Introduction

The Call for Collaboration

1 Collaboration Calling

Which branch of government should we trust to protect rights in a democracy? Some take a court-centric approach to this question, arguing that the courts provide a 'forum of principle'[1] which makes judges uniquely situated to protect rights against the feared and fabled 'tyranny of the majority'. Others urge us to put our faith in the democratic legislature as a supremely dignified, diverse, and deliberative forum which can protect our rights against the oligarchic offensive of an ermined elite.[2] Rejecting the binary options of either the courts or the legislature, this book argues that protecting rights is a collaborative enterprise between all three branches of government, where each branch has a distinct but complementary role to play whilst working together with the other branches in constitutional partnership. Instead of advocating the hegemony and supremacy of one branch over another, this book articulates a collaborative vision of constitutionalism where the protection of rights is a shared responsibility between all three branches. On this vision, protecting rights is neither the solitary domain of a Herculean super-judge nor the dignified pronouncements of an enlightened legislature. Instead, it is a complex, dynamic, and collaborative enterprise, where each branch of government plays a valuable role whilst treating the other branches with comity and respect.

In making the case for the collaborative constitution, this book inscribes itself into a longer trajectory of scholarly attempts to work out which branch should protect rights in a democracy. In Chapter 1, I begin by exploring the Manichean narrative of 'courts versus legislature' and

[1] Dworkin (1985).
[2] Waldron (1993b); Webber et al. (2018).

'political versus legal constitutionalism'[3] which dominated the scholarly discourse on protecting rights in the late twentieth century. Rejecting these alternatives as false dichotomies between polarised extremes, I argue that we need to move 'beyond Manicheanism'.[4] Beyond the binaries of 'heroes versus villains' and 'good versus evil', this book offers a less dramatic but more realistic account of institutional roles, where all three branches of government are presented as 'imperfect alternatives',[5] each with its fair share of pros and cons. Whatever virtues the branches of government possess, I argue that they are necessarily 'partial virtues which must be integrated into an institutionally diverse constitutional order'.[6]

Instead of embracing 'nirvana solutions'[7] where paragons of principle are pitted against oligarchic ogres, what is urgently needed to advance this debate is a more grounded and granular institutional account which acknowledges the valuable, but necessarily imperfect, contributions of all three branches of government in a differentiated division of labour. The aim of this book is to provide that account. Once we accept that the protection of rights needs both legislation and adjudication – both elected politicians and independent judges – the key task, then, is to work out how these institutions act, interact and counteract in a complex, collaborative scheme. Abandoning the Manichean battlefield where democracy is presented as 'constitutionalism's nemesis'[8] and constitutionalism is portrayed as 'the constant object of a democrat's fear and suspicion',[9] this book recasts the debate in collaborative rather than purely conflictual terms. Between the dramatic forces of light and darkness, this book explores the many shades of grey.

In the twenty-first century, scholars began to explore ways of transcending the binary framing of this debate and the antagonistic picture on which it rests. Inspired by innovations in constitutional design in the UK and Commonwealth countries, scholars argued that we should view the relationship between the branches of government as a dialogue.[10] Instead of positing the hegemony of one branch over the other, the courts

[3] Kavanagh (2019).
[4] Hilbink (2006).
[5] Komesar (1994).
[6] Whittington (2000) 693.
[7] Komesar (1994) ix.
[8] Waldron (2016) 38.
[9] Ibid 38.
[10] Hogg & Bushell (1997); Sigalet, Webber & Dixon (2019a).

and the legislature could each have a say, albeit with the fall-back of legislative finality in circumstances of disagreement. Yet, whilst the metaphor of dialogue usefully highlighted the interaction between the branches, Chapter 2 argues that it lacked the analytical resources to capture the complexity of the constitutional relationships between the branches of government.[11] The malleability of the metaphor meant that it could be applied to any form of inter-institutional interaction, ranging from polite conversations between friends to no-holds-barred shouting matches between enemies locked in combat. For that reason, the idea of dialogue failed to take us beyond the Manichean narrative of 'courts versus legislature' and 'rights versus democracy'. In fact, it resurrected the antagonistic narrative, shifting the debate to which branch should get 'the last word'[12] in the dialogue: the legislature, as 'political constitutionalists' preferred, or the courts, as 'legal constitutionalists' claimed.[13] With its fixation on legislative finality and override of courts, the Manichean narrative reappeared in dialogic clothing.

In order to make sense of the subtleties of the relationships between the branches, this book argues that we need to dig deeper into the foundations of constitutional democracy, anchoring our analysis in a plausible and attractive account of the roles and relationships between the branches of government. In short, we need to ground our analysis in a conception of the constitutional separation of powers. This book makes the case for collaboration as the guiding value of such an account. Instead of squaring off against each other to get the last word on rights in fierce constitutional combat, or having a cosy constitutional conversation on the meaning of rights, the central chapter of this book – Chapter 3 – argues that they must work together in constitutional partnership marked by the values of comity, collaboration, and conflict management. On this vision of constitutionalism, the branches of government are not enemies at war. But they are not friends either. Instead, they are partners in a collaborative enterprise, where they are required to treat each other with constitutional comity and respect.

At the heart of this book lies a relational and collaborative conception of the separation of powers, where distinct branches of government perform different institutional roles whilst working together in a collaborative

[11] Kavanagh (2016a).
[12] For 'a hard look at the last word' in constitutional discourse, see Kavanagh (2015a).
[13] Bellamy (2011) 91–2; Kavanagh (2019) 56.

constitutional scheme.[14] When we look at how the branches of government carry out their distinctive roles, it is clear that they are not 'satellites in independent orbit'.[15] Instead, they are interdependent and interrelated actors who must work together in a system of 'separateness but interdependence, autonomy but reciprocity'.[16] Rather than viewing the separation of powers as a prescription for solitary confinement with 'high walls'[17] between the branches, this book explores the constitutional norms of respect and restraint, fortitude and forbearance, which frame and shape the interactive engagement between them. Beyond 'high walls', this book builds bridges. Delving deep into the interactive dynamics between the branches, it explores the myriad modes of constructive engagement which form 'the connective tissue'[18] between the different arms of government in a healthy body politic.

The collaborative constitution does not overlook the critical role of robust checks and balances between the branches. On the contrary, such checks and balances are partly constitutive of the collaborative enterprise. Comity and contestation are not mutually exclusive activities. However, alongside contestation, critique and mutual oversight, this book also discerns the inter-institutional dynamics of mutual respect and mutual support as the branches carry out their distinct but interconnected tasks. Situating checks and balances within a broader collaborative endeavour, my account emphasises that the branches of government 'do not merely counteract protectively; they also interact productively'.[19] In place of a static vision of separated functions and isolated authorities, the separation of powers is thus recast in relational terms as a dynamic process of interaction and engagement, framed and shaped by the norms of mutual respect, restraint and 'role recognition'[20] in a collaborative constitutional scheme.

So what is collaboration? Collaboration is the act of working together with others. As its etymology reveals, the ideas of combined labour and joint effort lie at its core.[21] In the constitutional context, collaboration

[14] Kavanagh (2022); Kyritsis (2017); Cartabia (2020).
[15] Bingham (2000) 230.
[16] *Youngstown Sheet and Tube Co v Sawyer* 1953 343 US 579, 635 (Jackson J); Kavanagh (2016b) 235ff.
[17] *Plaut v Spendthrift Farms Inc* 514 US 211 (1995) (Scalia J).
[18] Greene (2018) 94, 103; MacDonnell (2019) 204; McLean (2018) 412–13.
[19] Hickman (2005a) 335.
[20] Hodge (2015) 474; Kavanagh (2022) 539–41
[21] 'Collaboration' comes from the Latin *collaboratus* meaning 'to labour together' – *com* (with) and *laborare* (to labour or work).

refers to a shared commitment by diverse actors to carry out their responsibilities in mutually responsive and respectful ways as part of a joint endeavour oriented towards a common goal.[22] Collaboration is a complex kind of 'acting together'[23] marked by three features: (1) mutual responsiveness; (2) mutual respect and support; and (3) a commitment to the joint enterprise as a 'shared cooperative activity'.[24] To be clear, collaboration does not require consensus or conformity. Nor does it require identity or even equality between the parties in the collaborative effort. On the contrary, collaboration 'signposts the coming together of distinct elements, espousing complementary goals but responding to a different set of incentives'.[25] Indeed, the value and point of many collaborative endeavours is precisely the desire to reap the collaborative advantage of combining a diverse range of abilities, aptitudes, skills, and perspectives in the joint resolution of a complex problem. Therefore, the collaborative constitution has institutional heterogeneity at its core. Embracing a 'principled plurality of governing institutions',[26] the collaborative constitution envisages a joint enterprise where each branch makes a distinct but complementary contribution to the joint constitutional effort. Achieving just government under the constitution is a 'common goal, differently realised'.[27]

Throughout this book, I use the term 'constitutional constitutional*ism*' in order to capture the dynamic and diachronic dimension of constitutional government as a 'going concern'[28] and a 'work in progress'.[29] Recalling the metaphor of constitutionalism as 'rebuilding the ship at sea',[30] I emphasise that this constitutional 'building' and 'rebuilding' is an ongoing, collaborative effort which requires all hands on deck in order to keep the ship afloat and maintain it on an even keel.[31] Instead of framing the separation of powers solely as a set of sanctions for constitutional malfeasance, or as a negative admonition to 'mind the

[22] Bratman (2014); Dyzenhaus (2006) 4–5.
[23] Gardner (2002) 495; Kutz (2000).
[24] Bratman (1992); Bratman (2014) (providing a philosophical analysis of the nature of 'shared cooperative activity').
[25] Joseph (2004) 334; Carolan (2016a) 221–5.
[26] Sabl (2002) 15.
[27] Levi (1976) 391; Jackson (2016) 1718; Bateup (2006) 1169
[28] Balkin (2016) 242–3; Vermeule (2007) 245ff.
[29] Paris (2016) 26; Bell (2016) 421ff; Balkin (2016) 241; Leckey (2015) 19; Dyzenhaus (2012) 257.
[30] Elster, Offer & Preuss (1998); Vermeule (2007) 245.
[31] Craiutu (2017) 20, 159; Daly (2017) 280ff.

institutional gaps', the collaborative constitution also embraces a form of positive constitutionalism which calls on the branches to care for the connections between them.[32]

Once we adopt a 'wide-scope vision of the constitutional order'[33] which encompasses multiple institutions, this raises the question of how we can bring diverse institutional perspectives together, combining them in a workable *system* of constitutional government or a 'constitutional *order*' as it is sometimes called.[34] After all, if there is a 'polyphony'[35] of constitutional voices, each singing to a different tune, this runs the risk of having either a variety of competing virtuoso performances or a constitutional cacophony with no coordination between them. The answer offered in this book is that constitutional government is an ensemble piece not a virtuoso performance, where each branch plays a different role as part of a broader collaborative enterprise whilst remaining responsive to – and respectful of – the distinct contributions made by their fellow participants in the constitutional scheme. This does not require each contributor to the collaborative process to play the same tune on the same instrument at exactly the same tempo. Nor does it require them to achieve perfect constitutional harmony. On the contrary, the aim of the collaborative constitution is to combine the different tones, timbre and tempo of many voices, where each participant acknowledges their distinctive role *as part* of a broader collaborative effort whilst respecting and supporting the valuable contribution of their fellow participants. Sometimes in harmony, sometimes in counterpoint – and sometimes with syncopated rhythms, discordant contributions, and a few wrong notes along the way – the constitutional actors must recognise their own voice – and those of their fellow contributors – as one amongst many.[36] What combines them together in a shared collaborative activity is their mutual responsiveness, recognition and commitment to each other, and to the larger ensemble piece.

Working together with others in a constructive, long-term partnership over time is hard work. Not only does it require each of the partners to

[32] Kavanagh (2019); Appleby, MacDonnell & Synot (2020) 447; Dyzenhaus (2006) 5.
[33] Kyritsis (2017) 6; also see Kavanagh (2019) 63.
[34] Möllers (2013) 44.
[35] Kyritsis (2017) chapter 2 (providing 'a moral map of constitutional polyphony'); Craiutu (2017) 23–4, 49 (describing constitutional governance as a 'complex polyphony'); Waldron (1999a) chapter 3 (applying the metaphor of 'many voices' to the legislature); Schapiro (2009) (on 'polyphonic federalism'); Bratman (1992) 327ff.
[36] Rosenblum (2008) 7, 12.

carry out their respective roles with integrity, commitment, and professionalism, it also requires them to exercise some *self-discipline*, which manifests in norms of mutual respect, self-restraint, and self-control. This self-control is necessary in order to keep the partnership going over the long haul. Accepting the complexity of comity and counterbalancing, contestation and collaboration, tension and tolerance in the collaborative constitutional order, I characterise the relationship between the branches of government as a difficult but dynamic *constitutional partnership in progress*.

Three leitmotivs are woven into the tapestry of the book, and bear emphasis at the outset. These are: *constitutional relationships, unwritten constitutional norms*, and *constitutional restraint*. Let us start with the idea of *constitutional relationships*. In many ways, this is a book about relationships. Resting on the insight that 'constitutions are shaped by the working relationships between their principal institutions',[37] this book presents constitutional government as a relational phenomenon, forged in a complex web of ongoing relationships between a multiplicity of constitutional actors.[38] Once we appreciate constitutional government *as relational*, new and exciting lines of constitutional inquiry come into view. Instead of asking 'who is the ultimate arbiter of rights: the courts or the legislature?', we can reject the false dichotomy presupposed by the question and acknowledge that all three branches of government have a shared responsibility for upholding rights. Shifting our focus 'from rivals to relationships',[39] we can begin to examine the health of those relationships, uncovering the norms of respect, restraint, and reciprocity which frame and shape the relational dynamics in a healthy body politic.[40]

The focus on relationships has other analytical payoffs. For one thing, it 'renders visible a number of constitutional actors and dynamics that are often invisible on traditional accounts'.[41] Widening the cast of key constitutional actors 'beyond the usual constitutional coterie',[42] this book appreciates civil servants, legal advisers, parliamentary drafters, the Loyal Opposition, the Upper Chamber of a bicameral legislature, the Attorney General and many more as key constitutional actors, each embedded in a

[37] Griffith (2001) 49; Kavanagh (2019) 50.
[38] On the relational nature of constitutionalism, see Cartabia (2020); Kavanagh (2019); Kavanagh (2022); Appleby, MacDonnell & Synot (2020); Weis (2020b) 625.
[39] Kavanagh (2019).
[40] Appleby, MacDonnell & Synot (2020) 448; Cartabia (2020) 3ff.
[41] Appleby, MacDonnell & Synot (2020) 439.
[42] Ibid 449.

'dense collaborative network'[43] within, between and beyond the branches of government. Recasting the separation of powers in relational terms, we can shift the focus away from the febrile adversarialism of the Manichean narrative towards a more productive inquiry into the interactive dynamics and collaborative interplay between the key constitutional actors. Putting constitutional relationships at the heart of our constitutional understanding, this book takes up the challenge of analysing the relational interplay between a multiplicity of actors, whilst articulating the normative values, constitutional virtues, and practical institutional skills required to make constitutional relationships work.

The second, and related, theme concerns the fundamental role of *unwritten constitutional norms* which lie at the foundation of the collaborative constitution. By 'unwritten constitutional norms',[44] I mean the rules, norms, and practices of constitutional government 'accepted as obligatory by those concerned in the working of the constitution'.[45] Though neither required nor enforced by law, these non-legal rules nonetheless provide the 'basic ground rules of constitutional practice'[46] – the constitutional rules of the game which are binding as a matter of 'constitutional morality'.[47] Whilst the written constitutional rules may specify the *powers* of the branches of government, it is the unwritten constitutional norms which articulate the constitutional *responsibilities* which attach to those powers.[48] These norms regulate the roles and relationships between the branches of government.[49] They put flesh on the bones of the body politic.

In the UK and Commonwealth constitutional orders, these unwritten constitutional norms have a particular salience. Known as 'constitutional conventions',[50] they distribute responsibilities and facilitate collaboration between 'the major organs and officers of government'.[51] They are 'the hidden wiring'[52] on which the constitutional system depends. Yet, whilst these norms are often associated with the Anglo-Commonwealth

[43] Krisch (2010) 228; Cohn (2013) (on 'network governance').
[44] Elster (2010).
[45] Marshall (1984) 7.
[46] Wilson (2004) 420
[47] Dicey (1964) 24.
[48] Jennings (1959) 81–2; Halberstam (2004) 734.
[49] Elster (2010) 21; Pozen (2014) 30.
[50] Marshall (1984).
[51] Ibid 1; Pozen (2014) 30.
[52] Hennessy (1995).

constitutional tradition, they are no mere peculiarity of the uncodified constitution. In fact, *all* constitutions rely to a significant extent on unwritten norms of constitutional behaviour, which frame and shape the roles and relationships between the branches of government.[53] Indeed, all constitutions ultimately rest on the most fundamental norm of all, namely, that the key branches of government must recognise and accept the constitution as an authoritative framework for their behaviour and for the polity as a whole.[54] Thus, even the most comprehensively crafted 'written constitution' ultimately rests on political will and constitutional commitment by the key political actors to abide by the constitutional rules of the game.[55] Absent that fundamental commitment, the constitution becomes a hollow hope, a parchment barrier devoid of authority because the key constitutional actors do not recognise it as binding on their behaviour.

The salience and significance of these norms for any well-functioning constitutional system is put into stark relief in contemporary times. In the vast literature on constitutional corrosion and democracy decay across the world, the deepest lament amongst constitutional lawyers is that powerful political figures are violating the 'unwritten democratic norms'[56] of mutual toleration, respect, and forbearance on which a well-functioning constitutional democracy depends. Leading American scholars observe that much of Donald Trump's 'most vexing political behaviour challenge[d] not the interpreted Constitution, but the unwritten norms that facilitate comity and cooperation in governance'.[57] In an insightful analysis, political scientists Steven Levitsky and Daniel Ziblatt emphasise the pivotal importance of norms of respect for the constitutional rules of the game and the 'shared codes of conduct'[58] about how political actors are expected to behave. Without such foundational rules, constitutional practice descends into chaos and corrosive conflict.[59]

[53] Griffith (2001) 43; Gardner (2012) 89; Fallon (2001) 8; Levinson (2011) 697ff; N Siegel (2017); Pozen (2014) 30ff (on the role of 'unwritten constitutional norms' in the US system); Dixon & Stone (2018) (on 'the invisible constitution in comparative perspective'); MacDonnell (2019); Endicott (2021) 14–15; Taylor (2014) (on conventions in German constitutionalism).
[54] Hart (2012) chapters 5 & 6 (famously describing this as the 'rule of recognition').
[55] Levinson (2011); Chafetz (2011).
[56] Levitsky & Ziblatt (2019) 8, 100ff.
[57] Pozen (2014) 9; Greene (2018); Balkin (2018) 24–8.
[58] Levitsky & Ziblatt (2019) 101.
[59] Pozen (2014) 9.

Indeed, if the key political actors stop observing those norms, then the constitutional checks and balances we rely on for security against constitutional abuse 'cannot serve as the bulwarks of democracy we imagine them to be'.[60]

This underscores the foundational Hartian point that all legal systems ultimately rely on a commitment of the key constitutional actors to abide by the rules of the constitutional game and treat them 'as normative'.[61] Beneath the constitutional architecture of legal rules lies constitutional attitudes as political norms. As Mattias Kumm observed, 'at the heart of constitutionalism is not a constitutional text but a constitutional cognitive frame'.[62] Instead of embracing the idea of 'constitution as architecture',[63] therefore, this book foregrounds the idea of 'constitutionalism as mindset',[64] grounded in the norms and beliefs, the attitudes and actions, the dispositions and commitments of the constitutional actors to make the system work. When Donald Trump became President of the United States, his 'norm-breaking' behaviour highlighted the fundamentality and fragility of these 'unwritten rules'[65] to a well-functioning constitutional order – norms which had been largely invisible to American constitutional scholars in previous generations because they had been taken for granted in a relatively well-functioning system. One of the aims of *The Collaborative Constitution* is to bring to these 'unwritten' norms to the surface of constitutional analysis, rendering them visible for all to see.

The third leitmotiv which echoes across this book is the theme of *constitutional restraint*. In all long-term working relationships, discord and disagreement, arguments and acrimony will inevitably arise at times. A healthy long-term relationship built on the firm foundations of mutual commitment, respect, and restraint can weather these storms, enabling the partners – and the partnership as a whole – to move forward in a constructive and collaborative fashion. However, if these flashpoints of friction become the pervasive, persistent and endemic mode of inter-institutional interaction, then this will undermine the fundamental norms of respect, trust and mutual recognition on which the working constitution depends.

[60] Levitsky & Ziblatt (2019) 7.
[61] Green (2012) xxi.
[62] Kumm (2009) 321.
[63] Bator (1990).
[64] Koskenniemi (2006).
[65] Levitsky & Ziblatt (2019) chapter 6 (on 'The Unwritten Rules of American Politics').

In order to avoid a downward spiral of escalating animosity and entrenched antagonism, the key constitutional actors need to carry out their constitutional roles with a modicum of constitutional restraint. Therefore, mutual respect begets mutual restraint, which bespeaks a concern to channel, constrain and manage interbranch conflict and rivalry in constitutionally constructive ways. Collaboration does not naively suggest an absence of tension or conflict between the branches. Instead, it discerns a duty of mutual respect and restraint between interdependent actors who have a responsibility to make the constitutional partnership work. If constitutions are shaped by the working relationships between the key constitutional actors, then there is a duty on all branches of government to work on their relationships and to treat each other with constitutional civility and mutual respect. On the collaborative vision, contestation and conflict must be mediated by the norms of comity, civility and collaboration. Fierce disagreement must be moderated by forbearance and a commitment to constitutional fair play.[66] Instead of celebrating interbranch conflict in the form of dramatic *constitutional showdowns*,[67] the collaborative constitution emphasises the quotidian demands of *constitutional slowdown* as a preferable *modus vivendi* for a successful long-term partnership over time.

In mapping the contours of the collaborative constitution, this book seeks to provide a new linguistic register in which to analyse constitutional dynamics, one that 'sounds more in responsibility and restraint'[68] than in conflict and confrontation. The collaborative constitution emphasises an 'ethics of responsibility'[69] and a collaborative mindset which frames and shapes inter-institutional engagement over time. Whilst leading theoretical accounts of constitutional government emphasise the inevitability of disagreement, foregrounding a conflictual narrative of 'constitutional hardball',[70] this book seeks to reorient the inquiry towards more constructive questions about how to manage, channel and frame those disagreements in order to make them politically productive in a constitutional democracy. Of course, we are naturally fascinated by the agonistic drama of high-stakes conflict and constitutional showdowns. Conflict sells copy, whilst quiet collaboration, compromise and civility behind the

[66] Levitsky & Ziblatt (2019) 107, 213; Heclo (2008) 3.
[67] Posner & Vermeule (2008).
[68] Pozen (2014) 63.
[69] Weber (1919) 32; Sabl (2002) 168; Chafetz (2011).
[70] Tushnet (2004); Balkin (2008).

scenes is hardly newsworthy. We are transfixed by narratives of 'competing supremacies'[71] locked in a 'contest for constitutional authority'.[72]

Yet, by focusing on the blockbuster cases and fiery flashpoints of political friction, we 'guarantee drama at the expense of perspective'.[73] We also risk mistaking the exception for the norm, thereby distorting our overall vision of the constitutional dynamics at stake. In calling for collaboration, this book aims to seed a more productive conversation about the laborious requirements of constitutional process, where constitutional actors agree to play by the rules of the game, acting in accordance with the demanding constitutional role-imperatives of a collaborative constitutional scheme. Though admittedly less glamorous and less dramatic than 'constitutional showdowns', these are the requirements that make constitutional democracy work. We may spend our evenings transfixed by cinematic narratives about relationships breaking down, but this book explores the quotidian practices of making long-term constitutional relationships work. Turning our backs on the high-octane drama of friction and rupture – where the key constitutional actors face off against each other in a heightened state of conflict and crisis – this book documents the slow, painstaking, and often invisible labour of developing constitutional meaning collaboratively over time.

Whilst leading theoretical accounts champion the idea of full-blooded disagreements on questions of justice, this book focuses on how such disagreements are negotiated, constrained and ultimately resolved in a constitutional democracy. One of the most basic rationales of constitutional government is to 'prevent the day-to-day political competition from devolving into no-holds-barred conflict'[74] and to manage disagreements about how to proceed as a political community.[75] The norms of

[71] Hunt (2003) 337; Dyzenhaus (2006) 7.

[72] Burgess (1992). Other book titles reveal our fascination with conflict: see e.g. Geyh (2006) (*When Courts and Congress Collide*); Burt (1992) (*The Constitution in Conflict*); Hampshire (2000) (*Justice Is Conflict*). For the related focus on constitutional crisis, see Graber, Levinson & Tushnet (2018a) (*Constitutional Democracy in Crisis?*) (though note the question mark); Runciman (2019) (*How Democracy Ends*); Levitsky & Ziblatt (2019) (*How Democracies Die*).

[73] Sabl (2002) 3.

[74] Issacharoff (2018) 449; Ginsburg & Huq (2016) 19; Ginsburg & Huq (2018); Balkin (2018) 15–16.

[75] Loughlin (2003) 39; Carolan (2009) 4; Levinson & Balkin (2009) 714 ('Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries').

collaborative constitutionalism are the keystone of that effort. In order to make the constitutional partnership work, this book draws on a cluster of undramatic though deeply demanding constitutional virtues, including comity,[76] forbearance,[77] civility,[78] moderation,[79] trust,[80] compromise,[81] democratic discipline, and constitutional self-restraint.[82] These are the virtues, traditions, and practices which are central to 'making democracy work'.[83] They lie at the heart of the collaborative constitution.

2 The Collaborative Constitution as Practice and Principle

In developing and defending the idea of the collaborative constitution, the argument of this book is forged through an iterative engagement between abstract theory and constitutional practice, perennially testing theoretical claims against common features of that practice. Proceeding in the mode of a 'reflective equilibrium',[84] I investigate how abstract propositions square with familiar features of constitutional practice, and then return to the theoretical inquiry with a series of insights, puzzles and problems which any credible constitutional theory must explain, or explain away. In striving to make sense of the roles and relationships between the branches of government in a constitutional democracy, I draw on the deep well of analytical legal philosophy, political theory, and constitutional theory. But I also take constitutional practice seriously as generative of its own insights and inspiration for the theoretical and comparative scholar.[85] Connecting theory and practice in a dialectical process of mutual correction, creative insight and critical import, I adopt

[76] On comity, see Endicott (2015a); Katzmann (1988).
[77] On forbearance, see Levitsky & Ziblatt (2019) 102, 106–7, 127–8, 212; Holland (2016).
[78] On civility and civic culture, see Bejan (2017); Calhoun (2000); Carter (1998); Shils (1997); Almond & Verba (1989); Bellah et al. (2008); Craiutu (2017) 23–5, 155–9.
[79] On moderation, see Craiutu (2012), (2007); Rosenblum (2008) 121
[80] On trust, see O'Neill (2002); Putnam (1994) 15, 89–90, 171–80. On the role of trust in 'making and breaking cooperative relations', see Gambetta (1988); Kramer (2000); Axelrod (1990).
[81] On compromise, see Gutmann & Thompson (2014); Fumurescu (2013); Margalit (2010); Sabl (2002) chapters 1 & 2; Craiutu (2017) 27–32, 119–20, 212–16, 222–3; Weinstock (2013).
[82] On the value and virtue of 'democratic restraint', see Wall (2007); Sabl (2002) 48.
[83] Putnam (1994); Stoker (2006).
[84] Rawls (1971) 18–22, 46–53; Pettit (2012) 20; Rosenblum (1998) 19.
[85] Kyritsis (2012) 299; Fallon (2001) chapter 1.

a theoretically informed but empirically grounded perspective which is internal to constitutional practice.[86]

One question which arises is whether the collaborative constitution *describes* a particular constitutional system or, alternatively, whether it *prescribes* a normative ideal to which constitutional democracy should aspire. The answer is that it does both. In defending the collaborative constitution, I argue that it rests on a phenomenologically plausible account of key features of constitutional practice, whilst simultaneously embodying a normatively attractive constitutional ideal. In short, *The Collaborative Constitution* combines descriptive and normative dimensions as part of an analytical account of constitutional government which is both grounded in practice and geared towards principle.[87] Taking constitutional law as it is currently practised, I try to 'reconstruct aspects of its immanent normative structure'[88] in a way which illuminates the practice and uncovers the ideals to which that practice aspires. Given the centrality of this methodological approach to the book as a whole, it is worth clarifying its contours at the outset.

Let us start with the idea that the collaborative account is *grounded in practice*. In this book, I adopt a phenomenological approach, which takes the institutions, practices, structures, norms and modes of decision making in a constitutional democracy as the primary object of analysis, whilst seeking to understand, explain and illuminate – in short, to make sense of – that practice in all its complexity.[89] In order to grasp the phenomenology of inter-institutional interaction, this book proceeds from the premise that normative theorising about what institutions *should* do must rest on an accurate picture of what those institutions *can* and *cannot* do.[90] Thus, if the central question animating this book is 'who should protect rights in a democracy, and how?', then philosophical analysis must be complemented by *institutional analysis* of *what* the key institutions do, *how* they do it, and *how they interact* with other actors in a differentiated institutional landscape.[91] On this approach, 'taking rights seriously' entails 'taking institutions seriously'[92] – not just as abstract instantiations of the

[86] Leckey (2015) chapters 1 & 2.
[87] Fowkes (2016a) 4; Fombad (2016a).
[88] Pozen (2014) 9, 74.
[89] Raz (1994) 44.
[90] Fallon (2001) 37; Friedman (2005) 270; Graber (2002) 332; King (2012) 2, 127; Young (2012) 3.
[91] Young (2012) 3; Komesar (1994).
[92] Whittington (2000) 697; Komesar (1984).

values we prize, but as concrete practices, structures and norms which frame and shape institutional behaviour in a plurality of institutional settings.

In striving to illuminate the roles and relationships between the branches of government, this book adopts an 'internal point of view',[93] appreciating the rules, practices, and norms of institutional behaviour from the perspective of those who are charged with making the constitution work.[94] Beginning with 'an inquiry into the mundane practices of actually existing constitutions',[95] I give credence to the 'observable self-understandings'[96] of judges, legislators and government Ministers about how they perceive their roles and relationships in the constitutional scheme. In doing so, I grapple with the tools of their trade, situating their decisions within the relevant institutional context. Thus, when examining the judicial role, I combine an appreciation of the insightful theoretical literature on the subject with a descent into the doctrinal detail and procedural rules of the adjudicative process, viewing judicial decision-making in the crucible of constitutional practice. Drawing on a close reading of cases in context – supplemented by practitioner manuals and academic textbooks – I listen to what judges have to say about the challenges of judging in a democracy.[97] Likewise, when striving to understand the role of the Executive and legislature in the constitutional scheme, I engage with the political science scholarship on what these institutions do. In short, I put the politics in 'political political theory'.[98] The resulting account may fall short of eulogies extolling the dignity of the legislature as the apotheosis of our most noble democratic ideals. But it has the countervailing value of being truer to the practice of Executive and legislative constitutionalism on the ground.[99]

The upshot of this approach is a book which ranges widely and deeply across disciplinary divides – from legal doctrinal analysis to normative argument, political science to political theory, and comparative

[93] Hart (2012) 89–90, 115–16, 242–3, 254; Harel (2014) 230.
[94] Heclo (2006) 733; Raz (1979) 181.
[95] Loughlin (2006) 436 (describing this as 'the immanent method' of constitutional theorising).
[96] Leckey (2015) 155. On the role of self-understandings in legal theory, see Smith (2000) 249; Dickson (2015a) 221, 225–8; Dickson (2015b) 578–85; Kyritsis & Lakin (2022) 5–6.
[97] In the UK, there has been a recent proliferation of judicial speeches, which are available at https://www.supremecourt.uk/news/speeches.html.
[98] Waldron (2016).
[99] Komesar (1994).

constitutional law to constitutional theory. This interdisciplinary approach is not borne out of a hubristic ambition for methodological multiplicity. On the contrary, it is rooted in a humble appreciation for the complexity of the institutional questions posed in this book. If constitutionalism is a collaborative enterprise between distinct and diverse institutional actors, then we need to attend to the diverse institutional contexts in which collaborative constitutionalism is forged.

So much for the collaborative constitution being *grounded in practice*. What about the other dimension of being *geared towards principle*? Beyond its use as an explanatory account, the collaborative constitution also articulates a normative constitutional ideal, i.e. a set of norms which govern – and *should* govern – the roles and relationships between the branches of government in a constitutional democracy. When the branches of government carry out their respective roles in the constitutional division of labour in a spirit of comity, civility and collaboration, this helps to make the constitution work. As American constitutional scholar Philip Bobbit observed, 'the most successful constitutional order is one that encourages collaboration . . . among the various constitutional institutions and actors, and thereby enhances its own stability'.[100] On my account, therefore, collaborative constitutionalism is what happens when constitutional government goes well.[101]

Of course, as with any ideal, reality has a way of falling short. The constitutional actors in any system may fail to live up to the norms and requirements of the collaborative constitution, either by overreaching the limits of their own institutional role, or by failing to treat their constitutional partners with comity and constitutional respect. Indeed, in contemporary times, the collaborative constitution is increasingly under threat. With the rise of populist authoritarianism across the world, we see the alarming spread of constitutional corrosion and democracy decay, where powerful political actors use strong-arm tactics to undermine the constitution from within.[102] Whilst maintaining the formal façade of constitutional democracy, they strip out the 'hidden wiring'[103] – the norms of comity, collaboration and constitutional commitment – required to make constitutional democracy work.[104] The result is 'a

[100] Bobbitt (1982) 182.
[101] Ibid 182.
[102] Sadurski (2019) 8, 253, 259.
[103] Hennessy (1995).
[104] Sadurski (2019) 8, 19, 179, 186, 253–61.

constitution without constitutionalism'[105] – a written document which endorses laudable constitutional ideals, without the hard work and constitutional commitment on which a well-functioning constitutional democracy depends. Less drastically, but no less insidiously, established democracies such as the UK and the US are experiencing a deterioration in respect for the inherited norms of constitutional fair play, and contempt for the accountability actors designed to keep the Executive in check.[106] These days, it feels as if we are all living in 'fragile democracies'.[107]

But this evolving picture of constitutional corrosion does not undercut the force of the collaborative conception of constitutionalism. It fact, it raises the stakes and heightens the imperative to take collaborative constitutionalism seriously as a way of sustaining the working constitution over time. The current decline in respect for constitutional norms highlights the critical importance of preserving the precious resources of the collaborative constitution, lending new urgency to claims that they should not be squandered through careless practice and raw political ambition devoid of an ethics of constitutional responsibility.[108] The creeping authoritarianism of contemporary regimes underscores the point that a working constitutional democracy is not guaranteed by parchment barriers, nor by an intricate matrix of checks and balances designed to run like constitutional clockwork. At the deepest level, all constitutions ultimately rest on a commitment by the key constitutional actors to abide by the norms of constitutional democracy under the rule of law.[109] In short, they depend on a fundamental commitment to the principles and practices of collaborative constitutionalism.

In a context where that commitment is fragile even in the most established constitutional democracies, we need to attend to the deep foundations of constitutional democracy, ensuring that we recognise the importance of unwritten norms of constitutionalism to making any written constitution work. Even when key political figures fall short of the ideal of collaborative constitutionalism – as they inevitably will from time to time – this is the ideal against which they should be understood and assessed, and towards which they should strive.[110] Given the practice-oriented, internal

[105] Fowkes (2016b) 205.
[106] Pozen (2014) 9.
[107] Issacharoff (2015).
[108] Weber (1919).
[109] Levinson (2011); Sadurski (2020a) 330.
[110] Raz (1979) 47; Dickson (2001) 138.

approach adopted in this book, which seeks to understand constitutional government from within, it should not be surprising that many constitutional democracies already conform – imperfectly but substantially – to the norms of collaborative constitutionalism.[111] This is because the norms of collaborative constitutionalism are already inherent in constitutional practice to some meaningful degree. Even if the key constitutional actors fall short, we can still articulate the ideal they have betrayed. Understanding institutions involves understanding the ideal to which they aspire – 'for that is how they are supposed to function, and that is how they publicly claim that they attempt to function'.[112] The argument of this book is that constitutionalism is, and should be, oriented towards the collaborative ideal.

In articulating and defending that ideal, this book does not pretend to provide a programmatic blueprint for detailed institutional behaviour in an ideal constitutional universe. There is no such place, and there is no such blueprint. Institutional behaviour and interaction is inevitably contingent and context-specific to a large degree, dependent on a myriad of historical, social, political, legal and cultural factors which no constitutional theory can hope to encompass. Moreover, the collaborative conception of the separation of powers accepts the inevitable and valuable variation in how that ideal is instantiated across diverse systems with discrete constitutional histories. Nonetheless, *The Collaborative Constitution* articulates a constitutional ideal with a 'prescriptive core',[113] thereby providing some theoretical, analytical, and institutional resources we can use to evaluate, appraise, and critique constitutional performance. In this spirit, I offer the idea of the collaborative constitution both as an explication of constitutionalism in practice and as an articulation of a constitutional ideal which informs – and should inform – institutional behaviour in a constitutional democracy.

3 Constitutions, Comparison, Context

In defending the collaborative constitution, I base my analysis on democratic constitutional orders, whose salient features include a general adherence to the principles of democracy, the separation of powers, the protection of rights, and the rule of law. Particularly in the first part of the book where I lay the theoretical foundations, I draw freely on

[111] Pozen (2014) 89.
[112] Raz (2009) 103–4; Raz (1979) 47, 181; Rawls (2005) 85ff.
[113] Kyritsis (2017) 211.

examples from a number of different jurisdictions which broadly share a commitment to these principles, even if that commitment appears shaky at times.[114] However, in order to illustrate the idea of the collaborative constitution in context, I provide a fine-grained analysis of rights protection in the UK constitutional order, alongside insightful comparators from the Commonwealth constitutional tradition.

On one level, choosing the UK as an illustrative case-study may seem strange. After all, given its famously 'unwritten constitution', the UK system is often presented as exceptional and aberrational in comparative terms.[115] However, there are two features of the UK constitution which make it an insightful theoretical and comparative case study in this context. First, all constitutions ultimately rest on unwritten norms of constitutional behaviour, including a commitment by the constitutional actors to treat the written text as authoritative, and norms of inter-institutional behaviour requiring the branches of government to treat each other with comity and respect.[116] At this fundamental level, the UK constitutional order is the same as all other constitutional systems.[117] Indeed, the very fact that the UK lacks a 'canonical constitutional master-text'[118] points up the particular importance of these norms in grounding a constitutional democracy. Therefore, rather than being an aberration, the UK constitutional order makes explicit the common constitutional foundations which all constitutional systems share.[119]

Second, the UK's exceptionalism was significantly reduced in the context of rights following the enactment of the Human Rights Act 1998 (HRA), where courts were empowered to evaluate legislation against a canonical set of rights and, if found wanting, to declare that the law is incompatible with rights. True, the HRA deliberately departed from some features of American-style judicial review, particularly in its determination to prevent courts having the power to strike down or invalidate legislation.[120] Nonetheless, the very act of enumerating rights in a canonical document which courts are then empowered to use as standards against which legislation is judged, brings the UK courts into

[114] For a similar approach, see King (2012) 10–13.
[115] See e.g. Graber, Levinson & Tushnet (2018b) 8 (who question whether the UK even counts as a constitutional democracy).
[116] Walters (2008) 260, 265; MacDonnell (2019) 191; McLean (2018) 395; Foley (1989).
[117] Gardner (2012).
[118] Ibid 90.
[119] Walters (2016); MacDonnell (2019).
[120] Human Rights Act 1998, section 4.

the common constitutional realm of reviewing legislation for compliance with rights. The recurrent political proposals to amend and repeal the HRA do not change this, since the Government has always proposed to put an alternative statutory or parliamentary Bill of Rights in its place.[121] In an era of statutory Bills of Rights, the gap between the 'written' and 'unwritten' – or, more accurately, between the codified and uncodified constitutions – begins to close.

But there are other reasons why the UK provides an insightful case-study of collaborative constitutionalism in action. For one thing, the HRA embodies an innovation in constitutional design which explicitly engages all three branches of government in a joint enterprise of protecting rights. Instead of positing the courts as the solitary and supreme guardian of rights, the HRA specifically enlisted the Executive and legislature to play a central and constructive rights-protecting role in a multi-institutional constitutional scheme.[122] The HRA was intended to 'weave acceptance and understanding of [rights] into the democratic process' so that 'positive rights and liberties would become the focus and concern of legislators, administrators and judges alike'.[123] By explicitly drawing the Executive and legislature into the joint enterprise of protecting rights, the HRA therefore provides both an illustrative case-study and instructive testing ground for collaborative constitutionalism in action.

There is another reason why the UK experience sheds light on broader comparative and theoretical themes. When the Human Rights Act was enacted, it was hailed by comparative constitutional lawyers as instantiating a 'new model of constitutionalism'[124] which – together with Canada, New Zealand, and some Australian states – carved out a constitutionally desirable middle path between the 'bipolar extremes'[125] of parliamentary supremacy on the one hand and US-style judicial supremacy on the other. Variously described as 'the new Commonwealth model',[126] the 'hybrid

[121] See e.g. the proposed Bill of Rights Bill 2022, which was eventually withdrawn, at www.gov.uk/government/publications/bill-of-rights-bill-documents. For claims that the HRA enacted a 'parliamentary Bill of Rights', see Kavanagh (2009a) 2; Ewing (2004); Hiebert & Kelly (2015) 1; Klug (2001) 370; Elliott (2011) 13 (describing the HRA and the New Zealand Bill of Rights Act as 'interpretative bills of rights').
[122] Section 19 HRA; White Paper *Rights Brought Home: Human Rights Bill*, Cm 1997 Cm 3782 [3.1].
[123] Irvine (2003a) 36; Straw (1999); Hiebert & Kelly (2015) 9, 251 ff; Hunt (2010) 601–2.
[124] Gardbaum (2013b).
[125] Gardbaum (2013b) 1, 51
[126] Gardbaum (2013b).

approach',[127] the 'dialogue model',[128] or 'weak-form review',[129] the distinctive feature of the new model was that it left the last word with the democratically elected legislature.[130] Thus, whilst the Canadian Charter of Rights and Freedoms empowered the courts to strike down rights-infringing legislative provisions, it nonetheless allowed the legislature to override some of those rights.[131] In the UK, the courts were empowered to make a declaration of incompatibility, but that declaration had no impact on the validity of the impugned legislation; nor did it place a legal obligation on Parliament to change the law to comply with the declaratory ruling.[132] As Stephen Gardbaum put it, the new model of constitutionalism 'decoupled' constitutional rights-based review 'from judicial supremacy by empowering the legislature to have the final word'.[133] The recurring leitmotiv of the new model was one of judicial decision and legislative dissent, judicial oversight and legislative override. The New Commonwealth Model was said to rest on a combination of weak – or at least 'weakened'[134] – courts, and strong, if not emboldened, legislatures.[135]

As an innovation in constitutional design which self-consciously departed from the American model, the New Commonwealth Model elicited great excitement amongst constitutional theorists and comparative lawyers. Not only did it provide a real-world instantiation of a new constitutional design, it also seemed to provide a seductively simple solution to the notorious 'counter-majoritarian difficulty'[136] which had vexed American scholars for decades. By shifting the last word from unelected courts to the democratic legislature, the New Commonwealth Model seemed to have found the Holy Grail of reconciling constitutionalism and democracy. Instead of allowing courts to displace the legislature, now the democratic legislature could displace the courts.[137] All at once,

[127] Goldsworthy (2003a) 483; Weill (2012) 349.
[128] Hogg & Bushell (1997); Roach (2016b); Young (2017); Hickman (2005a)
[129] Tushnet (2008b); Dixon (2012); Dixon (2019b); Bateup (2009).
[130] Kavanagh (2015c) 1009; Tushnet (2008b) 21; Yap (2015) 1–2.
[131] *Canadian Charter of Rights and Freedoms 1982*, section 33.
[132] Section 4 HRA.
[133] Gardbaum (2001) 709.
[134] Dixon (2019b).
[135] Tushnet (2008b); Kavanagh (2015c).
[136] Bickel (1986) 16.
[137] On the idea of institutional 'displacement' as pivotal to the distinction between 'strong-form' and 'weak-form' review, see Tushnet (2004) 1897; Tushnet (2003a) 2786; cf. Kavanagh (2015c) 1010–13.

the UK's position in comparative discourse shifted from constitutional pariah to constitutional paradigm, providing a 'better, more democratically defensible balance of power between courts and legislatures'[138] than traditional constitutional models.

As a leading exemplar of the New Commonwealth Model, the UK therefore provides a fertile testing ground for these ambitious theoretical and taxonomic claims. Not only has the distinction between 'strong-form' and 'weak-form review' become an enormously influential way of categorising constitutional systems,[139] the idea of 'weak-form review' has also garnered support amongst constitutional theorists who had long resisted rights-based review on grounds of democratic illegitimacy.[140] Therefore, alongside Canada, New Zealand, and some Australian states, the UK system provides a living laboratory to test some of the key theoretical and comparative claims which dominate contemporary constitutional scholarship. By offering a textured and nuanced narrative of how the UK system works – one which speaks back to the global, comparative, and theoretical field – this book makes a targeted intervention in the broader comparative and theoretical literature on how to uphold rights in a democracy. It speaks in the vernacular, whilst translating the Commonwealth experience into the *lingua franca* of global constitutional theory. Viewing comparative constitutional law as an 'expanded form of contextualisation'[141] where understanding is deepened by differentiation, I argue that some of that experience got lost in translation. Part of the aim of this book, therefore, is to make a key contribution to comparative constitutional law scholarship, in the form of a complement, corrective and challenge to leading comparative taxonomies.[142]

[138] Gardbaum (2013b) 75–6; Tushnet & Dixon (2014) 102; Gardbaum (2001) 744; Kavanagh (2015c) 1010–13

[139] Lavapuro, Ojanen & Scheinin (2011) (Finland); Hirschl (2011) (the Nordic countries); Khosla (2010) 759ff (India); Weill (2012) & Weill (2014) (Israel); Stone (2008) 30–2 (Australia); Kelly & Hennigar (2012) (Canada); Dixon (2012) (America, UK, Canada, New Zealand); Colón-Ríos (2012) & Colón-Ríos (2014) (Latin America); Kavanagh (2015c) 1009 (UK).

[140] Waldron (2016) 199–200; Dixon (2017).

[141] Dann (2005) 1465; see also Watt (2012) (on 'comparison as deep appreciation'); Lemmens (2012) (on comparison as an 'act of modesty'); Zweigert & Kötz (1998) 21, 40–41; Geiringer (2018) 323.

[142] For discussion of the complementarity between fine-grained contextual comparativism and broader taxonomies, see the *ICON-Debate* with Kavanagh (2015c) 1031; Gardbaum (2015) 1048; Kavanagh (2015d) 1052; see also Geiringer (2019).

The deeper point here is that collaborative constitutionalism is not inexorably tied to any particular constitutional design. It lives primarily in the unwritten norms of comity, collaboration, and constrained conflict which lie at the foundation of a constitutional order. Of course, some designs and decisional structures may bolster and enhance collaborative constitutionalism more than others. The HRA is one such option, especially given its explicit invitation to all three branches of government to contribute to the joint enterprise of protecting rights. The HRA wears its collaborative colours on its sleeve. Nonetheless, whilst this book uses the UK as an illustrative case–study and instantiation of the collaborative ideal, this has less to do with the precise institutional configurations of the HRA, and more to do with how the branches of government understand their constitutional roles, and how they engage with each other when implementing the constitutional framework in practice.

4 Outline and Overview

This book is divided into four parts. Part I lays the theoretical foundations of the collaborative constitution, examining 'Institutions and Interactions' through the lens of leading theoretical accounts. Proceeding dialectically, and to some extent chronologically, Chapter 1 addresses the 'Manichean narrative' which pits courts against legislatures. In order to make headway in the debate about who should protect rights in a democracy, this chapter argues that we need to move 'beyond Manicheanism'. Chapter 2 considers the influential theory of 'dialogue' which dominated the discourse on protecting rights in the early part of the twenty-first century. Acknowledging the insights that dialogue brought to the constitutional table – particularly its emphasis on the iterative and interactive nature of constitutionalism in context – I argue that 'dialogue' overpromised and underdelivered. By resting on an oversimplified picture of interbranch interaction, and succumbing to the polarities of the traditional Manichean narrative, it ultimately led to a distorted understanding of the key interactional dynamics at work in a well-functioning constitutional democracy.[143]

The pivotal chapter of this book is Chapter 3, which makes 'the case for collaboration' as a descriptively defensible and normatively attractive way of understanding and illuminating the relationship between the

[143] Geiringer (2019) 573.

branches of government in a constitutional democracy. Together with this Introduction and the Conclusion, Chapter 3 contains the main arc of the argument in favour of the collaborative constitution. Moving 'from rivals to relationships'[144] – and from conversation to collaboration – Chapter 3 sets out the key claims of collaborative constitutionalism, laying down the theoretical foundations on which the subsequent analysis rests. Instead of viewing the branches of government *in isolation, in opposition* or *in conversation*, Chapter 3 argues that they should be viewed instead *in collaboration* – as partners in a collaborative enterprise, based on a division of labour where each branch has a distinct but complementary role to play in upholding rights.[145]

The rest of the book puts collaborative constitutionalism in motion, examining in detail and in depth how a plurality of constitutional actors work together to make rights real. Part II presents the Executive and legislature as 'pro-constitutional actors',[146] exploring the iterative, interactive and collaborative dynamic between them in the Westminster system. The decision to begin the institutional analysis with the political actors and not the courts was deliberate. It bespeaks a constitutional perspective which views the Government and legislature as leading protagonists and full partners in the collaborative enterprise of protecting rights.[147] Starting with the Executive and legislature also has the advantage of following the constitutional chronology on the ground. After all, when courts adjudicate whether a legislative provision violates rights, they typically enter the picture *after* the legislation has been crafted, proposed, scrutinised and debated by the Executive and legislature acting in concert.[148] Therefore, in terms of defining, defending and specifying rights, the Executive and legislature *get there first*. My analysis follows this constitutional chronology, exploring the primacy of the political actors in making rights real in a constitutional democracy.

Part III turns to the role of judging in a democracy. Eschewing the image of the hero-judge, I defend a more modest but, I suggest, more accurate idea of 'judge as partner'. On the collaborative vision, judges are neither solitary crusaders for moral enlightenment nor our saviours from democratic depravity. Instead, they are independent decision-

[144] Kavanagh (2019).
[145] Coenen (2001) 1590.
[146] Jackson (2016).
[147] Kumm (2009) 305; King (2012) 57–8.
[148] Gardbaum (2013b) 80; Kyritsis (2012) 319.

makers in an interdependent constitutional scheme, whose role is to adjudicate legal disputes, whilst paying respect to the democratically elected legislature. Chapter 7 examines the anatomy of adjudication, revealing a significant but subsidiary role for the courts in the collaborative law-making enterprise. Building on this collaborative account, Chapter 8 analyses adjudication under the HRA, presenting it as a 'constitutional partnership in progress'. Chapter 9 defends the idea of 'calibrated constitutional review' as a way of operationalising the judicial duty of respect for the democratic legislature in the constitutional scheme. Charting a middle course between supremacy and subordination, I argue that judges must *calibrate* the mode, means and intensity of review out of respect for the relative institutional competence, expertise and legitimacy of the branches of government.[149] Chapter 10 rounds out the analysis by exploring the tools and techniques of collaborative constitutionalism in court, documenting the myriad doctrines and devices which courts use to give shape to the shared responsibility for protecting rights. Whilst the underlying theme of 'judge as partner' portrays judges as largely responsive actors in the constitutional scheme, this chapter highlights the catalytic function of courts in prompting and prodding the Executive and legislature to rise to their own responsibilities to promote rights. Framed under the rubric of 'court as catalyst'[150] and 'judge as nudge', the courts are portrayed as suitably responsive but subtly catalytic actors in the collaborative constitutional scheme.

The fourth and final part of this book turns to the idea of 'Responsive Legislatures', exploring the ways in which the Executive and legislature respond to judicial decisions that legislation violates rights. Given the pivotal importance of the legislature's 'right to disagree'[151] with courts in so-called weak-form systems or dialogic review, Chapter 11 undertakes a close, contextual and comparative assessment of the legislative powers to ignore, override or displace judicial decisions about rights in the UK and Canada. Exploring the conspicuous 'underuse of the override' in both jurisdictions, this chapter argues that the rare use of the legislative override was a feature, not a bug, in the constitutional design of both

[149] Komesar (1994) 23; Kavanagh (2015c) 1038 (arguing that the courts should 'calibrate their respect for the institutional competence and legitimacy of the elected branches of government, thus facilitating a division of labour between them').
[150] Scott & Sturm (2007).
[151] Yap (2012) 532–3.

of these systems from the outset. Though the legislature was *empowered* to override or reject judicial decisions, it was *expected* to exercise this power with caution and circumspection. Departing from the dominant scholarly narrative which treats the underuse of the override as a failure of democratic dialogue, I defend it as a potential success story in the collaborative constitution. Chapter 11 is an example of 'fine-grained, contextual comparativism'[152] in action, attuned to the way in which constitutional texts can only be properly understood when viewed in the context of constitutional culture.

Chapter 12 turns to the question of whether there is an emerging constitutional convention in favour of complying with declarations of incompatibility under the HRA. Following a comprehensive empirical analysis of all political responses to declarations of incompatibility since the HRA was enacted, I argue that there is a strong political presumption in favour of complying with declarations of incompatibility rather than defying them outright. Building on previous empirical accounts,[153] I discern the emergence of a constitutional convention in *statu nascendi* where the political actors believe themselves to be under a general constitutional obligation to comply with declarations of incompatibility, unless exceptional circumstances arise.

The book concludes with some broader reflections on 'the currency of collaboration' in contemporary times. In the fractured political landscape of the post-Brexit era, political actors in the UK are increasingly hostile to rights, manifesting a worrying impatience with constitutional constraints and the inherited norms of the collaborative constitution. Given this context, it is tempting to end the book with a 'eulogy for the constitution that was'[154] and a constitutional *cri de coeur* for the demise of the political constitution. I resist that temptation for two reasons. First, even acknowledging the current strains and pains in the collaborative constitutional order, I believe that the UK constitution is still a relatively well-functioning example of collaborative constitutionalism in action. The traditions of mutual respect between the organs of government and the discipline of responsible government in a parliamentary system, not to mention the abiding constitutional commitment to liberty and the rule of law, run so deep and wide in the British constitutional culture that I hesitate to conclude that they have been completely swept aside.

[152] Kavanagh (2015c) 1037; Geiringer (2019) 577; Gardbaum (2015) 1048.
[153] King (2015a); Crawford (2013); Sathanapally (2012); Young (2011).
[154] Webber (2014a).

Though it is tempting to pronounce a constitutional crisis, I reserve that diagnosis for circumstances more dire.[155]

My second reason is the flipside of the first. When we look around the world today, it is striking how gradual, incipient and insidious the shift from constitutional democracy to popular authoritarianism has been. Instead of wearing their authoritarian colours on their sleeve, these regimes have hidden the deep democratic decay and constitutional corrosion under a false façade of 'political constitutionalism'[156] and democratic government. Evoking a lost Eden of pure democracy, populist authoritarian leaders claim that they, and only they, can speak on behalf of the people. This toxic combination of populist rhetoric, potent nostalgia and the alluring ideal of giving 'power to the people,'[157] stands to threaten us all. In light of this challenge, the call for collaboration should be heard loud and strong. There is no room for constitutional complacency or a sanguine assumption that 'it can't happen here'.[158] It can. Instead of ending on a note of loss and lament, therefore, I conclude this book on a note of vigilance and vindication. Highlighting the fundamentality and fragility of collaborative constitutional norms, I argue that these norms are a precious resource of *constitutional capital* we squander at our peril. The book concludes, therefore, with a renewed call for commitment to the hard work and combined effort of the collaborative constitution. We must all do what we can to nourish the norms of comity, collaboration and constitutional partnership on which a healthy body politic depends.

[155] Balkin (2018) 14–15; Balkin (2008) 590; Levinson & Balkin (2009) 714.
[156] Sadurski (2018) 251–3.
[157] Tushnet & Bugaric (2021).
[158] Sunstein (2018a).