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

Richard Bellamy

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POLITICAL CONSTITUTIONALISM

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

RICHARD BELLAMY is Professor of Political Science and Director of the School of Public Policy, University College London. He is the author of five books, numerous articles and book chapters and has edited over twenty volumes including *The Cambridge History of Twentieth Century Political Thought* (with Terence Ball, Cambridge, 2003) and editions of Beccaria and Gramsci in the Cambridge Texts in the History of Political Thought series.

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In Memory of my Father

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PREFACE AND ACKNOWLEDGEMENTS

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

In developing this thesis, I have incurred numerous debts. While controversial within the legal and political theory communities that I habitually frequent, it is far less so among political scientists. I owe much to the Government Department at Essex, where this project was originally

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conceived and partly written, for providing an environment where you seem to absorb the latest research on political systems and behaviour simply by walking along the corridor. Colleagues in the Political Theory group nonetheless ensured I addressed certain central normative issues, and I am particularly grateful to Albert Weale for written and verbal comments on Part I and to Sheldon Leader in the Law Department for likewise reading drafts of those chapters and judiciously reminding me that not all legal constitutionalist objections could be dealt with quite as cavalierly as I might have hoped. At University College London (UCL), I have received a similar stimulus from colleagues in Political Science, Philosophy and Laws. I am especially grateful to Cécile Laborde for her supportive and incisive comments on the chapters in Part II which provided much needed advice and encouragement. The general republican orientation of my argument incurs a deep indebtedness to Quentin Skinner and Philip Pettit, to whom I owe inspiration and support over a long period. Initially, the book had been planned as a joint monograph with Dario Castiglione, with whom I have co-authored numerous pieces exploring constitutionalism in the EU that gave rise to many of the key ideas of this work. Unfortunately, other projects prevented Dario from being a co-author on this occasion but he has been so generous in reading and discussing drafts of the book that I almost feel he has been so nonetheless. I am also grateful to many others who have read, heard or simply discussed various parts of the argument and offered helpful observations, criticisms and guidance. With apologies to any I have inadvertently forgotten, these include Larry Alexander, Luca Baccelli, Rodney Barker, John Bartle, Ian Budge, Tom Campbell, Alan Cromartie, John Dryzek, Andrew Gamble, Jason Glynos, Bob Goodin, Ross Harrison, Janet Hiebert, David Howarth, Peter John, Anthony King, Christian List, Martin Loughlin, Neil MacCormick, Peter Mair, Andrew Mason, John McCormick, Glyn Morgan, Danny Nicol, Aletta Norval, Emilio Santoro, Niamh Nic Shuibhne, Adam Tomkins, Jim Tully, Richard Vernon, Jeremy Waldron, Neil Walker, the late Iris Marion Young and Danilo Zolo. John Haslam and Carrie Cheek have been long suffering in awaiting the delivery of the manuscript and extremely helpful in seeing it through to completion. They arranged exceptionally helpful referees' reports, and I am especially grateful to Jeremy Waldron for his detailed comments on the original proposal and draft chapters. Needless to say, all the usual caveats apply, with I alone responsible for the errors and misunderstandings these friends and colleagues have valiantly struggled to save me from. The one delay that was not of my own doing resulted from my father's death in the Autumn of 2005. It's a sad truth that you often do

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not appreciate how important certain people are to you until they are no longer there. I really do not know how to express what I owe to Louise and Amy for helping me through that difficult period and keeping me focused on other things, not least this book. Though my father always dutifully promised to read each one of my books, it was a sobering fact that his eyes would start to droop somewhere around page 3 – if he got that far. However, I greatly miss the support and love he showed me in proudly displaying them alongside his own very different publications. Now his adorn my shelves, I'm proud in my turn to stack this one next to them and to dedicate it to him.