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978-0-521-68367-8 - Political Constitutionalism: A Republican Defence of the  
Constitutionality of Democracy

Richard Bellamy

Excerpt

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AND POLITICAL CONSTITUTIONALISM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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are both normative and empirical. Similar difficulties bedevil discussions over which electoral system best embodies democratic principles so as to ensure an equal influence over government policy.

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

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

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

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

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

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

<sup>9</sup> Waldron, *Law and Disagreement*, pp. 107–18, A. Weale, *Democracy*, Basingstoke: Macmillan, 1999, pp. 8–13.

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

<sup>11</sup> M. Shapiro, 'Political Jurisprudence', *Kentucky Law Journal*, 52 (1964), pp. 294–345.

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

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

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

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

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

<sup>15</sup> Raz, 'On the Authority and Interpretation of Constitutions', p. 154.

<sup>16</sup> J. Habermas, Appendix II: 'Citizenship and National Identity', *Between Facts and Norms*, p. 500.

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

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

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

Chapter 3 then enquires whether it might not be necessary nonetheless to protect the preconditions of democracy within a constitution. I start by examining the substantive version of this thesis, evident in the above quote from Cherie Booth, whereby a bill of rights is seen as encapsulating democratic values. I then look at arguments that seek to defend equitable democratic processes. Both are found wanting. The second collapses into



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the first, which returns to the already criticised constitutional rights thesis. I then investigate whether it makes a difference for the constitution itself to have been democratically enacted. I cast doubt on the democratic credentials of such self-binding constitutional moments and contrast unfavourably the populist constitutional politics most proponents of this thesis espouse to the genuinely constitutional and constitutive qualities of normal politics.

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

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

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



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

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

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

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

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

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

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

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

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

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