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## A Note From the Editors: The State of the Political Constitution

By Marco Goldoni\* and Christopher McCorkindale\*\*

The revival of the political constitution has come about in parallel with two developments, one in constitutional practice and the other in political theory. With regard to the former, the political constitution has been seen as something of a bulwark against the rise of legal (or judicial, or common law) constitutionalism.<sup>1</sup> The seeming hegemony of this latter model of constitutionalism among contemporary lawyers and political scientists has produced from (so-called) political constitutionalists a reaction against the delegation of important decisions to non-political institutions and an obsessively court-centered scholarship.<sup>2</sup> Perceiving this shift in focus from political to legal institutions to be the very antithesis of the traditional Commonwealth (more particularly, of the United Kingdom's parliamentary) model of constitutionalism, and, more broadly, to be an affront to democratic sensibilities, the notion of the political constitution was retrieved and defended in a seminal article in the 1979 edition of the *Modern Law Review*, written (though first delivered in his Chorley Lecture the previous year) by the late John Griffith.<sup>3</sup> More recently, in the work of Adam Tomkins, Richard Bellamy, and Grégoire Webber and

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<sup>1</sup> See RONALD DWORIN, *A BILL OF RIGHTS FOR BRITAIN: WHY BRITISH LIBERTY NEEDS PROTECTION* (1990), for the context of Great Britain.

<sup>2</sup> The latter being aggravated by the spread of US constitutionalism with its typical court-centered approach to constitutional law and its consequential focus on the counter-majoritarian issue. See, e.g., JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>3</sup> John Griffith, *The Political Constitution*, 42 *MOD. L. REV.* 1 (1979). The growing number of articles on Griffith's constitutional thought are indicative of the interest in the model of the political constitution. In addition to the many cited throughout this edition, see Thomas Poole, *Tilting at Windmills? Truth and Illusion in The Political Constitution*, 70 *MOD. L. REV.* 250 (2007); Graham Gee, *The Political Constitutionalism of J.A.G. Griffith*, 28 *LEGAL STUD.* 40 (2008).

Graham Gee, a normative interpretation has been lent to Griffith's thesis so as to provide a full-fledged constitutional *theory* capable of standing as an alternative to the liberal-legal paradigm—a turn, one might say, from the political constitution to political constitutionalism.<sup>4</sup>

With regard to the latter, this return to the normative foundations of the political constitution has found in the concurrent revival of republican political theory something of a convenient bed-fellow in the attempt to construct a meaningful alternative to liberal constitutionalism. This renaissance of republican thinking, inspired by the work of Philip Pettit and Quentin Skinner,<sup>5</sup> has provided the basis for the normative reconstruction of the political constitution by lending its core principle, freedom as non-domination, as that against which the assessment of institutional design and constitutional travel can be measured. Whilst many of these neo-republicans advocate a constitutional form almost indistinguishable from liberal variations on the theme,<sup>6</sup> they have at least retrieved an account of politics as an activity to be celebrated and performed rather than feared and closed off,<sup>7</sup> and it is in this tradition that Tomkins and Bellamy have sought to add normative meat to bones of the political constitution and that to institution, Parliament, at its core. Whether the political constitution itself is *necessarily* an instantiation of republican philosophy, however, remains an open issue.<sup>8</sup>

This collection began its life as a reaction to each of these developments. Our view, and it is a view which recurs in Part I but which is forcefully challenged by Adam Tomkins in the concluding essay, is that the development of the political constitution does not depend upon its juxtaposition with (let alone any confrontation with) the legal constitution; that the development of the political constitution in a perpetual defense *against* the legal constitution unduly inhibits the ways that we imagine, articulate and present our case. The aim of this edition, then, is to bring together the protagonists driving the revival of the political constitution and to invite them to reflect on the meaning, the content, the

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<sup>4</sup> ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005); RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

<sup>5</sup> See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998). See also MAURIZIO VIROLI, *REPUBLICANISM* (2002); *REPUBLICANISM AND POLITICAL THEORY* (Cécile Laborde & John Maynor eds., 2008); *LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES* (Samantha Besson & José Luis Martí eds., 2009).

<sup>6</sup> See, e.g., PETTIT, *supra* note 5 (seeing enshrined rights protected by an active judiciary as integral to his republican model).

<sup>7</sup> To be accurate, the relevant reflection on politics comes from more traditional versions of republicanism. Cf. HANNAH ARENDT, *THE HUMAN CONDITION* (1958); BERNARD CRICK, *IN DEFENCE OF POLITICS* (1962).

<sup>8</sup> The political philosophy of Jeremy Waldron, for example, is liberal, but his constitutional theory is closer to political constitutionalism. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346 (2006).

normative core - the *state* of the political constitution - *on its own terms*. For this reason, Part I opens with Keith Ewing's forceful contribution, *The Resilience of the Political Constitution*. Here, Ewing assesses the actual condition of the political constitution in the current British context whilst reconstructing the main building blocks of British parliamentary culture. He praises the political constitution's flexibility as its greatest virtue, one which (at least partly) explains its impressive and lasting vitality.

Next, Graham Gee and Grégoire Webber (*A Grammar of Public Law*) focus on what it means to speak politically about public law. Analyzing constitutional language as it is (in their view, mis)used by political constitutionalists, Gee and Webber urge us to avoid blurring the complexity of political practices by resorting to an indeterminate or vague lexicon. According to the authors, confronting the nuances of the constitution head on is the only way that it is possible to approach our discipline with due political sensitivity—this because the intricacies of political action cannot be captured by sweeping (and all too commonly asserted) generalizations. Following from this plea for a parsimonious use of language and concepts, Paul Scott offers in his contribution (*[Political] Constitutions and [Political] Constitutionalism*) a precious analysis of the possible relationships between law and politics in contemporary constitutional theory. Scott's reconstruction clarifies many of the ambiguities afflicting the debate on political constitutionalism and sets out to answer one of the key questions at the heart of this issue: How can we begin to think of constitutions *both* as instruments for the augmentation *and* (at the same time) the limitation of power.<sup>9</sup> Stephen Tierney (*Whose Political Constitution?*) next confronts the question of the popular legitimacy undergirding political constitutionalism. His contribution aims to carve out new spaces for popular mobilization that are not limited to what he sees as being an elite dichotomy of parliamentary and judicial politics. For Tierney, if political constitutionalists are serious in their attempts to revive the virtues of their tradition then they must spread their gaze from institutional politics and start to look also to alternative channels of political engagement within, and democratic authorship of, the constitution (here focusing on the instrument of the referendum as one such possibility). Finally, Marco Goldoni and Christopher McCorkindale (*Why We (Still) Need A Revolution*) make a case for putting conflict, and the extraordinary exercise of constituent power, at the heart of the political constitution. Taking their cue from Griffith's 1969 essay *Why We Need A Revolution*, the authors argue that where it is the political institutions themselves that have become corrupt—where political accountability, political representation and political equality have failed—the conflict stoked by a constituent power re-invoked, acting-in-concert against the constitutional *status quo*, should be understood *within* the tradition of political constitutionalism: A political act of constitution making (or re-shaping) *par excellence*. Arguing against the reduction of politics to its parliamentary form, Goldoni and McCorkindale take the background to legislative devolution to Scotland as an example of the power of such extra-ordinary constituent moments.

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<sup>9</sup> Here Arendt's constitutionalism resonates. See HANNAH ARENDT, ON REVOLUTION (1963).

Part II is devoted to a study of the relationship between the courts and political institutions. In this respect, it should be understood as the second part of a diptych: whilst Part I stressed the importance of thinking the politics of political constitutionalism autonomously, the second part seeks to address judicial review and the role of the courts *within* a political constitution, beyond a mere contrast with legal constitutionalism.<sup>10</sup> As a result, this part documents the changing attitude of political constitutionalists towards (so-called) weak-form judicial review, accepting (if it was ever doubted) that the idea of the political constitution entails a necessarily legal (even judicial) element, even if it is not defined by it. The first article, by Stephen Gardbaum (*The Case for the New Commonwealth Model of Constitutionalism*), proposes a normative evaluation of what he calls “the New Commonwealth Model” of constitutionalism. Gardbaum makes a convincing argument in favor of weak-form judicial review as the best articulation of both political and legal constitutionalism by showing that this form of review is capable of “taking rights seriously” without de-politicizing controversial issues.<sup>11</sup> In his essay (*The Relation between Political Constitutionalism and Weak-Form Judicial Review*), Mark Tushnet, in order to prove the compatibility of weak-form review with political constitutionalism, describes the (political) preconditions which make such a relationship possible. In so doing, he comes to the conclusion that weak-form judicial review is especially suitable for the enforcement of second and third generation rights. Janet Hiebert, in *The Human Rights Act: Ambiguity about Parliamentary Sovereignty*, examines the controversial *Hirst* judgment on prisoner voting rights in the UK. Here, Hiebert offers a careful reconstruction of the Parliamentary debates which followed *Hirst* and outlines the ambiguity of the last phase of parliamentary protection of rights under the UK’s Human Rights Act—that phase which enables (perhaps even expects?) Parliament to implement remedial (and rights enhancing) legislation in light of a negative judgment by domestic or, in this case, supra-national courts. Her thesis is that Parliament, in its response to *Hirst*, failed adequately (if at all) to address the substantive issue—whether the legislation in question was incompatible with a fundamental right—because it was fixated with a different controversy, the perceived challenge to its own sovereignty.<sup>12</sup>

For Griffith, writing in 1979 against the back drop of calls for sweeping constitutional reform including (but not restricted to) the adoption of a legally enforceable bill of rights, the political objection to such a move was clear: First, “that law is not and cannot be a substitute for politics,” that is to say that political controversies should not be disguised

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<sup>10</sup> For a more detailed treatment of this theme, which engages also the counter view—what legal constitutionalists see as the *limits* of judicial review—see generally *The Role of the Courts in Constitutional Law*, 60 U. TORONTO L.J. (SPECIAL ISSUE) (David Dyzenhaus & Adam Tomkins eds., 2010).

<sup>11</sup> See also, STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

<sup>12</sup> Here, the main accusation against the Strasbourg court was jurisdictional: The Court was acting *ultra vires*. See also Danny Nicol, *Legitimacy of the Commons Debate on Prisoner Voting*, 2011 PUB. L. 681.

and even distorted as legal ones; secondly, that “requir[ing] a supreme court to make certain kinds of political decisions does not make that decisions any less political.”<sup>13</sup> Taking as our starting point Griffith’s view that rights claims are no more than that, *claims* to be put on the table and balanced against any other (be they political, moral, social, economic, ethical, religious or other claims), we believe that in the work of Gardbaum, Tushnet and Hiebert can be seen the genius of the Human Rights Act and (to a greater or lesser extent) other weak-form models of judicial review: the potential *both* to engage head on with questions of rights (and even the incompatibility of primary legislation with those rights) whilst nevertheless returning even successful rights claims to the political arena *qua* claims, for resolution. Whilst neither Gardbaum, Hiebert nor Tushnet would attribute to themselves the label of “political constitutionalist,” at least not so explicitly, it is our view that in this body of work it is possible to locate the reinvigoration of the political constitution in (or, at the very least, the reconciliation of the political constitution with) the age of rights.

The issue is closed by Adam Tomkins (*What Is Left of the Political Constitution?*), whose typically robust contribution represents an important shift from the position that he has adopted (so influentially) in earlier work.<sup>14</sup> Tomkins makes a powerful case for interpreting the British constitution as neither a purely political nor a purely legal construct. Instead, Tomkins argues that ours is a mixed constitution, and a healthy one at that. The mixed constitution here is not to be taken in the classic sense of a constitution representative of different (and conflicting) social classes, but instead as a variant mix of intertwined legal and political aspects. Despite this, Tomkins is still able to show that “plenty” is left of the political constitution, whose institutions and core values by necessity feature heavily in that mix.

While these papers represent a first step in providing a dedicated *internal* debate on the state of the political constitution, many questions remain open for discussion and further exploration. As we see it, (and here one *caveat* is in order: what follows are mere suggestions offered in the spirit of opening such debate), at least four future developments in the literature on political constitutions and political constitutionalism seem to present themselves with particular urgency. First, and looking even further inwards, it seems to us that political constitutionalists take the meaning of “the political” for granted—that it is bound in parliamentary (or at least in institutional) form—and that a more expansive critique of the content of the political, in both its constituted *and constituent* forms, would enrich the normative foundations of the tradition. Secondly, the relationship between and the interconnectedness of political and economic institutions, cultures and constitutions—

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<sup>13</sup> Griffith, *supra* note 3, at 16.

<sup>14</sup> *C.f.* Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. TORONTO L.J. (SPECIAL ISSUE) 1 (David Dyzenhaus & Adam Tomkins eds., 2010).

an inseparable relationship according to Griffith<sup>15</sup>—stands in need of closer scrutiny now, as the response to the global financial crisis limits and even usurps democratic choice and freedom,<sup>16</sup> more than ever. Thirdly, and this time looking outwards, if we accept, as Griffith did (and as Ewing discusses in his paper) that *all* constitutions are political then we can see the potential for political constitutionalists within the commonwealth tradition both to inform and to learn from a comparative approach to the study *of* the political and how best to capture and preserve it institutionally and extra-institutionally. The invitation by Graham Gee and Grégoire Webber to use the political constitution as a model for the study of public law,<sup>17</sup> and to think and speak politically *about* public law<sup>18</sup> is one that we believe should be taken up in order to enrich the somewhat dry and legalistic approach which currently pervades the comparative public law literature.<sup>19</sup> Finally, a fourth possible trajectory consists in an analysis of the relationship between national and supranational jurisdictions. Globalization and the rise of supranational bodies have had an obvious impact on political constitutions, not least of all by transferring some political questions away from accountable and representative national institutions to alternative sights of discourse (often concealing the political nature of their jurisdiction behind the fig leaf of juristic or technocratic—and therefore, they claim, *a*-political - justifications). Of course, this is not an original observation.<sup>20</sup> Janet Hiebert in this issue, and Richard Bellamy elsewhere, have tackled one level of possible interaction between the national and the supranational in their evaluation of the *Hirst* saga and the relationship between domestic democratic institutions and international human rights courts. However, there remains much to be done. Other supranational bodies—the EU,<sup>21</sup> the WTO, the World Bank and the IMF to name but a few—are making decisions or issuing directives with a direct impact on the ability of the political constitution (as it is traditionally understood) adequately to represent those who are affected by those decisions, and effectively and meaningfully to hold to account those who make those decisions. Given the enormous scale of powers increasingly exercised on the supranational plane, an attempt to think politically about the constitution of (again, *both* in the sense of enabling *and* of limiting) that power appears essential.

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<sup>15</sup> See J.A.G. Griffith, *Why We Need a Revolution*, 40 Pol. Q. 383 (1969).

<sup>16</sup> Of which moves towards technocratic government in Greece and Italy are but the most stark examples.

<sup>17</sup> Graham Gee & Grégoire C. N. Webber, *What Is a Political Constitution?*, 30 O.J.L.S. 273 (2010).

<sup>18</sup> Graham Gee & Grégoire C. N. Webber, *Rationalism in Public Law*, 76 Mod. L. Rev. 708 (2013).

<sup>19</sup> See Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT'L J. CONST. L. 1 (2013) (lamenting the state of comparative law).

<sup>20</sup> Many titles already track and even challenge this trajectory. See *THE TWILIGHT OF CONSTITUTIONALISM?* (Petra Dobner & Martin Loughlin eds., 2010); GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (2012); Danny Nicol, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* (2010).

<sup>21</sup> See, e.g., Mike Wilkinson, *Political Constitutionalism and the European Union*, 76 Mod. L. Rev. 191 (2013).

In these pages, then, we hope to lay the ground work for the next stage of the debates around the political constitution. If the first phase began with Griffith, and concerned the *function* of the political constitution, and the second with Tomkins, with Bellamy, and with Gee and Webber, concerning the *normative grounding* of the political constitution, then here we mark the beginning of a third phase: The celebration and the articulation, on its own terms, of the potential for politics to open up hitherto obscured or even unknown (indeed perhaps, in advance, unknowable) constitutional possibilities: This is to say, the *political* phase of the political constitution.<sup>22</sup>

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<sup>22</sup> As the contributions in Part II of this collection show, the novelty of the Human Rights Act in (successfully?) balancing the meaningful judicial protection of human rights with the primacy of a political institution, Parliament, shows the creative capacity of thinking *politically* about rights and about constitutions.

