The Modern Constitutional State: A Defence

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In the world of constitutional law, theory and practice are moving in opposite directions. As a matter of legal practice, since the end of the Second World War a groundbreaking constitutional paradigm has emerged. This paradigm integrates (1) a constitution that exhaustively establishes the conditions for the valid exercise of all public authority, (2) a constitutionally entrenched bill of rights that delineates the right of persons, by virtue of their dignity, to just governance, and (3) a politically independent judicial body to which any individual can bring a constitutional complaint challenging the validity of any exercise of public authority that violates a constitutional right. As a matter of theoretical justification, however, this phenomenon remains enigmatic. Its defenders often argue that modern constitutionalism is justified because it contributes to the realization of some morally desirable outcome, for example, elevated levels of public debate or just decisions. Such justifications are open to a devastating skeptical challenge: The various benefits that constitutionalism is purported to bring may be realized in its absence, while the presence of constitutional arrangements provide no guarantee that the benefits will accrue.

This essay formulates a justification of modern constitutionalism that is not vulnerable to this objection. Instead of justifying modern constitutionalism by appealing to benefits that could be achieved in its absence, the author argues that modern constitutionalism is a systematic response to a moral problem involving public authority that every legal system must address, but that cannot be addressed apart from the legal and institutional structure of a modern constitutional state. The problem—common to all precursors of modern constitutionalism—is not that the government necessarily exercises public authority in a manner that violates the human dignity of the ruled, but that in the event of a violation one or more persons are left without legal recourse. To address this problem, one requires a legal and institutional structure that enables any individual to challenge the validity of any exercise of public authority by raising a constitutional complaint. This is exactly what the modern constitutional state—and only the modern constitutional state—provides.

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Introduction

In the world of constitutional law, theory and practice are moving in opposite directions. As a matter of *constitutional practice* since the end of the Second World War, an extensive and growing literature produced by lawyers, judges and political scientists acknowledges the emergence of a groundbreaking constitutional paradigm. In states as diverse as Germany, South Africa and Canada, this modern constitutional paradigm integrates (1) a written constitution that exhaustively establishes the conditions for the valid exercise of all public authority, (2) a constitutionally entrenched bill of rights that delineates the right of persons, as bearers of dignity, to just governance, and (3) a politically independent judicial body to which any individual can bring a constitutional complaint challenging the validity of any exercise of public authority that violates a constitutional right. The emergence of this modern constitutional paradigm has been described as "the most important public law event of the twentieth century",[1] "a constitutional and civil rights revolution",[2] and as the "full realization" of democracy.[3]

As a matter of *constitutional theory*, the modern constitutionalism paradigm remains enigmatic. Proponents of modern constitutionalism typically argue that "the question whether or not a country should adopt constitutional adjudication is not one of principle, but one of pragmatics. It requires a balancing of benefits and costs . . . [E]ach country has to find

1. Juan Colombo Campbell, "Constitutional Court Judges' Roundtable" (2005) 3:4 Intl J Constitutional L 544 at 545, citing Louis Favoreu, "Justicia y Jueces Constitucionales" (1999) 61 Revista Derecho Publico 10.

2. Mauro Cappelletti, "Repudiating Montesquieu?: The Expansion and Legitimacy of 'Constitutional Justice'" (1986) 35:1 Cath U L Rev 1 at 28 [Cappelletti, "Constitutional Justice"].

3. *United Mizrahi Bank Ltd v Migdal Cooperative Village*, [1995] 49 PD 221 at para 47 (Supreme Court Israel).

its own solution".[4] Ronald Dworkin's final treatment of constitutional governance is emblematic of this approach. Distancing himself from his earlier view that judicial review of constitutional rights makes an essential contribution to a well-ordered regime by elevating the level of public debate[5] and generating just outcomes,[6] Dworkin explained in *Justice for Hedgehogs* that while critics of judicial review are wrong to hold that the practice "is inevitably and automatically a defect in democracy", its appropriateness rests on considerations "that vary from place to place".[7] These considerations include a country's track record in protecting individual and minority rights, as well as "the strength of the rule of law, the independence of the judiciary, and the character of the constitution judges are asked to enforce".[8] In a world in which the judicial review of constitutional rights has solidified as a central feature of constitutional governance, Dworkin refrained from formulating its principled justification.[9]

The pragmatism of proponents of constitutional governance can be contrasted with the principled objections of its opponents. While opponents need not be hostile to notions of individual rights, they share the view that the legal and institutional structure through which modern constitutional states make constitutional rights justiciable is

4. The Honourable Dieter Grimm, "Constitutional Adjudication and Democracy" in Mads Andenas & Duncan Fairgrieve, eds, *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (The Hague: Kluwer Law International, 2000) 103 at 105 [Grimm, "Constitutional Adjudication"] (while Grimm's view is that "more arguments speak for, than against judicial review", he conceives of the arguments both for and against as pragmatic in nature).

5. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass: Harvard University Press, 1996) at 345 [Dworkin, *Freedom's Law*].

6. *Ibid* at 34.

7. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011) at 398–99.

8. *Ibid* at 398.

9. I focus here on Dworkin's treatment of the institutional question "Who should decide?" rather than the substantive question "What should be decided?" Once these questions are differentiated, one can recognize that Dworkin's framework offers a pragmatic answer to the former question and a principled answer to the latter. For an example of the principled component of his theory, see Ronald Dworkin, *Justice in Robes* (Cambridge, Mass: Belknap Press of Harvard University Press, 2006) (claiming that political integrity requires governments to "govern under a set of principles in principle applicable to all" at 176).

objectionable. By empowering the judiciary to strike down legislation, a modern constitutional state imposes an illegitimate constraint on the democratic right of a majority (or plurality) to enact its preferences into law.[10] This view separates the issue of whether a legal system should protect individual rights from the issue of the institutional framework through which rights should be protected; one can accept the former while rejecting the latter.[11] Confronted by principled opponents but lacking a principled defence, modern constitutionalism has had to develop without (and often in opposition to) an established theoretical framework.

The purpose of this article is to offer a principled defence of the modern constitutional state by setting out the connection between its normative commitments, on the one hand, and its legal and institutional structure on the other. I proceed in four Parts.

Part I formulates the moral problem between rulers and ruled to which the legal and institutional structure of a modern constitutional state systematically responds. The problem—common to all precursors of modern constitutionalism—is not that rulers *necessarily* exercise public authority in a manner that violates the inherent dignity and fundamental rights of the ruled, but that in the event of a violation one or more persons are left without legal recourse. In legal systems in which public authority is exercised by the few, as in autocratic or oligarchic forms of government, the many are left without legal recourse. Conversely, in legal systems in which public authority is exercised by the many, as in majoritarian democracies, it is the few who stand vulnerable. In each of these legal systems, there exists no legal and institutional structure that makes the dignity and fundamental rights of each person justiciable. I call this the *problem of accountability*.

Part II presents the fundamental innovation of modern constitutional states through an exposition of the legal and institutional structures of Germany, South Africa and Canada. In contrast to earlier forms of government, modern constitutionalism is systematically designed to make the exercise of public authority accountable to neither the preferences of the many nor the few, but—for the first time in the long history of public law—to the justiciable right of each and every inhabitant of the legal order,

10. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346 at 1375, 1388–89 [Waldron, "Case Against Judicial Review"].

11. *Ibid* at 1366.

as a bearer of human dignity, to just governance. This accountability is evident in the distinctive features of a modern constitutional state: a written constitution that establishes the conditions for the valid exercise of public authority, a constitutionally entrenched bill of rights premised on the inherent dignity of each person subject to public authority, and a politically independent judicial body to which any individual may bring a constitutional complaint. Through its legal and institutional structure, a modern constitutional state transforms the right of each person within the legal order to just governance from a mere moral imperative into a justiciable legal right. So conceived, a modern constitutional state addresses a problem that arises in every legal system but that no legal system can address apart from the distinctive legal and institutional structure of a modern constitutional state.

Part III assesses the adequacy of a competing model of constitutionalism; the commonwealth model instantiated by the United Kingdom. On the one hand, I argue that the commonwealth model should not be regarded as a constitutional ideal to which legal systems should aspire because the problem of accountability persists within it. On the other hand, I argue that the commonwealth model should not be cast aside because it offers legal systems that presently cannot realize modern constitutionalism with a way of approximating its approach to rights protection. Although the commonwealth model is not the ideal constitution, there are contexts in which its adoption represents a step in the right direction.

Part IV of this article defends this model of governance from a leading critic, Jeremy Waldron. Waldron raises two lines of objection against judicial review, a fundamental feature of modern constitutionalism. First, he criticizes theorists, like Dworkin, who justify the judicial review of legislation by appealing to the desirable outcomes that the practice might produce, for example, elevated levels of public debate or just decisions. Waldron argues that such justifications do not succeed because legal experience reveals both that judicial review might fail to produce these outcomes and that these outcomes might be produced by legal systems that lack judicial review. The position that I advance is not vulnerable to this line of objection because it does not defend judicial review as an arrangement for producing outcomes that could in principle be achieved without it. As I argue in Part II, the problem of accountability cannot be addressed apart from the legal and institutional structure of a modern

constitutional state. Waldron's second line of objection attacks judicial review more directly by arguing that since it imposes constraints on majority rule, it is undemocratic and therefore illegitimate. I respond by explaining that even though modern constitutionalism is not majoritarian, it is nonetheless a democratic form of governance. It is democratic insofar as citizens exercise political rights and thereby govern themselves through their representatives. It is not majoritarian insofar as it creates a legal framework in which the legislative power of the citizenry is accountable to the inherent dignity and fundamental rights of each person bound by it.

Two clarifications are in order from the outset. My defence of modern constitutionalism does not offer a detailed blueprint of the totality of constitutional norms and institutional arrangements appropriate for legal systems in general. Instead, the purpose of the defence is to articulate a moral problem inherent in the public law relationship between rulers and ruled and then to explain how the general legal and institutional structure of modern constitutional states address this problem. As I illustrate in Part II in discussing how the legal systems of Germany, South Africa and Canada address the problem of accountability, a variety of approaches are permissible. The purpose of the constitutional theory that I elaborate is to set out a general moral framework that enables a distinction to be drawn between acceptable and objectionable instances of legal variation.

Further, in offering a principled defence of modern constitutionalism, I do not deny that pragmatic considerations have a role to play. Principles neither answer to pragmatic considerations nor exclude them. Rather, pragmatic considerations are relevant to the determination of how principles in a particular context are to be effectuated. If it can be established as a matter of principle that each legal system must enact reforms to address the problem of accountability, and that the concrete features of an existing legal system present both opportunities for and obstacles to reform, the question of what a particular legal system must do cannot be raised in abstraction from considerations pertaining to its concrete circumstances.

I. The Problem of Accountability

In this Part, I set out a normative problem that precursors to modern constitutional states occasion but are incapable of addressing.

Modern constitutionalism reflects a particular conception of the juridical relationship between the rulers and the ruled of a legal system. According to this conception, the right of rulers to exercise public authority is accompanied by a duty to respect and protect the human dignity of the ruled. In the self-understanding of modern constitutional states, this duty is not the result of the enactment of a constitutional norm requiring rulers to exercise their authority in conformity with the human dignity of the ruled. Rather, the obligation is understood to form the impetus for the enactment of a constitutional norm that acknowledges it.[12]

Although the philosophical and theological significance of the concept of human dignity remains contested,[13] a constitutional conception of

12. See e.g. Arthur Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16:2 SAJHR 193 [Chaskalson, "Human Dignity as a Foundational Value"] (by recognizing that human dignity is inherent, the South African Constitution asserts "that respect for human dignity, and all that flows from it" is "not a privilege granted by the state" at 196); Eckart Klein, "The Concept of the Basic Law" in Christian Stark, ed, *Main Principles of the German Basic Law: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law* (Baden-Baden, Ger: Nomos Verlagsgesellschaft, 1983) 15 ("the constitution is laid down to guarantee liberty, not to grant it" at 16); Günter Dürig, "An Introduction to the Basic Law of the Federal Republic of Germany" in Ulrich Karpen, ed, *The Constitution of the Federal Republic of Germany* (Baden-Baden, Ger: Nomos Verlagsgesellschaft, 1988) 11 (the constitution "convert[s]" human dignity into legal rights, which the constitution "does not create, but simply recognizes" at 13); Lourens WH Ackermann, "The Legal Nature of the South African Constitutional Revolution" [2004] 4 NZLR 633 (the South African Constitution recognizes "that all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof" at 647); Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (Durham: Duke University Press, 2012) at 56. The authors stated, "[The Basic Law] does not regard the state as the source of fundamental rights. The core of individual freedom, like human dignity itself, is regarded as anterior to the state." *Ibid.*

13. The purpose of the present essay is not to contribute to the philosophic debates about the nature of dignity, but to consider the relationship between the duty that human dignity imposes on government and the legal and institutional structure of modern constitutional

human dignity is emerging in the jurisprudence of modern constitutional states around the world.[14] Dignity is the moral status of a human person subject to law. Persons possess this status not because each has committed the relevant act to acquire it, but because this status inheres in each individual "by virtue of his or her being a person".[15] Thus, human dignity can neither be acquired nor forfeited. This status is *moral* in nature because it reflects the right of each person to freedom.[16] Persons are free to "determine and develop themselves"[17] in a manner compatible with the equal right of all others to do the same.[18] Correlative to the right of each person to freedom is the duty of all state authority to respect the freedom

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states. For a critical overview of the concept of human dignity in its historical, theological, philosophical and juridical dimensions, see Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: Oxford University Press, 2013). In recent years, there has been a proliferation of philosophical explorations of the concept of human dignity, see Jeremy Waldron, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012) [Waldron, *Dignity*]; Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, Mass: Harvard University Press, 2012); George Kateb, *Human Dignity* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011); Charles R Beitz, "Human Dignity in the Theory of Human Rights: Nothing but a Phrase?" (2013) 41:3 Phil & Publ Aff 259.

14. Paolo G Carozza, "Human Dignity in Constitutional Adjudication" in Tom Ginsburg & Rosalind Dixon, eds, *Research Handbook in Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar Publishing, 2011) 459 at 460. On the contrast between the constitutional meaning of human dignity and its theological or philosophical meaning, see Dieter Grimm, "Dignity in a Legal Context: Dignity as an Absolute Right" in McCrudden, *supra* note 13 at 383–84.

15. Federal Constitutional Court, Karlsruhe, 15 February 2006, *Aviation Security Act Case*, (2006), 115 BVerfGE 118 at para 119 (Germany). See also *Minister of Home Affairs v Fourie*, [2006] 1 S Afr LR 524 at para 15 (S Afr Const Ct) [*Fourie*]; *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 10 [*Constitution of South Africa*].

16. Drucilla Cornell et al, eds, *The Dignity Jurisprudence of the Constitutional Court of South Africa* (New York: Fordham University Press, 2013) (attributing to Ackermann J the view that freedom is "the originary right of all human beings, and therefore the basis of their dignity" at 14).

17. Federal Constitutional Court, Karlsruhe, *Life Imprisonment Case*, (1977), 45 BVerfGE 187 (Germany), cited in Edward J Eberle, "The German Idea of Freedom" (2008) 10:1 Or Rev Intl L 1 at 13 [Eberle, "Freedom"].

18. See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321 [*Big M Drug Mart*]. See also *Grundgesetz für die Bundesrepublik Deutschland*, Federal Ministry of Justice and Consumer Protection, 1949, art 2(1) [translated by Christian Tomuschat & David Currie] [*Grundgesetz*].

of each individual within the legal order.[19] In what follows, I refer to this legal relationship between the free individual and the public authority of a legal system in terms of the right of persons to just governance and the correlative duty of government to rule justly.

Once the right of government to rule is conceived as accompanied by a duty of just governance grounded in the inherent and equal dignity of all human persons subject to law's authority, the problem of accountability becomes apparent. The problem is that the right of government to exercise its authority is always accompanied by a duty to govern justly, but persons subject to public authority have no legal mechanism that enables them to stand on their right to just governance and hold the exercise of public authority to account.

The problem of accountability is a distinctive feature of the public law relationship between rulers and ruled. In private law, which concerns the rights and duties apposite to the interaction of private persons, the problem of accountability is addressed by the presence of public institutions. A person who suffers a wrong at the hands of another private person can bring her case before the impartial authority of a judge and demand to be made whole by the wrongdoer. A different structure, however, obtains in the public law relationship between rulers and ruled. When one suffers a wrong at the hands of the public authority, the public authority is both a party to the dispute and judge in its own cause. Consequently, the public authority might ignore one's grievance, deny that the grievance amounts to a wrong, or even concede the commission of a wrong but withhold a corresponding remedy. Every person subject to public authority has a right to just governance, but whether that right will be respected depends on the very party that is under an obligation with respect to it. Publicly authoritative institutions make private persons accountable to one another but they also generate a problem of accountability whenever the legal system is organized in such a way that persons susceptible to public wrongs are left without legal recourse.

19. Federal Constitutional Court, Karlsruhe, 16 July 1969, *Microcensus Case*, (1969), 27 BVerfGE 1 at paras 31–32 (Germany). For a theory of public law that grounds the claim that, in any legal system, the right of government to exercise public authority is accompanied by a duty to bring the legal order into the deepest possible conformity with the dignity of each person bound by it, see Jacob Weinrib, "Authority, Justice, and Public Law: A Unified Theory" (2014) 64:5 UTLJ 703.

The problem of accountability is *conceptual*, not *causal*. Alexander Hamilton makes a causal claim in his remark, "Give all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many."[20] Hamilton's remark is causal because it suggests that if there is a discrepancy between those who exercise power and those on whom power is exercised, it is probable that the former will oppress the latter. The problem of accountability, in contrast, is deeper because it arises not from the *likelihood* that public authority will be exercised unjustly, but from the mere *possibility* that persons susceptible to unjust governance could be left without legal recourse.[21] The problem would therefore arise even if circumstances were so fortuitously arranged that public authority had always been exercised justly because those entitled to just governance would nevertheless remain incapable of standing on their right to just governance. The problem arises in any legal system in which there is a disjuncture between those who are subject to public authority and those who can hold the public authority to account.

The history of the theory and practice of public law is a testament to the pervasiveness of the problem of accountability. When Aristotle surveyed the constitutions of the ancient world, he discerned that the governing body is the "authoritative part of a state" and that "this part must be either one ruler or few or the majority".[22] Each of these modes of

20. *The Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787: With a Diary on the Debates of the Congress of the Confederation*, Jonathan Elliot, ed (Washington, DC: 1845) at 203.

21. For an account that oscillates between conceptual and causal accounts of the problem, see Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 2010) [Pettit, *Republicanism*]. Pettit argued that

> even if government agents always respected the interests and ideas of ordinary citizens in their decision-making, the fact that they had the capacity not to do so—the fact that they had the power to interfere on an arbitrary basis—would imply that they had dominated such citizens.
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> [M]ajoritarian agents will exercise more or less arbitrary power if their will is unconstrained. Let the laws be subject to ready majoritarian amendment, then, and the laws will lend themselves to more or less arbitrary control; they will cease to represent a secure guarantee against domination by government.

Ibid at 171–72, 181.

22. Aristotle, *Politics*, translated by Hippocrates G Apostle & Lloyd P Gerson in *Selected Works*, 3rd ed (Grinnell, Iowa: Peripatetic Press, 1991) 557 at 587.

exercising public authority shares a common defect: the failure to address the problem of accountability. The problem is inescapable so long as public authority rests in the hands of a single person (as in a monarchy), a few persons (as in an aristocracy) or many persons (as in a majoritarian democracy). A monarchy is unaccountable to every person bound by its lawgiving, while an aristocracy is unaccountable to the many. A majoritarian democracy is sometimes described as an accountable form of government because it makes those who exercise public authority answer to the preferences of the majority of adult citizens, as registered periodically during elections.[23] But from the standpoint of the problem of accountability, majoritarian democracy is defective in three respects.

First, majoritarians typically conceive public authority as an instrument for realizing *popular preferences*.[24] The majoritarian view is premised on the capacity of rational persons to formulate their own preferences about how public authority should be exercised.[25] Since persons are capable of formulating their own preferences regarding the exercise of public authority, the state should not subjugate persons to the preferences of rulers, but should instead create the conditions in which citizens can guide the exercise of public authority towards the fulfillment of their shared preferences. Because it is unrealistic to suppose that citizens will invariably agree about what preferences public authority should serve, a procedure is required that both recognizes the capacity of citizens to formulate their own preferences and affords each citizen an equal say in determining what preferences public authority should pursue. Majoritarian democracy is that procedure. In a majoritarian democracy, preferences are legitimated not by the merit of their content, which might culminate in disagreement, but by attracting the assent of the many, that is, a majority or plurality of adult citizens at the ballot box. The popular assent of the many transforms any preference from a private wish into a public purpose. In this social calculus of unconstrained preferences,

23. See e.g. Francis Fukuyama, *The Origins of the Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus & Giroux, 2011) at 321–22, 420.

24. See e.g. Robert A Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971) (assuming that "a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals" at 1).

25. For an overview of this conception of democracy, see Gregory H Fox & George Nolte, "Intolerant Democracies" (1995) 36:1 Harv Intl LJ 1 at 14–16.

"[m]y preferences about how you lead your life . . . count as much as yours".[26] Such a framework is not necessarily opposed to directing public authority towards the fulfillment of the right of each person to just governance. For the purpose to which law's authority is directed depends upon the preferences that persons happen to have. But that is exactly the problem. The aggregation of the unconstrained preferences of the many might culminate in outcomes that are incompatible with the right of the few to just governance. When such outcomes arise, the few are left without legal recourse.

The second defect is that majoritarian democracy holds that government is accountable to the *people* when it is really answerable only to the preferences of the majority of its adult citizens. In contrast, to address the problem of accountability, a legal system must make the exercise of public authority answerable to the right of every person within it to just governance. This includes all adult citizens and also children, prisoners, tourists, immigrants, refugees and guest workers. Such an inclusive conception of accountability is puzzling to majoritarians. If a government is accountable to preferences, and different persons affirm incompatible preferences, then it is impossible for government to be accountable to the preferences of every person subject to its lawgiving. The next best thing would be for government to be accountable, in the words of Justice Oliver Wendell Holmes, to the "right of a majority to embody their opinions in law".[27] However, if the duty of government is not to impose the particular purposes affirmed by "the dominant forces of the community" upon all others,[28] but to create a system of law that—to the greatest extent possible—vindicates the freedom or purposiveness of each, then the problem of incompatible purposes dissolves.[29]

26. Ronald Dworkin, "Law's Ambitions for Itself" (1985) 71:2 Va L Rev 173 at 186.

27. *Lochner v New York*, 198 US 45 at 75 (1905). For an exploration of the judicial philosophy that animates Holmes' approach to the First Amendment, see Steven J Heyman, "The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence" (2011) 19:3 Wm & Mary Bill Rts J 661.

28. *Gitlow v New York*, 268 US 652 at 673 (1925).

29. *Ibid.* See also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 16–17 (on the distinction between conceiving of freedom as the right to do whatever one wishes and in terms of a set of reciprocal limits on conduct).

Third, in a majoritarian democracy, government is held accountable *from time to time* through elections. The problem of accountability is not addressed by such an intermittent mechanism. In addition, a legal system must create the conditions in which every person bound by law's authority can stand on his right to just governance, regardless of whether an election has just concluded, is presently occurring, or will soon transpire.

Prior to their respective transitions to modern constitutionalism, Germany, South Africa and Canada illustrate that whether public authority is exercised by a single person, a minority of persons or by the majority of adult citizens, its exercise remains unaccountable to the inherent dignity of all those who are bound by it. In Germany, public authority was exercised (at least for a time)[30] by one and was unaccountable to all; in South Africa, public authority was exercised by the few and unaccountable to the many; and in Canada, public authority was exercised by the many and unaccountable to the few. Following the descent of Weimar into Nazism, the Führer exercised power in accordance with the totalitarian slogan *Du bist nichts, dein Volk ist alles!* ("You are nothing; your nation is everything!"). The Führer determined how persons were to be treated in accordance with his perception of the objectives of the nation. Whereas in Nazi Germany power was exercised by one and was unaccountable to all, apartheid South Africa placed state power in the hands of the few, a white minority that could enact law "without a need to justify even to those governed by the law".[31] Those who were excluded from contributing to the enactment of law "were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power . . .. In short they were denied recognition of their inherent dignity".[32] Although the majority of the population was denied political rights, the judiciary "accepted that parliament could make laws

30. For a lucid discussion of the dissolution of legal authority under Nazi power, see Julius Ebbinghaus, "The Law of Humanity and the Limits of State Power" (1953) 3:10 Phil Q 14.

31. Etienne Mureinik, "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31 at 32.

32. *Prinsloo v Van der Linde*, [1997] 6 B Const LR 759 at para 31 (S Afr Const Ct). On the inhumanity of apartheid power, see Ackermann, *supra* note 12 at 644–45.

that, expressly or by necessary implication, sanctioned discrimination and the deprivation of rights".[33]

Unlike South Africa, in which the few exercised power in a manner unaccountable to the many, Canada presented the opposite problem: The many exercised public authority in a manner that was unaccountable to the few. Prior to the enactment of the *Canadian Charter of Rights and Freedoms*[34] in 1982, persons enjoyed the right to ask the legislature to govern in a manner compatible with their freedom, equality and human dignity. However, "Canada's constitutional order protected these norms only in the interstices of its parliamentary system of government and its federal structure".[35] So long as the federal and provincial branches of government acted *intra vires*, public power could be directed towards the "discriminatory denial of employment opportunities and the franchise; the removal of the right of citizens, natural born and naturalized, to remain in Canada; restrictions on basic political rights and social benefits".[36] In sum, the problem of accountability pervaded the disparate modes of governance in Germany, South Africa and Canada prior to their transitions to modern constitutionalism. In each case, the legal order was arranged in such a way that individuals subject to the law's authority lacked the legal capacity to stand on their right to just governance.

It is crucial to distinguish an accountable legal order from a perfectly just one. A legal order is accountable if each person subject to law's authority can stand on his or her right to just governance. Thus, even if "there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected",[37] the question of how a legal order could be designed to make the right of persons to just governance justiciable persists. Here, an analogy with legal relationships in private law is illuminating. By recognizing, interpreting and enforcing private rights, a legal system

33. Arthur Chaskalson, "From Wickedness to Equality: The Moral Transformation of South African Law" (2003) 1:4 Intl J of Constitutional L 590 at 592 [Chaskalson, "From Wickedness to Equality"].

34. s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

35. Lorraine Eisenstat Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) 33:1 Israel LR 13 at 14.

36. *Ibid* at 16, n 8.

37. John Rawls, "Reply to Habermas" (1995) 92:3 J Philosophy 132 at 166.

makes private persons accountable to one another in their conduct by enabling each private person to stand on his own rights in relation to every other. Of course, this does not mean that private persons never commit injustices against one another or that the judiciary is infallible in recognizing and remedying private wrongs. Rather, it means that persons who have suffered a private wrong have the legal recourse to bring the supposed wrongdoer before an authoritative body empowered to recognize wrongs and impart remedies. An accountable legal order extends legal recourse from the domain of private law relationships to the public law relationship between a state and its members. A legal system is accountable if it creates the conditions under which the inherent dignity of the human person forms a justiciable constraint on the exercise of all public authority. Therefore, an accountable legal order is not one devoid of public injustices, but one in which these injustices are themselves justiciable.

The problem of accountability raises a fundamental question about legal ordering: How would a legal system be designed in order to make public authority accountable neither to the preferences of the many nor to the few, neither during this election nor the next, but to the unceasing right to just governance held by each inhabitant of the legal order?

II. A New Form of Government

Modern constitutionalism is a mode of legal organization designed to systematically address the problem of accountability by transforming the right of each person to just governance from "a mere guideline of a political, moral, or philosophical nature" into a justiciable constraint on all public authority.[38] In this Part, I argue that a legal system designed to make the exercise of public authority accountable to the right of each person to just governance would have a distinctive legal and institutional structure. First, to constrain the exercise of public authority, a legal system would have to establish conditions for the valid exercise of public authority by any branch of government, whether the legislature, executive or judiciary. Second, these legal conditions would have to encompass the

38. Mauro Cappelletti, "The Expanding Role of Judicial Review in Modern Societies" in Shimon Shetreet, ed, *The Role of Courts in Society* (Dordrecht, Neth: Martinus Nijhoff, 1988) 79 at 89 [Cappelletti, "Judicial Review in Modern Societies"].

right of each person, as a bearer of dignity, to just governance. Third, the legal order would have to create an institution that empowered any individual to challenge the validity of an exercise of public authority on the basis of its failure to conform to his right to just governance.

In what follows, I explain that this is exactly what a modern constitutional state provides by integrating constitutional supremacy, constitutional rights and judicial review. I will elaborate on the role of each of these components by explaining how the constitutional orders in Germany, South Africa and Canada addressed the problem of accountability that was obtained in the preceding regime. I will then argue that if even one of these legal or institutional components is absent, the problem of accountability persists. Because every legal system must address the problem of accountability, and the problem cannot be addressed apart from the general legal and institutional framework of a modern constitutional state, every legal system must ultimately adopt some version of this framework.

A modern constitution *constitutes* government by establishing the conditions for the valid exercise of public authority within a given legal system. Since the constitution is exhaustive in establishing these conditions, all public authority descends from it: there can be no extra-constitutional mode of "exercising public power".[39] Further, because the constitution determines the conditions of the valid exercise of public authority, it denies the validity of any act of government—legislative, executive or judicial—that conflicts with constitutional standards. Thus, Germany's *Basic Law* indicates that the rights and duties that it recognizes bind the legislature, the executive and the judiciary.[40] Similarly, the *Constitution of the Republic of South Africa* holds that "law or conduct inconsistent with it is invalid and the obligations imposed by it must be

39. Dieter Grimm, "German and American Constitutionalism: A Comparison", *The Berlin Journal* 7 (Fall 2003) 8 at 8, online: <www.americanacademy.de/sites/default/files/BJ7l-res.pdf>. See also Dieter Grimm, "The Achievement of Constitutionalism and Its Prospects in a Changed World" in Petra Dobner & Martin Loughlin, eds, *The Twilight of Constitutionalism?* (New York: Oxford University Press, 2010) 3 at 9.

40. *Grundgesetz*, *supra* note 18, arts 1(3), 20(3). On constitutional supremacy in Germany, see Jutta Limbach, "The Concept of the Supremacy of the Constitution" (2001) 64:1 Mod L Rev 1.

fulfilled".[41] Because the Constitution is the supreme law, a court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[42] In the Canadian context, the *Constitution Act, 1982* declares that the "Constitution of Canada is the supreme law . . . any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".[43] As the Supreme Court of Canada stipulated unanimously in one of its most important judgments: "The Constitution binds all governments, both federal and provincial . . .. They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[44] Since the constitution alone empowers government, no branch of government may exercise the authority that the constitution affords while ignoring the duties that it imposes.

In making the right of persons to just governance the constitutional condition for the valid exercise of all public authority, a modern constitutional state makes a fundamental break from earlier forms of government. In precursors to modern constitutionalism, public authority could of course be directed towards the enactment and enforcement of just laws that fulfill the right of persons to just governance. But in the event of this right's violation, those who suffer public wrongs could be left without legal recourse. By contrast, the modern constitutional state reorients the relationship between the right of government to exercise public authority and the right of persons to just governance by, on the one hand, recognizing that every person within the legal order—by virtue of her inherent dignity—imposes a duty on all public authority, and on the other, establishing that compliance with this duty is a constitutional condition for the valid exercise of public authority. Thus, Article 1 of Germany's *Basic Law* declares: "Human dignity shall be inviolable. To respect and protect [human dignity] shall be the duty of all state

41. *Constitution of South Africa*, *supra* note 15, s 2. See also Chaskalson, "From Wickedness to Equality", *supra* note 33 at 599; Ackermann, *supra* note 12 at 643.

42. *Constitution of South Africa*, *supra* note 15, s 172(1)(a).

43. *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

44. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72, 161 DLR (4th) 385.

authority."[45] That the state must *respect* human dignity precludes the state from interfering with persons in a manner unbefitting of their dignity. That the state must *protect* human dignity requires the state to create the conditions in which all persons within the legal order may live in dignity under law.[46] In South Africa, the "touchstone of the new political order" is the recognition of the inherent dignity of all South Africans, which the apartheid regime denied.[47] Therefore, the South African Constitution is premised on the values of "human dignity, equality and freedom".[48] Although Canada's *Charter of Rights and Freedoms* does not explicitly entrench human dignity, it holds that the rights and freedoms that it guarantees are grounded in the values of a "free and democratic society".[49] Chief Justice Dickson elucidated both the aim and the foundation of such a society: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms . . .. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person."[50] In a modern constitutional state, the right of government to exercise public authority is to be constrained neither by the preferences of the few nor of the many, but by the equal right of every inhabitant of the legal order to just governance.

By recognizing that the *inherent* dignity of human persons forms the purpose and constraint of all public power, a modern constitutional state repudiates any arrangement that ties the right of persons to just governance or their capacity to hold public power accountable to characteristics that some possess but others lack, whether a particular gender, race, religious worldview, class or favorable standing with respect to the dominant forces of the community. Since dignity is a moral status that inheres within

45. *Grundgesetz*, *supra* note 18, art 1(1). See Eckart Klein, "Human Dignity in German Law" in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 145 at 146 [Klein, "Dignity"]. Klein stated: "The dignity of man is the legitimizing basis of the State and its legal order. The State's respect for and protection of human dignity constitute its purpose." *Ibid.*

46. Kommers & Miller, *supra* note 12 at 60. On the affirmative duty to protect human dignity, see Dieter Grimm, "The Basic Law at 60: Identity and Change" (2010) 11:1 German LJ 33 at 43–44; David P Currie, "Positive and Negative Constitutional Rights" (1986) 53:3 U Chicago L Rev 864.

47. *S v Makwanyane*, [1995] 3 S Afr LR 391 at para 329 (Const Ct).

48. *Constitution of South Africa*, *supra* note 15, s 7(1).

49. *Supra* note 34.

50. *Big M Drug Mart*, *supra* note 18.

each person, each must have the legal capacity to stand on her right to just governance and hold the government to account. In the words of a former President of Germany's Federal Constitutional Court:

> The most important sentence in the Basic Law will always be Article 1 . . .. The founding fathers and mothers of the Basic Law purposely did not refer to the state or state authority, or to the nation, in this opening sentence. On the contrary, it concerns the human person and the dignity of the individual. It is an explicit rejection of every ideology which sacrifices human life or life chances to a supposedly higher cause. And it is a rejection, too, of every form of discrimination on grounds of origin, colour, creed or conviction. Article 1 does not say: "The dignity of the German people shall be inviolable". Nor does it refer to the dignity of the healthy or wealthy. It is a clear commitment to the inviolability of *human* dignity. This is not an abstract philosophical concept, but a binding obligation and an enduring mission for all those who bear political responsibility in our democratic and social state under the rule of law.[51]

The general constitutional duty to respect and protect human dignity is concretized by a set of constitutional rights that specify the relationship between the free individual and the coercive state. Germany's *Basic Law* sets out the relationship between human dignity and constitutional rights in Article 1. Under this article, the recognition that human dignity is "inviolable" is immediately followed by the statement that the "German people therefore [*darum*] acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[52] Accordingly, persons possess a set of basic rights, including the general right to liberty, which entitles each person to the free development of his or her personality in concert with others in the legal order.[53] The rights contained in the *Basic Law* are "not mere proclamations or slogans" as they were under the Weimar Constitution,[54] but rather are "directly applicable law" that binds all branches of government.[55] As Günter Dürig observes, "In earlier times (including Weimar) the basic rights were only

51. Ernst Benda, "Foreword by the Federal President" in *Basic Law for the Federal Republic of Germany* (Berlin: German Bundestag, 2001) at 5–6.

52. *Grundgesetz*, *supra* note 18, arts 1(1), 1(2). For discussions of the relationship between dignity and constitutional rights, see Klein, "Dignity", *supra* note 45 at 146ff. See also Eberle, "Freedom", *supra* note 17 at 16–17.

53. *Grundgesetz*, *supra* note 18, art 2(1).

54. Dürig, *supra* note 12 at 13.

55. *Grundgesetz*, *supra* note 18, art 1(3).

valid subject to the laws; today the laws are only valid subject to the basic rights."[56]

This conception of the relationship between the inherent dignity of the human person and constitutional rights is echoed by the constitutional orders of South Africa and Canada. In South Africa, human dignity is not only a foundational value of the legal order[57] but is also a justiciable right.[58] Dignity "informs the content of all the concrete rights" that the constitution delineates.[59] Similarly, Canada's *Charter* grounds the rights and freedoms it elaborates in the values of a free and democratic society, which include the "inherent dignity of the human person".[60] This inherent dignity "is at the heart of individual rights in a free and democratic society".[61] Within the modern constitutional paradigm, human dignity and constitutional rights are not simply a catalogue of past agreements enacted into law, but an elaboration of the more general duty that each person, as a being free and equal in dignity, imposes on public authority.

A constitution that makes the duty to govern justly a condition for the valid exercise of public authority is necessary, but not sufficient, to render government accountable to each of its members. It is necessary because it enables a distinction to be drawn between valid exercises of public authority (which conform to the right of persons to just governance) and mere exercises of power (which violate the constitutional condition for the valid exercise of public authority). It is not sufficient because even though such an arrangement recognizes that public authority must be directed towards the satisfaction of the right of persons to just governance,

56. Dürig, *supra* note 12 at 13.

57. *Constitution of South Africa*, *supra* note 15, s 7. See also Francois Venter, *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional States* (The Hague: Kluwer Law International, 2000) at 139–47.

58. *Constitution of South Africa*, *supra* note 15, s 10.

59. Chaskalson, "Human Dignity as a Foundational Value", *supra* note 12 at 204. See also Arthur Chaskalson, "Human Dignity as a Constitutional Value" in Kretzmer & Klein, *supra* note 45, 133 at 136. For a discussion of the distinction between dignity as the *ground* of particular rights and dignity as the *content* of rights, see Waldron, *Dignity*, *supra* note 13 at 14.

60. *R v Oakes*, [1986] 1 SCR 103 at 136, 26 DLR (4th) 200. On the relations between human dignity and constitutional rights in Canada, see *R v Morgentaler*, [1988] 1 SCR 30 at 161, 14 DLR (4th) 184, Wilson J, concurring.

61. See e.g. *Egan v Canada*, [1995] 2 SCR 513 at 543, 87 DLR (4th) 320; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 120, 126 DLR (4th) 129.

it leaves persons who believe that this right has been violated without legal recourse. If government is to be accountable to each person owed a duty of just governance, there must be an institution capable of assessing constitutional complaints on their merits, providing a public determination of the constitutionality of state action (or inaction), invalidating state action (or inaction) that violates constitutional standards and imparting remedies to those who have suffered public wrongs.[62] Further, to perform this role, the relevant institution would have to possess legal expertise in constitutional interpretation and rights adjudication. Finally, this institution would have to be politically independent so that complaints would be considered on their legal merits rather than in reference to the preferences of the government of the day.

The judiciary (or a specialized constitutional court) is uniquely suited for this role. The legal expertise of the judiciary enables it to interpret constitutional law and adjudicate rights claims. The political independence of the judiciary insulates it from political pressure and thereby enables it to assess constitutional complaints against the government in accordance with the normative framework established by the constitution. Further, unlike the legislature, which owes a duty of just governance to each person in the constitutional order but is accountable only to a majority (or plurality) of adult citizens at election time, judicial review enables any person to bring a constitutional complaint at any time challenging the validity of any instance of government conduct. The right of each person to bring a constitutional complaint before a politically independent judicial body, empowered and obligated to effectuate constitutional norms, reflects the most basic commitment of the modern constitutional paradigm: that each person subject to public authority must enjoy the legal capacity to respond to a public wrong by standing on his right to just governance.

Following the horrors of Nazism and the failure of Weimar to make constitutional norms "judicially enforceable",[63] Germany created a constitutional court to transform constitutional norms into a constitutional reality: "In the spirit of 'Never again' the framers were convinced that a constitution, as good as it may be, is of little value if it is not accompanied by an independent institution that enforces constitutional law . . .. So a

62. Cappelletti, "Judicial Review in Modern Societies", *supra* note 38 at 89.

63. Kommers & Miller, *supra* note 12 at 44.

court with a very wide range of powers was foreseen in the Basic Law."[64] The *Basic Law* states: "Should any person's rights be violated by public authority, he may have recourse to the courts."[65] As a former President of the Federal Constitutional Court of Germany, Wolfgang Ziedler J, remarked: "[T]he administration of justice . . . would be unthinkable without the complaint of unconstitutionality".[66] In turn, the *Constitution of South Africa* affirms that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[67] Similarly, Canada's *Charter* establishes that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[68] Chief Justice Dickson explained this provision when he stated:

> Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.[69]

If the general right to just governance is to be justiciable then so too must the particular constitutional rights that render it determinate.

The legitimacy of judicial review of legislation hinges on the conception of accountability that one endorses. On a majoritarian conception of accountability, articulated above, judicial review is a suspect practice

64. Dieter Grimm, "Values in German Constitutional Law" [unpublished, on file with author].

65. *Grundgesetz*, *supra* note 18, arts 19(4), 93(1)(4a). On the contrast between the justiciability of constitutional rights under the Weimar Constitution and the *Grundgesetz*, see Donald P Kommers, "German Constitutionalism: A Prolegomenon" (1991) 40:1 Emory LJ 837 at 853.

66. Kommers & Miller, *supra* note 12 at 12 (quoting Wolfgang Ziedler J).

67. *Supra* note 15, ss 34, 165(2).

68. *Supra* note 34, s 24(1). For a discussion of how section 24(1) of the *Charter* and section 52 of the *Constitution Act, 1982* transform the role of Canada's judiciary, see *Vriend v Alberta*, [1998] 1 SCR 493 at para 135, 156 DLR (4th) 385.

69. *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 229, 53 DLR (4th) 1.

insofar as it involves judges, who are accountable to no one, dismissing the preferences that the people's representatives have enacted into law while imposing their own preferences upon the people. The conception of accountability that I offer casts judicial review in a different light. Neither the legislature nor the judiciary enjoys an unconstrained right to exercise public authority by enacting its preferences into law. The legislature must enact laws that fulfill the right of every person to just governance, while the judiciary must preserve the constitutionally acknowledged relationship between the right of government to exercise public authority and the duty of government to rule justly. To this end, the judiciary must assess constitutional complaints on their merits. And when legislative or executive power is found to depart from the constitutional conditions of its exercise, the judiciary is required to uphold constitutional norms by denying the validity of the unconstitutional act. As Iacobucci J explained in the Supreme Court of Canada's landmark decision of *Vriend v Alberta*:

> It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge.[70]

The invalidation of unconstitutional legislation by the judiciary does not usurp the unconstrained right of the majority to enact its preferences into law. For the duty of the modern constitutional state to fulfill the inherent dignity of each of its inhabitants denies such a right. When the judiciary responds to a constitutional complaint by rigorously assessing the constitutionality of state action, the judiciary acts in accordance with its own constitutional duty to constrain the exercise of public authority to constitutional standards. In so doing, the judiciary renders the exercise of public authority accountable to the inherent dignity of each individual person within the legal order and so to the people considered as a whole. While proponents of the majoritarian view of

70. *Supra* note 68 at para 56.

accountability call for a passive judiciary deferential to legislative power, a judiciary that fails to hold government to constitutional standards would both violate its own constitutional duty and resurrect the problem of accountability, which the modern constitutional state exists to address. In the words of Sachs J of the Constitutional Court of South Africa, "The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."[71]

Now a proponent of majoritarian democracy might object that far from addressing the problem of accountability, the modern constitutional state simply raises it in a new form. For in a majoritarian democracy, the legislature is elected and accountable to the people, while in a modern constitutional state the judiciary is "unelected and unaccountable".[72] The objection is successful if the relevant conception of accountability refers to the intermittent capacity of a majority or plurality of adult citizens to make the exercise of public authority expressive of their preferences. On this conception of accountability, a majoritarian democracy is inherently accountable and a modern constitutional state is inherently unaccountable. However, if the relevant conception of accountability refers instead to the ongoing right of each inhabitant within the legal order to challenge any exercise of public authority on the basis that it violates her inherent dignity, then the positions of the two regimes are reversed: A modern constitutional state is inherently accountable; a majoritarian democracy is not.

When majoritarians assert that the judiciary must be rendered accountable to the preferences of the many, they endorse a principle that is incompatible with the creation of a legal order in which the exercise of public authority is accountable to the right of each of its members to just governance. If the legal order as a whole is to be accountable in this sense, then there must be an institution to adjudicate constitutional complaints alleging that government has exercised constitutional powers in a manner that violates constitutional norms. Further, if this institution is to adjudicate constitutional complaints against government on their legal merits rather than in accordance with the preferences of the many, it

71. *Fourie, supra* note 15 at para 94.

72. Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999) at 293 [Waldron, *Law and Disagreement*].

must enjoy judicial independence and be insulated from political pressures. To render the legal system as a whole accountable to the right of each of its inhabitants to just governance, the judiciary must answer neither to the many (which would regenerate the problem of accountability) nor to a higher authority (which in turn, would have to answer to a higher authority ad infinitum), but solely to the supreme norms of the constitutional order.

The modern constitutional project is not exhausted by the performance of the judicial role. Even if the judiciary fulfills its role by assessing the constitutionality of state action on the basis of the legal merit of the complaint rather than considerations of political expedience, the separation of powers means that the judiciary cannot enforce its determinations on the legislature or the executive.[73] The modern constitutional project cannot succeed if the legislature does not internalize constitutional norms and seek to further their realization through its law-giving, or if the executive fails to carry out the judgments of the judiciary and the laws enacted by the legislature. It is crucial to note, however, that even though the modern constitutional state cannot exclude the possibility of these injustices occurring, it is a legal order that makes their occurrence a violation of its supreme law. In turn, the legal order makes the violation of its supreme law a basis for legal recourse. As I noted above, insofar as justice and accountability are not synonymous notions, a legal order can be accountable even if it is not fully just.

I have argued that the legal and institutional structure of a modern constitutional state systematically addresses the problem of accountability. The integration of constitutional supremacy, constitutional rights and judicial review enable each individual within the legal order to challenge the validity of an exercise of public authority on the grounds that it violates his right to just governance. I will now make the case that the modern constitutional state alone addresses the problem of accountability. If any of the building blocks of a modern constitutional state—constitutional

73. See e.g. Grimm, "Constitutional Adjudication", *supra* note 4 at 109. Grimm stated, "the courts have no means to enforce respect for the constitution vis-à-vis the rulers. There is no bailiff for constitutional matters." *Ibid.* See also Kommers & Miller, *supra* note 12 ("the Constitutional Court's rulings are exclusively declaratory" at 37); Mauro Cappelletti, "Judicial Review in Comparative Perspective" (1970) 58:5 Cal L Rev 1017 ("[t]he theoretical power of the judge of constitutionality is awesome, yet in the end he has neither sword nor purse and must depend on others to give his decisions meaning" at 1053).

supremacy, constitutional rights or judicial review—are not present, then the problem of accountability persists.

Suppose that a legal system integrates constitutional supremacy and constitutional rights but lacks judicial review of legislation. This was the legal situation in Weimar immediately following the enactment of the *Weimar Constitution of 1919*.[74] In these circumstances, the constitution may recognize the "inviolable" liberty of the person,[75] but the problem of accountability remains. In the absence of judicial review, individuals lack the legal capacity to stand on the various rights that the constitution acknowledges. This does not mean that constitutional rights will be routinely violated, but it does mean that bearers of rights are at the mercy of government, the very entity that constitutional rights place under an obligation. As the political scientist Carl Joachim Friedrich observed in 1928, "If the German National Assembly may decide at will whether its statutes conform to the Constitution or not, the Bill of Rights and Duties is in large part robbed of all protection."[76]

Now suppose that a legal system contains constitutional supremacy and judicial review but lacks constitutional rights. This was the situation in Canada prior to the enactment of the *Charter of Rights and Freedoms*. Within this legal setting, individuals could challenge the validity of legislation for failing to meet constitutional standards. However, since those standards concerned a division of powers between the federal and

74. For an account of the subsequent piecemeal introduction of judicial review, see Carl Joachim Friedrich, "The Issue of Judicial Review in Germany" (1928) 43:2 Pol Sci Q 188; JJ Lenoir, "Judicial Review in Germany Under the Weimar Constitution" (1940) 14:3 Tul L Rev 361.

75. *The Constitution of the German Commonwealth*, League of Nations, December 1919, art 114.

76. Friedrich, *supra* note 74 at 194. For a similar remark in the context of pre-World War One Germany, see Otto von Gierke, "German Constitutional Law in Its Relation to the American Constitution" (1910) 23:4 Harv L Rev 273.

> [I]t is a fundamental deficiency of our public law that there exists no protection of constitutional principles by an independent court of justice . . .. In Europe the conviction of the omnipotence of legislature prevails, so that the judges are obliged to obey every legislative measure enacted in legal form. Thus as against a "Reichgesetz" no appeal to any court can bring help in the case of violation of constitutional rights.

Ibid at 284–85.

provincial governments rather than constitutional duties incumbent on both, the right to challenge the constitutionality of a publicly authoritative act did not track the right of persons, by virtue of their inherent equal dignity, to just governance. So long as the federal or provincial legislatures acted "within their allotted jurisdiction", they "were subject to no overarching laws, bound by no substantive principles, and constrained by no guarantees of individual or collective rights".[77] Bora Laskin, who later became Chief Justice of Canada, observed that within this legal framework, the "basic constitutional question was which [federal or provincial] jurisdiction should have the power to work the injustice, not whether the injustice should be prohibited".[78] In the absence of a scheme of constitutional rights, the exercise of public authority remains unaccountable to the inherent dignity of all who are bound by it.[79]

The final possibility involves a legal system that lacks constitutional supremacy. Such a legal system does not necessarily exercise public authority unjustly but it necessarily fails to address the problem of accountability. For in the absence of constitutional supremacy, rights cannot have constitutional status. When rights do not have constitutional status, conformity to rights cannot be a justiciable condition of the valid exercise of public authority. I return to this point below in discussing the adequacy of the commonwealth constitutional model.

The problem of accountability then cannot be addressed in the absence of the legal and institutional structure of a modern constitutional state. With this, a *principled* defence of the legal and institutional structure of a modern constitutional state comes into view. Every legal system must address the problem of accountability. However, no legal system can

77. Lorraine Eisenstat Weinrib, "'Do Justice to Us!': Jews and the Constitution of Canada" in Daniel J Elazar, Michael Brown & Ira Robinson, eds, *Not Written in Stone: Jews, Constitutions, and Constitutionalism in Canada* (Ottawa: University of Ottawa Press, 2003) 33 at 33.

78. Irwin Cotler, "Jewish NGOs and Religious Human Rights: A Case Study" in John Witte Jr & Johan D van der Vyver, eds, *Religious Human Rights in Global Perspective* (Hague: Kluwer Law International, 1996) 235 at 254 (quoting Bora Laskin).

79. On the fragility of common law rights in a parliamentary supremacy, see Sir John Laws, "The Good Constitution" (2012) 71:3 Cambridge LJ 567 at 569–70.

address the problem apart from the legal and institutional structure of a modern constitutional state.[80]

So conceived, modern constitutionalism can be contrasted with Phillip Pettit's constitutional ideal, contestatory democracy. Recognizing that even a democratic government might dominate its citizens by directing its coercive power to its own interests, he defends a conception of democracy in which all government action is contestable. A contestatory democracy includes multiple forums for contestation, including the "opportunity of writing to your Member of Parliament, the capacity to require an ombudsman to make an inquiry, the right to appeal against a judicial decision to a higher court, and less formal entitlements such as those involved in rights of association, protest, and demonstration".[81]

The conception of modern constitutionalism that I have outlined makes two fundamental departures from Pettit's constitutional vision. The first concerns the justification of judicial review. Pettit conceives of judicial review as an instrument, among others, for bringing about contestation. For him, the question of which instruments a particular legal system should adopt is an empirical question about how best to promote contestability.[82] In contrast, I have argued not that it is *possible* to bring about contestation through judicial review, but that the problem of accountability cannot be addressed apart from it. Thus, judicial review is a *necessary* component of a legal system that addresses the problem of accountability. Every legal system must bring its arrangements into accord with the parameters of modern constitutionalism.[83]

The second discrepancy concerns the relationship between judicial review and democratic governance. On Pettit's view, the role of contestation is to influence the democratic will, not to subject it to legal constraints. Thus, Pettit explains that in a contestatory democracy the democratic process enjoys primacy over contestatory mechanisms and substantive constitutional constraints. As he puts it, "everything is up for

80. Pettit, *Republicanism*, *supra* note 21 at 193. Later, he indicates that such forums also include judicial review and administrative tribunals. *Ibid* at 296.

81. *Ibid* at 193.

82. *Ibid.*

83. For an account that applies Pettit's framework to Canadian constitutional jurisprudence, see Hoi Kong, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15:2 Rev Const Stud 249.

grabs".[84] In my view, contestatory democracy perpetuates the problem it purports to solve. In a contestatory democracy, one's right to be free from the arbitrary domination by government is contingent on one's capacity to wield political influence, even though one's lack of political influence is a central reason that one is susceptible to such domination in the first place. Accordingly, I have argued for a conception of constitutionalism in which the constraints binding public authority are legal rather than merely political. A modern constitutional state creates the conditions in which any person may challenge the validity of any exercise of public authority on the grounds that it violates his right to just governance. Challenges should, of course, influence the formation of the democratic will, but insofar as the challenges concern the validity of legislative and executive action, the legal impact of a challenge is not simply a product of its political influence.

Although modern constitutional states alone address the problem of accountability, modern constitutionalism is a versatile form of legal ordering. While the problem of accountability calls for a general legal and institutional framework, this framework can be filled with a variety of arrangements. The problem of accountability requires the rejection of modes of governance that are accountable to only the few or the many, and the adoption of legal and institutional arrangements that render the legal order as a whole accountable to all who are subject to it. The problem can be addressed through a variety of arrangements that are, from the standpoint of the problem of accountability, neither required nor prohibited. For example, a modern constitutional state may be unitary or federal, unicameral or bicameral, common law or civil law, presidential or parliamentary in its system of government, and centralized or decentralized in its system of judicial review.

III. Assessing Commonwealth Constitutionalism

This Part contrasts modern constitutionalism with a competing model, commonwealth constitutionalism. I argue that because this model fails to address the problem of accountability, it should be rejected as a constitutional ideal. However, while the commonwealth model cannot

84. Pettit, *Republicanism*, *supra* note 21 at 201.

be considered an ideal that legal systems should strive to realize, it may nevertheless be appropriate in circumstances in which the full realization of modern constitutionalism is not yet possible.

Commonwealth constitutionalism is an innovative and distinctive model that works to reconcile parliamentary sovereignty with the protection of rights.[85] Its leading proponent, Stephen Gardbaum, explains that the model has three "essential and defining features":

> (1) a legalized bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other governmental acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3), most distinctively, notwithstanding this judicial role, a formal legislative power to have the final word on what the law of the land is by ordinary majority vote.[86]

The United Kingdom is the paradigmatic instance of commonwealth constitutionalism. Section 1 of the *Human Rights Act 1998*[87] incorporates the *European Convention on Human Rights* (*Convention*) into domestic law.[88] Section 3 of the Act imposes a duty on the judiciary to interpret legislation "[s]o far as it is possible to do so" in accordance with the *Convention*'s enumerated rights.[89] Section 4 establishes that in the event that a legislative provision cannot be reconciled with a *Convention* right, higher courts may issue a declaration of incompatibility. Because *Convention* rights do not have the status of higher law, a declaration of incompatibility "does not affect the validity" of the legislative provision.[90] The result is that Parliament can respond to the declaration by amending

85. See e.g. Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp L 707 [Gardbaum, "The New Commonwealth Model of Constitutionalism"]; Stephen Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8:2 Intl J Constitutional L 167 [Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism"]; Stephen Gardbaum, "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14:12 German LJ 2229 [Gardbaum, "Case for Commonwealth Model of Constitutionalism"].

86. Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism", *supra* note 85 at 169.

87. *Human Rights Act 1998* (UK), c 42, s 1 [*Human Rights Act*]

88. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur TS 5 (entered into force 3 September 1953).

89. *Human Rights Act*, *supra* note 87, s 3(1).

90. *Ibid*, s 4(6).

the relevant legislative provision.[91] So conceived, the commonwealth model departs from two familiar paradigms. Unlike systems of legislative supremacy, the commonwealth model offers an effective scheme of rights protection by making *Convention* rights subject to judicial oversight in domestic courts. Unlike systems of constitutional supremacy, the commonwealth model does not subject the democratic will of Parliament to a judicial veto or to the imposition of judicial remedies.[92] The result, Gardbaum claims, is a model that recognizes that it is "possible to have what is essential to both: judicial protection of fundamental rights and the legislature retaining the right to have the last word on what is the law of the land".[93]

The adequacy of the commonwealth model can be considered from the standpoint of the problem of accountability. Recall that the problem calls for a legal and institutional structure in which an individual can challenge the validity of an exercise of public authority on the grounds that it violates his right to just governance. While the commonwealth model enables individuals to raise a complaint alleging that a legislative provision violates *Convention* rights, those rights lack the status of supreme law. The result is that even in cases in which the provision cannot be interpreted to accord with *Convention* rights, the provision's validity is unaffected. Of course "the normal result of a declaration [of incompatibility] will be amendment or repeal", but the *Human Rights Act* "does not *require* remedial action by government and Parliament in response to a declaration".[94] Thus, in the aftermath of a declaration of incompatibility, the government remains at liberty "to refuse to take steps to remedy the incompatibility

91. *Ibid*, s 10. But see Gardbaum, "The New Commonwealth Model of Constitutionalism", *supra* note 85.

> Once a declaration [of incompatibility] has been made, [the *Human Rights Act*] creates no legal duty on either Parliament or the government to respond in any way, but it does empower the relevant minister to make a 'remedial order' . . .. [The *Human Rights Act*] obviously did not need to empower Parliament to amend or repeal such legislation since the power clearly already exists.

Ibid at 733.

92. Gardbaum, "The New Commonwealth Model of Constitutionalism", *supra* note 85 at 739–40

93. *Ibid* at 741.

94. *Ibid* at 738 [emphasis in original].

if it deems it appropriate to do so".[95] In such cases, the government is both the party that is found to have violated a *Convention* right *and* the party that determines whether to amend the provision in question. In the event that an amendment is not forthcoming, domestic law offers no legal recourse to those whose rights have been publicly acknowledged to have been violated. Even if rights are invariably protected in the commonwealth model, the problem of accountability nevertheless persists.

Although the commonwealth model fails to address the problem of accountability, it need not be rejected completely. Gardbaum defends the commonwealth model in two different ways. First, he argues that the commonwealth model is superior to the available alternatives because it integrates their respective virtues—as he understands them—while eschewing their respective vices.[96] I reject this view. Because the problem of accountability is inescapable within the commonwealth model, it does not form an ideal appropriate for legal systems in general. Gardbaum's second defence is more modest. He asserts that the commonwealth model may be appropriate for a particular legal system because of contingent circumstances that obtain within it.[97] Thus, when Gardbaum describes the constitutional debate surrounding the *Human Rights Act* in the United Kingdom, he emphasizes both that the existing model of legislative supremacy was unacceptable because of its legacy of rights violations and that constitutional supremacy was unachievable because of deep-rooted commitments to parliamentary sovereignty. In his words, the United Kingdom was confronted by

> the following traditional conundrum: on the one hand, an ordinary statute bill of rights would likely provide insufficient legal protection for them; on the other, more protection than this was problematic if not *impossible* under the British constitution and its central doctrine of parliamentary sovereignty.[98]

Thus, Gardbaum presents the commonwealth model not as a "universally appropriate model of constitutionalism", but merely as a possibility that

95. KD Ewing, "The *Human Rights Act* and Parliamentary Democracy" (1999) 62:1 Mod L Rev 79 at 92.

96. Gardbaum, "Case for Commonwealth Model of Constitutionalism", *supra* note 85.

97. Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism", *supra* note 85 at 206.

98. Gardbaum, "The New Commonwealth Model of Constitutionalism", *supra* note 85 at 732 [emphasis added].

should be acknowledged in the catalogue of constitutional options.[99] I am sympathetic to this proposal, but for my own reasons.

If legal systems have a duty to bring themselves into the deepest possible conformity with the legal and institutional structure of a modern constitutional state, a question arises about the types of arrangements that should be adopted when the realization of such a regime is impossible. The commonwealth model offers an intermediary point between legislative supremacy and modern constitutionalism. This model takes an important step beyond legislative supremacy by enabling the judicial oversight of *Convention* rights. The model falls short of constitutionalism because *Convention* rights lack the status of supreme law. Consequently, legislative provisions that violate rights are not thereby invalid. Commonwealth constitutionalism should be regarded not as a constitutional ideal that is obligatory for legal systems to realize, but as a way for legal systems in which parliamentary sovereignty is presently inescapable to approximate the rights protection of a modern constitutional regime. On this view, the commonwealth model does not itself instantiate the ideal of constitutionalism, but may in certain contexts represent a significant step towards it.

Turning from considerations of justification to ones of fit, a further problem emerges as Gardbaum claims other jurisdictions as instances of his model. While he regards Canada's constitutional arrangements as the "pioneer" of the commonwealth model,[100] a deep antagonism emerges between the former and the latter. This antagonism stems from the fact that, in Canada, rights enjoy the status of supreme law. As such, rights cannot be amended through ordinary lawgiving. Further, the judiciary is empowered not only to determine whether ordinary laws conform to constitutional rights, but also to invalidate laws that do not. Finally, far from providing the legislature with plenary power to override the *Charter*, the notwithstanding clause, established in section 33, does not apply to all constitutional rights, is temporary, and has become so politically toxic that it fails to temper "the countermajoritarian difficulty

99. Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism", *supra* note 85 at 205–06.

100. Gardbaum, "The New Commonwealth Model of Constitutionalism", *supra* note 85 at 719.

posed by an unlimited power of judicial review".[101] Gardbaum responds to these discrepancies by arguing that to the extent that the Canadian constitutional practice departs from the model, the former is a defective instance of the latter.[102] The constitutional theory that I develop offers an alternative possibility: Canada is not a defective instance of the commonwealth model, but a generally successful instance of the modern constitutional model. Within the modern constitutional model, any individual can challenge the validity of any exercise of public authority on the grounds that it violates her constitutional rights.

Some might take issue with my account of Canada as a modern constitutional state. After all, section 33 of the *Charter* empowers the legislature temporarily to override a range of constitutional rights, and surely such a provision indicates that many of the duties that the *Charter* imposes on the legislature are defeasible.[103] While I cannot provide a full response to this objection here, I will say this: as a matter of constitutional theory, the problem of accountability requires every legal system to bring its arrangements into conformity with the parameters of a modern constitutional state. This duty has important implications in a range of legal contexts. On the one hand, this duty provides a program for constitutional reform in legal systems that lack the legal and institutional structure that render the exercise of public authority accountable to the right of each person to just governance. On the other hand, this duty binds legal systems that possess this legal and institutional structure to develop practices that are conducive to the realization of its constitutional aspirations. To this end, a modern constitutional state must develop conventions against employing arrangements that are inimical to the realization of a just and accountable legal order. The override clause is

101. *Ibid* at 727.

102. Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" *supra* note 85 at 183. Gardbaum stated:

> In sum, I view Canada as part of the new model because of section 33 . . . but as suffering from a serious practical problem due to the apparent near-convention against its use. The problem is less that the override power is rarely exercised per se than that this convention seems largely to exclude the sort of political discussion about rights called for by the ideal working of the new model.

Ibid.

103. *Charter*, *supra* note 34, s 33.

such an arrangement insofar as it could be employed to sidestep many of the rights and freedoms that the *Charter* exists to secure. Accordingly, so long as the clause remains in force, a modern constitutional state would have a duty to develop a convention against its use—regardless of whose rights happened to be at stake. As a matter of constitutional practice, this is arguably what has happened in Canada. In the context of a legal culture that is in principle hostile to overriding rights, the override does not subvert the accountability of the legal order.

Alon Harel's insightful book, *Why Law Matters*, offers a non-instrumental justification of the commonwealth model.[104] Harel and I have developed constitutional theories that are resolutely non-instrumental, but which generate opposing conclusions about the adequacy of commonwealth constitutionalism. I will identify the point of divergence and trace its broader implications for questions of constitutional design. Each of us follows a different non-instrumental strategy. My account articulates a general problem about the public law relationship between rulers and ruled. I then argue that the legal and institutional structure of a modern constitutional state is required to address this problem. On this view, constitutional supremacy, constitutional rights and judicial review are all required for the same reason. In contrast, Harel offers one justification for constitutional rights and another for judicial review. Although both of these justifications are non-instrumental, they introduce conflicting standards of justification that undermine his defence of the commonwealth model. I will consider each justification in turn and then note the discrepancy that obtains between them.

Harel's justification of constitutional rights proceeds from the conviction that when it comes to the enjoyment of their rights, individuals should not be "at the mercy" of the legislature.[105] On the basis of this conviction, he argues that a legal system is defective if the enjoyment of rights within it depends upon the discretion of the legislature. This leads Harel to identify a "non-contingent" defect of majoritarian democracies: "Even if the legislature is highly enlightened and is devoted to the protection of rights and justice, the mere fact that [individual] rights are

104. Alon Harel, *Why Law Matters* (New York: Oxford University Press, 2014).
105. *Ibid* at 148.

'at its mercy' is a deficiency that needs to be addressed."[106] On this point, Harel and I are in agreement.

But as the focus of Harel's argument shifts from individual rights to institutional deliberation, his original conviction is supplanted by an alternative justificatory standard. Judicial review is justified, he argues, because it constitutes the right to a hearing. This right consists of three components. The state must (1) "provide an opportunity for a person to challenge its decision," (2) "be willing to engage in meaningful deliberation," and (3) "be willing to reconsider the decision, to change it if the deliberation triggered by the individual grievance exposes that the decision is wrong".[107]

The difficulty that undermines Harel's account is that the two justificatory standards that he introduces are incompatible. Consider his treatment of the commonwealth model (which he refers to as a system of weak judicial review).[108] Such a model is justified, Harel argues, because it is compatible with each of the components that comprise a right to a hearing:

> For example, under the British *Human Rights Act*, the petitioner can raise a grievance and she is entitled to a full account of whether her rights have been violated (a declaration of incompatibility). But the reconsideration is left to the legislature and its good will, and in principle the legislature is not obliged to rely in its decision on the particularities of the case.[109]

For Harel, the distinctive feature of commonwealth constitutionalism is that it transfers the "task of reconsideration"—the third component of the right to a hearing—from the judiciary to the legislature.[110] Such a transfer is permissible, Harel explains, because meaningful reconsideration remains possible since a legislature can "take seriously the hearings conducted by courts even if they are not obliged to accept their judgments".[111]

This makes the conflict between the disparate justifications that run through Harel's constitutional theory apparent. On the one hand, his

106. *Ibid* at 189.
107. *Ibid* at 221.
108. *Ibid* at 220.
109. *Ibid* at 222.
110. *Ibid.*
111. *Ibid* at 223.

justification of constitutional rights holds that a legal system is defective if the freedom of any individual within it is "contingent on the good will of the legislature".[112] On the other hand, Harel's justification of judicial review holds that the commonwealth model is acceptable even though it leaves the task of determining whether to conform with the right "to the legislature and its good will".[113] Therefore, since the justificatory standards that Harel develops do not cohere, his theory culminates not in an integrated justification of constitutional rights and judicial review, but in a dilemma. Either the rights of individuals must not be placed at the mercy of the legislature (in which case the commonwealth model is unacceptable for the same reason as majoritarian democracy), or individuals merely have the right to a hearing—a right which can be fulfilled by any branch of government, including the legislature[114] (in which case the commonwealth model would be acceptable, but so would majoritarian democracy). Since Harel seeks to justify the commonwealth model while rejecting majoritarian democracy, each of these possibilities is fatal to the ambitions of his theory. Such a dilemma can be avoided by generating each of the components of a modern constitutional state from a common non-instrumental justificatory basis. This essay follows that strategy.

IV. A Reply to Waldron

The preceding Parts argued that there is a connection between the duty of a legal system to respect and protect human dignity, on one hand, and the legal and institutional structure of a modern constitutional state on the other. Modern constitutionalism is a versatile form of legal ordering that alone addresses the problem of accountability. In this Part, I will defend the legal and institutional structure of a modern constitutional state from a leading critic, Jeremy Waldron. As a liberal, Waldron holds that "minorities are entitled to a degree of support, recognition, and

112. *Ibid* at 7.

113. *Ibid* at 222.

114. *Ibid* at 213–14. Harel stated:

> The right-to-a-hearing justification for judicial review does not require review by courts or judges. It merely requires guaranteeing that grievances be examined *in*

insulation that is not necessarily guaranteed by their numbers or by their political weight".[115] As a critic of constitutionalism, Waldron holds that the protection of minority rights is not advanced by enabling the judiciary (or a special constitutional court) to review the constitutionality of legislation. Waldron offers two kinds of arguments against the judicial review of constitutional rights.[116] The first claims that judicial review does not produce better outcomes than majoritarian arrangements. The second claims that regardless of outcomes, the judicial review procedure is itself objectionable because it is undemocratic. If both objections are successful, then Waldron can conclude that the benefits that judicial review offers are uncertain, but the injustice it perpetrates in constraining the will of the majority is inescapable.[117] I respond to each objection in turn.

The most prominent strategy for justifying rights-based constitutionalism involves identifying some beneficial outcome and then arguing that constitutionalism is what contributes to its realization. Proponents of this strategy appeal to a range of desirable outcomes, but share the conviction that constitutional governance is justifiable if it contributes to the achievement of outcomes that are desirable by nature. According to this outcome-oriented justification, constitutionalism is an instrument: Its value lies in what it brings, not in what it is.[118]

Ronald Dworkin's initial defence of rights-based constitutionalism is representative of the outcome-based approach. In *Freedom's Law*, Dworkin explains that when considering issues of constitutional design in general, and rights protection in particular, he sees "no alternative but

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certain ways and *by using certain procedures* and *modes of reasoning*, but it tells us nothing of the identity of the institutions in charge of performing this task. Thus, in principle, the right to a hearing can be protected by any institution, including perhaps the legislature.

Ibid [emphasis in original].

115. Waldron, "Case Against Judicial Review", *supra* note 10 at 1364.

116. *Ibid* at 1353.

117. Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13:1 Oxford J Leg Stud 18 at 50. See also Waldron, "Judicial Review and the Conditions of Democracy" (1998) 6:4 J Political Philosophy 335 at 352 [Waldron, "Conditions of Democracy].

118. For a classification and criticism of five prominent instrumental justifications of judicial review, see Alon Harel & Tsvi Kahana, "The Easy Core Case for Judicial Review" (2010) 2:1 J Leg Analysis 227 at 230–38.

to use a result-driven rather than a procedure-driven standard for deciding them".[119] Accordingly, when Dworkin reflects on whether constitutional rights should be protected through judicial review, he turns his attention to the kinds of outcomes that this arrangement generates. For Dworkin, judicial review is justified because it produces a welcomed benefit by improving the quality of public debate:

> When an issue is seen as constitutional . . . and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality . . .. When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed, by future decisions, a sustained national debate begins, in newspapers, and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.[120]

As Dworkin explains, judicial review improves the quality of public debate by framing issues of public importance not in terms of their popularity or expediency (as legislatures too often do), but as questions of political morality.[121] Once questions of public importance are framed in this way, the judiciary responds by selecting "the best answers".[122]

Those who join Dworkin in defending rights-based constitutionalism typically share his presupposition that questions concerning the appropriateness of a legal regime should be addressed in reference to the benefits it brings and the burdens it alleviates. Aileen Kavanagh, for example, holds that the "ultimate standard by which we judge political institutions is their likelihood of achieving good substantive outcomes".[123] Accordingly, the "justification for constitutional review must depend ultimately on empirical assumptions about the likelihood that courts will succeed in protecting rights".[124] Kavanagh recognizes that the success of

119. Dworkin, *Freedom's Law*, *supra* note 5 at 34.
120. *Ibid* at 345.
121. *Ibid* at 344.
122. *Ibid* at 34.
123. Aileen Kavanagh, "Constitutional Review, the Courts, and Democratic Scepticism" (2009) 62:1 Current Leg Probs 102 at 134.
124. *Ibid* at 104.

courts in protecting rights may vary in different contexts. She therefore argues that scholars should support constitutional arrangements when they would be effective in protecting rights and oppose them when they would be ineffective.[125]

While Kavanagh defends constitutionalism by focusing on the benefits that it might bring, Samuel Freeman calls attention to the burdens that it might alleviate. Freeman conceives constitutional democracy to be an expedient for safeguarding equal rights in social and historical circumstances, in which legislative power might be used to "subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality".[126] For Freeman, as for Kavanagh and Dworkin, the justification of judicial review "is contingent upon the extent to which these procedures serve the ends in virtue of which they are found appropriate".[127] Judicial review is appropriate when it is conducive to the promotion of the best outcomes in relation to the complex matrix of factual circumstances at hand. As circumstances change within a given legal system, judicial review may be rightly adopted as beneficial and subsequently forsaken as detrimental, or vice versa.[128]

Outcome-based justifications do not establish that rights-based constitutionalism is, as a matter of principle, preferable to other modes of governance. On the one hand, each of the advantageous outcomes to which these justifications appeal can be realized within other kinds of legal systems. On the other hand, the various advantages that rights-based constitutionalism supposedly generates might fail to materialize. Thus, Jeremy Waldron has responded to Dworkin by cataloguing instances in which public debate has flourished in majoritarian democracies and floundered in rights-based constitutional regimes.[129] This leads to the question, if rights-based constitutionalism is simply an instrument for the

125. *Ibid* at 123–25.

126. Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990) 9:4 Law & Phil 327 at 355.

127. *Ibid* at 361.

128. Kavanagh, *supra* note 123 at 108.

129. Waldron, "Conditions of Democracy", *supra* note 117 at 339–40; Waldron, "Case Against Judicial Review", *supra* note 10 at 1349, 1384–85 (contrasting the quality of debates over the "liberalization of abortion law, the legalization of homosexual conduct among consenting adults, and the abolition of capital punishment" in states that are and are not constitutionalized).

promotion of outcomes that it might fail to produce or that could be realized in its absence, then why is it valuable?

To this, a proponent of the outcome-based approach might reply that we value rights-based constitutionalism not because it provides advantages that other forms of government are incapable of offering, but rather because it realizes the same kinds of advantages as other forms of legal ordering to a greater extent. Thus, Dworkin holds that the American experiment with judicial review of constitutional rights has been justified, because "[t]he United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions."[130] His claim is not that legislatures, unlike courts, are incapable of protecting rights but that if the United States lacked judicial review, then the United States would be less rights-protecting than it is today.

This claim is more problematic than Dworkin acknowledges as it takes the form of a counterfactual: *If it was not the case that A, then the result would not have been B.* As Waldron has rightly observed, counterfactual claims are "extraordinarily difficult to assess".[131] To verify Dworkin's claim that in the absence of judicial review the United States would be less just than it is today, one would have to determine the overall balance of just and unjust outcomes that have accumulated in the history of American constitutional jurisprudence.[132] One would then have to weigh this determination against the sum of just and unjust outcomes that *would have* occurred in the range of possible alternative legal systems. The former determination is perhaps incalculable; the latter is unknowable.

To be sure, the problem with Dworkin's counterfactual claim is not that he is wrong in asserting that if the United States lacked judicial review of constitutional rights, then it would be less just. Indeed, he might be correct. However, since the veracity of his claim seems "impossible to verify", his justification of constitutionalism dissolves into mere

130. Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) at 356.

131. Waldron, "Conditions of Democracy", *supra* note 117 at 337.

132. *Ibid* at 337–38 (explaining that verifying Dworkin's counterfactual would require weighing just judicial decisions like *Brown v Board of Education* against unjust decisions, such as those that struck down progressive labour legislation during the *Lochner* era). For the *Brown* decision, see *Brown v Board of Education*, 347 US 483 (1954).

assertion.[133] Thus Waldron concludes that it remains "an open question whether judicial review has made the United States (or would make any society) more just than it would have been without that practice".[134] The same argument is applicable to the Canadian context. To verify the claim that Canada is more just under the *Charter* than it would be in its absence, one would have to weigh the overall balance of just and unjust outcomes that the *Charter* has wrought against what would have occurred had the *Charter* not been enacted in 1982. Such an inquiry attracts conjecture, not proof.

So long as this problem of verification persists, we cannot elevate rights-based constitutionalism over other forms of government by pointing to its superior outcomes. Instead, the outcome-based justification yields the more modest conclusion that there might be circumstances in which constitutional arrangements are compatible with the realization of desirable outcomes. If this is all that can be said in favour of constitutionalism, then those who have described the modern constitutional paradigm as a "fundamental innovation" in governance[135] must be mistaken. The innovation of modern constitutionalism is hardly *fundamental* if it is just another means of achieving desirable outcomes that could be brought about without it. Further, modern constitutionalism is not *innovative* if it, like other modes of governance, might fail to bring about the outcomes by which it is justified.

This article offers a different way of thinking about rights-based constitutionalism by rejecting the unstated assumption of its proponents and critics: that any justification of constitutional arrangements must be outcome-based.[136] Unlike Dworkin and his followers, I have not argued that modern constitutionalism is justified because of some benefit that it might bring that could, in principle, be achieved in its absence, such as debates of high quality or just outcomes. Instead, just as majoritarians defend their conception of democracy by appealing to the moral significance of its procedures, so too a parallel strategy is available to

133. Waldron, *Law and Disagreement*, *supra* note 72 at 288.

134. *Ibid* at 355. For a detailed classification of the kinds of "consequentialist calculations" that would have to be balanced to verify Dworkin's counterfactual claim, see Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights" (2002) 22:2 Oxford J Leg Stud 275.

135. Cappelletti, "Constitutional Justice", *supra* note 2 at 6.

136. Harel & Kahana, *supra* note 118 at 237.

justify the legal and institutional structure of a modern constitutional state. Modern constitutionalism is a systematic response to a moral problem that confronts every legal system: the problem of accountability. Addressing this problem is what modern constitutionalism does and what cannot be done in its absence.

Precursors to modern constitutionalism may, as Waldron illustrates, enjoy high levels of public debate. They may even succeed in enacting just laws. There is, however, one problem that precursors to modern constitutionalism cannot address: the problem of accountability. A modern constitutional state alone makes the inherent dignity of each individual a "justiciable and enforceable *right* that must be respected and protected".[137] If every state must make the exercise of public authority accountable to the right of each of its inhabitants to just governance, and accountability of this kind is impossible apart from the legal and institutional structure of a modern constitutional state, then every state must—as a matter of principle—adopt modern constitutional arrangements. Modern constitutionalism, then, is required not because of the welcomed benefits that it might bring but because of what it is: a form of legal ordering that transforms the inherent equal human dignity of each person subject to law's authority into a justiciable legal norm.

The legal and institutional structure of a modern constitutional state is not an *instrument* for bringing about the morally desirable end of accountable government. The structure is itself morally valuable because accountable government is not possible apart from it. In this sense, the legal and institutional structure of a modern constitutional state is *constitutive* of a legal order that is accountable to the inherent dignity of each of its inhabitants. What it means for a legal system to be accountable is for it to be a modern constitutional state.[138]

Such a justification of modern constitutionalism departs from the outcome-based strategy in two respects. First, it establishes that the transition to modern constitutionalism is itself morally *necessary* for a legal system rather than merely *compatible* with the achievement of some extrinsically desirable outcome. Second, it justifies modern constitutionalism on the basis of a fundamental moral problem common

137. *Dawood v Minister of Home Affairs*, [2000] 3 S Afr LR 936 at para 35 (Const Ct) [emphasis in original].

138. On the role of means in instrumental and non-instrumental theories, see John Finnis,

to legal systems, instead of on the basis of cultural, historical or political circumstances found in some legal systems but absent in others. Once the problem to which modern constitutionalism systematically responds is in view, we can abandon outcome-based justifications without abandoning modern constitutionalism.

Whereas Waldron's first line of criticism targets the justifications that constitutional theorists have advanced to support judicial review, his second criticism attacks judicial review from the standpoint of a majoritarian democratic theory. For Waldron, a legitimate political order is democratic, a democratic political order is majoritarian and a constitutional regime is undemocratic and therefore illegitimate because it departs from majoritarian arrangements. Waldron makes this point in a variety of ways.

In one formulation, Waldron claims that the entrenchment of constitutional norms imposes a disability on the legislature, which hinders its "normal function of revision, reform, and innovation in the law".[139] Waldron is correct that the entrenchment of constitutional norms binds the legislature insofar as it denies the legislature the legal power to abrogate certain features of the constitutional order, such as its commitment to respect and protect the inherent dignity and fundamental rights of persons. However, it need not follow that this constrains the legislature's "normal function". If the public authority of government must always be directed towards the fulfillment of the inherent dignity of each individual within the legal order, then modern constitutionalism does not impose a new constraint on the legislature, but rather it recognizes a duty implicit in any legal system. The modern constitutional state introduces a novel legal and institutional framework to make this duty justiciable, but the

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Natural Law and Natural Rights, 2nd ed (New York: Oxford University Press, 1980). Finnis distinguishes

> between (i) actions which are means materially . . . *external* to that-to-which-they-are-means (as drawing money from the bank is external to buying this book, and buying this book is external to reading it . . .), and (ii) actions which are means *constitutive* of, or *components* or *ingredients* in, or *materially identified* with that-to-which-they-are-means (as reading this book is a way of thinking about certain matters)

Ibid at 77 [emphasis in original].

139. Waldron, *Law and Disagreement*, *supra* note 72 at 221.

duty itself obtains whenever public authority is exercised over bearers of dignity.

In another formulation of the objection from democracy, Waldron suggests that constitutionalism diminishes democratic rights by placing "issues of high principle" in the judicial domain, while leaving the people's elected representatives the less important task of sorting out "interstitial matters of social and economic policy".[140] Yet, modern constitutionalism does not relegate the legislature to mundane matters. As we saw in the previous Part, the duty to realize a legal order that unites to the greatest possible extent the authority of law with the dignity of each person bound by it is incumbent on all branches of government, including the legislature. While the legislature does not have the final say on issues of constitutional interpretation, this does not mean that issues of high principle are within the realm of the judiciary alone. All branches of government are bound by constitutional norms. Such an approach neither degrades the legislature nor idealizes the judiciary. The legislature must give laws that fulfill the right of each person to just governance. The judiciary must uphold the supreme norm of the constitutional order by holding the government to constitutional standards in its exercise of constitutional powers.

On other occasions, Waldron formulates the objection from democracy in this way: The problem with judicial review is that it excludes citizens from participating in important decisions regarding their own rights, and citizens will rightly feel "slighted" by this exclusion because the constitutional order, in effect, says that the citizens cannot make important decisions regarding their own governance.[141] I do not know if Waldron is correct in asserting that judicial review makes citizens feel slighted. If he is, then the global proliferation of modern constitutionalism is all the more puzzling. There is another possibility, which I offer not as a claim about how persons actually feel about modern constitutional norms and practices, but rather how it would be reasonable for them to feel. When people see that they live in a legal order that acknowledges the inherent dignity of each of its members, entrenches as its highest law the duty of all public institutions to extend just governance to each member of the legal order, and creates the conditions in which any person who believes

140. *Ibid* at 213.
141. *Ibid* at 239.

that his or her right to just governance has been violated may hold public power to account, the constitutional order may be recognized as a form of legal organization that takes seriously the right of each person to just governance. No one should feel slighted if the rights of every person are limited to secure both the entitlement of each to equal freedom and the accountability of the legal system as a whole to each of its inhabitants.

Finally, Waldron sometimes challenges proponents of judicial review by noting that, like legislators, judges often disagree about rights. When disagreements arise in multi-judge appellate courts, a decision procedure is required to resolve them and the "decision-procedure most often used is simple majority voting".[142] With this observation in place, Waldron accuses defenders of judicial review of having an incoherent outlook towards majority voting. On the one hand, defenders of judicial review reject majority voting as a decision procedure for cases in which *legislators* disagree about rights. On the other hand, defenders of judicial review affirm majority voting as a decision procedure for cases in which *judges* disagree about rights. Thus, Waldron asks: "Why is [majority decision] an appropriate principle to use in an institution that is supposed to be curing or mitigating the effects of majoritarianism?"[143] As I have argued, proponents of judicial review need neither reject the claim that the legislature should make determinations about rights nor the claim that in cases of disagreement it should employ majority voting. Instead, they may insist that every legal system, democracies included, must address the problem of accountability. The assessment of the constitutionality of legislation by an impartial judicial body is an integral feature of a legal system that is accountable to the right of each of its inhabitants to just governance. As Waldron notes, there are judicial procedures for resolving disagreement that do not involve majority voting,[144] but majority voting in the judiciary does not diminish the right of persons to stand on their right to just governance.

142. Waldron, "Case Against Judicial Review", *supra* note 10 at 1364.

143. Jeremy Waldron, "Five to Four: Why do Bare Majority Rule on Courts?" (2013) New York University School of Law Working Paper No 12-72.

144. *Ibid.*

Conclusion

Modern constitutionalism is a practice in search of a theoretical justification. In countries around the world, modern constitutionalism has become the pre-eminent response to the full range of pathologies of public law, from the inhumanity of failed states to the unaccountability of autocratic, oligarchic and majoritarian forms of government. At the same time, modern constitutionalism is increasingly subject to criticism from theorists committed to earlier models of governance that are incapable of addressing the problem of accountability. Whereas critics dismiss modern constitutionalism as wrong in principle, its defenders are content to offer pragmatic defences. These defences fail to illuminate the fundamental innovation of modern constitutionalism or articulate why practitioners regard modern constitutionalism as a fundamental advance over earlier forms of legal ordering.

This article has formulated a principled defence of the legal and institutional structure of a modern constitutional state. Modern constitutionalism is a form of governance that is systematically designed to address the problem of accountability. While earlier legal systems succeeded in making public authority accountable to the preferences of the few or the many, the modern constitutional state creates the legal conditions in which the exercise of public authority is accountable to the ongoing right of each member of the legal order to just governance. States must bring themselves within the parameters of modern constitutionalism because all legal systems must make the exercise of public authority accountable to the right of each person bound by it to just governance and such accountability is impossible apart from the legal and institutional structure of a modern constitutional state.