather, constitutionalism seeks to prevent arbitrary rule – that is, rule that can avoid being responsive to the interests of the ruled and fail to provide for the equal consideration of interests. I argue that taking rights out of politics, as legal constitutionalism attempts to do, gives rise to arbitrary rule – criticising along the way those republican theorists who have believed otherwise. The reason is that we have no method – including certain idealised accounts of democracy – for objectively ascertaining those outcomes that will treat all equally. Instead, we can only give individuals equal political resources to determine and contest the collective policies that should apply equally to all and employ processes they can recognise as promoting equal concern and respect.

Chapter 5 investigates the type of processes that might serve this purpose. Following the republican tradition, I argue their chief quality must be to encourage citizens and governments to 'hear the other side'. However, once again I take issue with certain contemporary republican theorists. A number of these have espoused deliberative democracy, on the one hand, and the separation of powers, on the other, as the appropriate means to achieve republican ends. Deliberative democrats assume that disagreements over rights and other matters of public policy can be resolved through a carefully structured form of rational debate. This model mirrors the claims made about the public reasoning of the judiciary by legal theorists. However, like the apologists of judicial deliberation, deliberative theorists provide flimsy epistemological grounds for their claims that

[17] Q. Skinner, *Liberty before Liberalism*, Cambridge: Cambridge University Press, 1998 and P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Clarendon Press, 1997.

such debates can produce the 'best' argument. Though deliberation can sometimes, though not always, improve arguments and move people to a fuller appreciation of their opponents' position, it is unlikely to produce consensus on the most rationally defensible view. On the contrary, deliberation may serve to polarise positions even more by highlighting the points of disagreement. A public reasoning process can only treat all equally through being inclusive and providing a transparent way of treating all views fairly. In other words, public reasoning has to be by the public and employ an impartial decision-making procedure for resolving their disputes. The separation of powers is often seen by legal constitutionalists and certain republican theorists as a necessary check on arbitrary power. By contrast, I argue it too produces arbitrary rule. Not only do its counter-majoritarian checks unfairly favour the *status quo*, potentially entrenching the unjust privileges of historically powerful minorities, but it also offers no incentives for those running these different branches to be responsive to citizens. Instead, I argue for a balance of power between competing aspirants for office. This arrangement creates accountability of the rulers to the ruled, while encouraging citizens to collaborate and compromise with each other. The result of combining procedural public reasoning with the balance of power is to produce both an attentiveness to rights and incentives to legislate in ways that treat all in relevant respects as equal under the law.

Chapter 6 sums up the foregoing argument by showing how the actually existing democratic systems of the main established democracies satisfy the requirements of non-domination. Taken together, majority rule, competition between parties in free and fair elections, and parliamentary government, provide an appropriately constitutional process of public reasoning and the balance of power. Defending majority rule against the critiques of public choice theorists, I argue it offers a fair and impartial procedure that is unlikely to produce either irrational or tyrannical decisions. Rather, it provides an open way whereby all citizens can feel their views and interests have received equal consideration. Meanwhile, competition between political parties in elections and parliament offers a balance of power that renders governments attentive and answerable to the electorate, and citizens tolerant of each other and willing to reciprocate and collaborate. I conclude by exploring a number of potentially hard cases, where the mechanisms that for the most part render legislation equitable and attentive to rights might fail to operate. As I show, legislatures neither perform so poorly nor courts so well for these exceptional cases to provide the basis for a general argument for rights-based judicial review.

Legal and political constitutionalism have often been identified with the American and British political systems respectively. The tendency to take an idealised version of the US Constitution as a model has been particularly prevalent among the highly influential generation of liberal legal constitutional theorists who grew to intellectual maturity under the Warren Court.[18] As a result, despite subsequent research revealing its role to have been atypical and its influence much exaggerated,[19] decisions such as *Brown*[20] have attained a certain iconic status in the legal constitutionalist literature, with the many less congenial Supreme Court judgements simply put to one side.[21] Likewise, parliamentary sovereignty and the Westminster model – no doubt often similarly idealised, if less influential – has frequently provided the model for political constitutionalists.[22] For that reason, I will often illustrate aspects of my argument with examples drawn from these two systems. However, it would be misleading to characterise my argument as a critique of US-style judicial review and a defence of the UK system pre-Human Rights Act. For a start, as I noted above, these two types of constitutionalism exist within most constitutions. There has always been a legal constitutionalist strand within British constitutional culture, and historians have long stressed the republican and political thread running through the American as well as the British constitutional tradition.[23] As a result, I cite evidence to back my criticisms of legal constitutionalism and its supporters from both systems, and align myself in each case with those who have stressed the merits of the political constitutionalist aspects of the American as well as the British polity.[24]

18 For example, the influence of the Warren era is discernible in Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise', e.g. p. 16, and – in a different way – even more in Ely, *Democracy and Distrust*, pp. 73–5. Though Rawls does not cite either *Brown* or *Roe*, his *Political Liberalism*, New York: Columbia University Press, 1993 is as much an idealisation of US constitutional arrangements and the role of the Supreme Court within them as is, in different ways, Dworkin's theory of judicial interpretation in *Law's Empire*, Oxford: Hart, 1998.

19 E.g. G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago: University of Chicago Press, 1991.

20 *Brown v Board of Education* 247 US 483 (1954), 349 US 294 (1955).

21 For comments on this tendency, see L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, New York: Oxford University Press, 2004, pp. 229–30; I. Shapiro, *The State of Democratic Theory*, Princeton: Princeton University Press, 2003, pp. 20–21.

22 E.g. J. G. A. Griffith, 'The Political Constitution', *Modern Law Review*, 42 (1979), pp. 1–21.

23 E.g. J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton: Princeton University Press, 1975.

24 On the US context, I have been most influenced by M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton: Princeton University Press, 1999, Dahl, *How Democratic*

At the same time, my concern is to criticise the very idea of legal constitutionalism and not just its US and British versions.[25] After all, it might be objected that in many European countries, notably Germany, constitutional judicial review operates rather differently, for example in being more appreciative of social rights, and so avoids certain of the problems I identify in British and US judgements. Though I think these substantive differences are overdrawn, particularly as the European Union promotes both economic liberalisation and a more adversarial and legalistic regulatory style on the Continent,[26] my main focus is with the procedural legitimacy of constitutional courts striking down democratically enacted legislation. In this regard, Continental European courts have been even more proactive than the US Supreme Court, with French, Italian and German courts invalidating more national laws in the past thirty years than it has over the course of its entire history.[27] As in the United States, the justification for such actions comes from counter-majoritarian arguments – often inspired by British and American practices – that largely predate modern democratic processes, being established during the nineteenth and early twentieth centuries. Meanwhile, as Unger observes in the quote cited above, those who have tried to give legal constitutionalism a democratic foundation have tended to do so in relation to a somewhat idealised form of democracy that similarly antedates mass electorates and contemporary party systems.[28] Indeed, this propensity is shared by many of the scholars behind the republican revival whose writings have to some

Is the American Constitution?, and, with the caveats expressed in chapter 3, Kramer, *The People Themselves*. For the British context, I draw on the work of Griffith, 'The Political Constitution' and his *The Politics of the Judiciary*, London: Fontana, 1977, the work of K. Ewing and C. Gearty in *Freedom under Thatcher: Civil Liberties in Modern Britain*, Oxford: Oxford University Press, 1990 and *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914–1945*, Oxford: Oxford University Press, 2001, and A. Tomkins, *Our Republican Constitution*, Oxford: Hart, 2005.

25 In this respect, I follow the approach taken by Waldron in *Law and Disagreement* and 'The Core of the Case Against Judicial Review', *The Yale Law Journal*, 115 (2006), pp. 1346–406.

26 See R. D. Kelemen and E. C. Sibbitt, 'The Globalisation of American Law', *International Organization*, 58 (2004), pp. 103–36.

27 A. Stone Sweet, 'Why Europe Rejected American Judicial Review. And Why it May Not Matter', *Michigan Law Review*, 101 (2003), p. 2780.

28 For example, Habermas's influential arguments, that idealise German constitutional arrangements in a parallel manner to the way Rawls idealises those of the United States, contrast 'normative' with 'empirical' accounts of democracy (Habermas, *Between Facts and Norms*, ch. 7), a distinction that clearly harks back to his account of the eighteenth century 'public sphere' and its undermining in the nineteenth century in his very first book on the *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Cambridge: Polity, 1989. I discuss his arguments in chapter 3.

degree inspired this project. Yet, in arguing that we must look instead to the constitutionality of 'actually existing democracy' I do not wish to idealise these arrangements in their turn and suggest any, least of all the British, are by any means perfect. Rather, just as the critique of legal constitutionalism centres on the inner rationale of constitutional judicial review, so my defence of democracy relates to the underlying logic of existing practices. Because political theory is often divorced from political science, many theorists have failed to explore the mechanisms of democratic politics and so appreciate their normative qualities. The chief aim of this book is to draw attention to these virtues of the democratic process and suggest that the constitutional goods of rights and the rule of law would be better served by developing rather than curtailing them via less effective and legitimate legal constitutional constraints.

PART I

Legal constitutionalism

1

Constitutional rights and the limits of judicial review

Central to legal constitutionalism is the idea of constitutional rights. Constitutions do many things beyond enshrining rights. But probably nothing has been so influential in driving constitutionalism along the paths of legal rather than political thought than the emphasis on rights, their entrenchment in a constitutional document and their interpretation and elaboration by a supreme or constitutional court. It is this rights focus that gives contemporary constitutionalism its whole juridical cast, whereby a constitution's task is viewed as being to embody the substance of fundamental law rather than to provide a fundamental structure for law-making.

Of course, few people would deny that individuals have certain fundamental interests that should be legally and politically protected. However, a commitment to rights is different to assuming their protection requires their entrenchment in a bill of rights overseen by a constitutional court. Three reasons standardly motivate this position and lie at the heart of legal constitutionalism.[1] First, rights-based judicial review is said to guard against majority tyranny and fecklessness. Though democracy offers a vital mechanism for citizens to pursue their interests and throw out governments that wilfully or negligently override them, prejudice, self-interest or simple thoughtlessness can lead majorities to pass legislation that oppresses minorities or even unwittingly works against their own concerns. Second, the integrity of law is said to depend on rights. Laws often allow more than one interpretation when applied to a given case, or have to be adapted to novel circumstances. In such hard cases, rights are said to provide the principles needed to guide judges towards a decision consistent with the basic values underlying the legal system as a whole. Third, certain rights are said to be implied by the democratic

[1] For a useful summary of these arguments, see R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press, 1996, 'Introduction: The Moral Reading and the Majoritarian Premise'.

process itself. Consequently, for a democracy to infringe rights would be self-defeating and inconsistent with its very rationale.

The three chapters comprising Part I of this book will challenge respectively all three arguments of this current orthodoxy. I shall question their underlying assumption that democracy and judicial review are best seen as the means to realise a particular account of rights – be it the account derived from a given, supposedly ideal, theory of justice, that allegedly held by the community, or one presumed to underlie the very idea of a constitutional democracy. Rather, these two mechanisms offer procedures for fairly adjudicating between alternative and occasionally conflicting accounts of rights. Seen in this light, democratic decision-making, including majority rule, is revealed as buttressing rather than threatening rights, as is often assumed. Meanwhile, judicial review performs the more modest, if no less vital, role of maintaining consistency through both the casuistical interpretation of the law and by supplying a means of challenging failures to apply it in an equitable manner.

The need for this alternative and more political approach arises from the contested nature of rights. Despite widespread support for both constitutional rights and rights-based judicial review, theorists, politicians, lawyers and ordinary citizens frequently disagree over which rights merit or require such entrenchment, the legal form they should take, the best way of implementing them, their relationship to each other, and the manner in which courts should understand and uphold them. These are often reasonable differences that are liable to arise in most open and democratic societies. They stem not from any neglect or carelessness about rights but from taking them very seriously indeed. Such disputes rarely involve a questioning of rights *per se*. In fact, there is often broad agreement at the level of abstract principle at which bills are usually framed, though dissent can arise here too.[2] But the interpretation and application of rights to particular circumstances are frequently the source of profound debate and conflict. In these circumstances, ambitious schemes of judicial review that ignore, unduly minimise or somehow seek to trump such disagreements over the meaning and bearing of rights prove hubristic. They risk making judicial decisions appear arbitrary, thereby threatening the legitimacy of the constitution.

This chapter explores the reasons behind disagreements about rights and the weaknesses of judicial review as a forum for resolving them.

[2] See R. Bellamy and J. Schönlau, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights', *Constellations*, 11:1 (2004), pp. 412–33.

The first section outlines the nature of the constitutional rights project and certain tensions within it. The second section then considers the sources and types of disagreement about rights, locating them within the circumstances of politics. The third section casts doubt on the legitimacy and effectiveness of judicial review as a mechanism for fairly adjudicating these disagreements. Many of the alleged advantages over democratic processes prove on further investigation to be disadvantages. Finally, the fourth section questions whether a bill of rights is necessary to create a culture of rights. This discussion sets the scene for investigating in chapters 2 and 3 how far judicial reasoning and the rule of law depend on constitutional rights, and whether democracy implies a set of rights requiring constitutional protection.

I Constitutional rights and 'the circumstances of justice'

We need rights because of what John Rawls, elaborating on David Hume, termed 'the circumstances of justice': namely, 'the normal conditions under which human cooperation is both possible and necessary'.[3] If there was a superabundance of resources and human beings were unfailingly altruistic (and, it should be added, omniscient too, and so not prone to inadvertently doing the wrong thing), there would be no need for rights.[4] Everyone could pursue their own plans in their own way while avoiding hindering the similar pursuits of others. However, when resources are even moderately scarce and people prone to careless and sometimes malicious behaviour, then, given the inevitability of social coexistence, it becomes necessary to have some common rules capable of coordinating individual activities. Of course, any social and legal rules will stabilise human relations to a degree and create certain rights of either a customary or institutional character. After all, it is ordinary legislation that details what rights we can claim in particular circumstances, indicates precisely who is entitled to a given benefit, such as social security, and lays down when and how it can be requested and provided. Yet, as we shall see in the next chapter, legal rules may not be that just or fair. They can unjustifiably discriminate against (and implicitly or explicitly unduly favour) certain groups of people, even if whatever stability of expectations they do offer helps promote an individual's ability to plan and act freely.

To avoid the possibilities of unjust or unfair law, constitutional bills of rights aspire to operate as a higher law that can be deployed to ensure

[3] J. Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971, pp. 126–30.
[4] R. Bellamy, *Rethinking Liberalism*, London: Pinter, 2000, pp. 152–5.