

Why We (Still) Need a Revolution

By Marco Goldoni* & Christopher McCorkindale**

Abstract

This paper posits a (very British!) call to arms, and does so in five steps. In part A, we address the need for constitutional fictions by which the many surrender political power to the few, in the name of stability, order and security. In part B, however, we will show that conflict is both a necessary and a core principle of political constitutionalism—that it is the latent possibility of conflict, the (re)awakening of the many where the few abuse that power, that acts as the final check on government. In part C, we trace the steps by which recent re-interpretations of the work of J.A.G. Griffith, with a focus on the work of Tomkins and Bellamy, have reduced politics to its parliamentary form, thereby closing—rather than “enlarging”—the “areas for argument and discussion”—a narrow view of the constitution to which, admittedly, Griffith himself might have subscribed. In part D, we will assess the limits of such a narrow reading of the political and argue that a more dynamic and reflexive approach is needed if we are to remain in—or recover to—rude constitutional health. Finally, in part E, we will use the political and constitutional background to the devolution of legislative and executive power to Scotland in order to demonstrate the power of political conflict, in extraordinary moments, to expose, break down and create new constitutional fictions.

A. Introduction

The political world mingles with the real world in strange ways, for the make believe world may often mold the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from the fact, the willing suspension of disbelief collapses. And conversely it may collapse if facts stray too far from the fiction that we want them to resemble.

* Lecturer in Law, University of Glasgow, marco.goldoni@glasgow.ac.uk.

** Lecturer in Law, University of Strathclyde, christopher.mccorkindale@strath.ac.uk.

Because fictions are necessary, because we cannot live without them, we often take pains to prevent their collapse by moving the facts to fit the fiction, by making our world conform more closely to what we want it to be. We sometimes call it, quite appropriately, reform or reformation, when the fiction takes command and reshapes reality.¹

When the late John Griffith penned that seminal piece, *The Political Constitution*,² he too was concerned with the intersection between political reality and political make-believe. The *reality* of politics, for Griffith, is one of conflict: Ubiquitous, inevitable, and intractable conflict. The ubiquity of conflict was self-evident to him: “All I can see in the community in which I live,” Griffith said, “is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement.”³ That these conflicts, such as they exist, are *inevitable*, in Griffith’s view, is because they spring from the human condition itself, and this in two ways. First, because we are—all of us—*both* individual and social animals, and the rights, principles and interests that we hold dear in each capacity are neither (necessarily) comparable, co-equal, nor, and this is the point, compatible.⁴ We are born and we are conflicted, indeed, *inherently* so. Secondly, because we seek a life lived with others. Be it in the company of the family and friends with whom we are surrounded in our private lives, or the communities in which we live, work and act, socially, economically and politically, our interactions with others serve only to multiply the differences and disagreements, conflicts and compromises that characterize our living together.⁵ Indeed it was the recognition of

¹ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 14 (1988).

² See J.A.G. Griffith, *The Political Constitution*, 42 *MOD. L. REV.* 1 (1979).

³ See *id.* at 12.

⁴ See ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 63 (2005). Adam Tomkins illustrates this point with the classic example of clean air:

We all have an interest, rather obviously, in breathing clean air. None of us acting alone can realise that interest. It is only by acting together—by acting politically—that it can be realised. Now, some of us will have private interests that militate against clean air. Some of us will be industrialists whose factories pollute the air. Others of us will be employees working in such factories, whose livelihoods depend on our employment. But even industrialists and their employees have an interest, as citizens, in breathing clean air.

Id.

⁵ HANNAH ARENDT, *THE HUMAN CONDITION* 8 (Univ. of Chicago Press, 2d ed. 1998) (1958). Hannah Arendt captures this brilliantly. “Plurality,” she said, “is the condition of human action because we are all the same, that is, human, in such a way that nobody is every the same as anyone else who ever lived, lives, or will live.” *Id.*

these tensions which led Griffith to the view that conflict is not only inevitable but intractable. “We find this [condition] difficult to accept,” he said, “and so we continuously seek the reconciliation of opposites and become frustrated and aggressive when this fails.”⁶ For Griffith, neither politics, “what happens in the *continuance* or resolution of those conflicts,”⁷ nor law, which is but “one means, one process, by which those conflicts are continued or *temporarily* resolved,”⁸ are capable of delivering us from conflict. Those who claim otherwise, it might be said, have left reality behind and entered the world of make-believe. Before we move on, let us say a little more on this.

There are at least three constitutional fictions against which Griffith’s stall was set. The first, and most obvious, is the Dworkinian belief that in the “rule of law,” in fundamental rights and in *a priori* principles of justice, judges might find the “right” answer to our hard cases. Much has been said, in this collection and elsewhere, about this particular debate—the relative merits of (so-called) political and (so-called) legal constitutionalism—though Griffith himself spoke of constitutions without the *ism*—and we do not intend to rehearse these arguments here.⁹ Suffice to say that for Griffith the definition of the rule of law, the content of those fundamental rights, the meaning and priority to be given to this or that principle is the very stuff of political disagreement and conflict, the continuance or resolution of which is no less political when conducted by the judiciary than when placed in the hands of the executive, the legislature or the people themselves, for example, in a referendum.¹⁰ In this paper, we are more concerned with a second and (a related) third fiction—fictions *internal* to the political constitution itself. This second fiction, then, is the appeal to popular sovereignty: The “nonsense,” which Griffith attributes to Locke, that sovereignty belongs to the people, and is held in trust for them by their politicians;¹¹ the third: That those people hold power, *qua* citizens, actively to participate in government.

⁶ Griffith, *supra* note 2, at 3; see also TOMKINS, *supra* note 4, at 63 (noting that the “clean air” example is a good one).

⁷ Griffith, *supra* note 2, at 20 (emphasis added).

⁸ *Id.* (emphasis added).

⁹ Indeed, the brief for both this collection and the workshop held in its preparation was precisely to move beyond the dichotomy of the political/legal constitution and to begin to define and promote the political constitution on its own terms.

¹⁰ See Griffith, *supra* note 2, at 16. On referendums as a device of political constitutionalism, see Stephen Tierney, *Whose Political Constitution? Citizens and Referendums*, 14 GERMAN L.J. 2173 (2013). Not all political constitutionalists would agree with Tierney that the referendum is on all fours with constitutionalism, however, particularly where the result of a referendum is to compel Parliament—the political institution *par excellence*—to legislate or not to legislate, contrary to its wishes. Here we use “compel” in a soft sense, as the results of referendums, at least in the UK, tend not to be legally binding upon government or Parliament, which retains the constitutional authority to “make or unmake any law whatever”.

¹¹ See Griffith, *supra* note 2, at 3.

“The art of politics,” Griffith said, in a line that betrays his deep *ambivalence* about politics—or at least, about those who hold political power—“is to persuade people that they make decisions while ensuring that they do not.”¹² Whereas our first fiction, the belief in a substantive notion of the rule of law, denies the very existence of reasonable disagreement (at least where the stakes are most high),¹³ the second and third *embrace* it—only immediately to close it off and deny its truly, and radically, creative potential. The aim of this paper then, modest though it may seem, is no more and no less than this: To place conflict—and its capacity both to break down old orders *and*, creatively, to build anew, to constitute—back at the heart of the political constitution. Let us begin, then, with an ode to conflict.

B. In Praise of Conflict

When Edmund Morgan said that fictions are necessary, that we cannot live without them, what he meant was that we cannot live an orderly political life without them. It is *government*, in Morgan’s view, that requires “make-believe”—make believe that the king is ordained by God; make believe that Parliament is the people; make believe that government serves the people; make believe that there is *a* people, possessed of *a* voice *qua* people—because, exposed to *reality*, to the disagreements and conflicts that are the very lifeblood of politics, the permanence of the political world, and the stability of those institutions through which the many are governed by the few, is always threatened.¹⁴

There is a double movement at play here. The first is the willing suspension of disbelief on the part of the people themselves, who surrender the burdens of public life to a political elite, elected or otherwise, in exchange for security in their private pleasures. This is what Benjamin Constant famously, and influentially,¹⁵ called the liberty of (us, we) the moderns, who exercise *political* freedom only at “fixed and rare intervals,” and even then only immediately to “renounce it” by way of delegation to a public official through election.¹⁶ Modern, or in Berlin’s terms, *negative*, liberty meant a freedom *from* government, and *from* the burdens of the public realm. It meant:

¹² J.A.G. Griffith, *Why We Need a Revolution*, 40 POL. Q. 383, 387 (1969).

¹³ See Lord Woolf, *Droit Public—English Style*, PUB. L. 57, 69 (1995). Thus, when Lord Woolf said that there are “advantages” in courts making clear the limits of Parliament’s supremacy, he defended his position with the, in our view, dubious claim that these are limits only “of the most modest dimensions *which I believe any democrat would accept.*” *Id.* (emphasis added).

¹⁴ See MORGAN, *supra* note 1, at 13–14.

¹⁵ See ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958). Most notably, Isaiah Berlin stated that the distinction between positive and negative liberty owed much to Benjamin Constant’s own division between liberties—ancient and modern.

¹⁶ See BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in BENJAMIN CONSTANT: POLITICAL WRITINGS 307, 312 (Biancamaria Fontana ed., 2001) (1819).

[T]he right to be subjected only to the laws, and to be neither arrested, detained, put to death or maltreated in any way by the arbitrary will of one or more individuals. It is the right of everyone to express their opinion, choose a profession and practice it, to dispose of property and even to abuse it . . . It is everyone's right to associate with other individuals, either to discuss their interests, or to profess the religion which they and their associates prefer, or even simply to occupy their days or hours in a way which is most compatible with their inclinations or whims.¹⁷

It meant, further still, the institutional guarantees accorded for the enjoyment of those pleasures.¹⁸ It meant, finally, a freedom *from* conflict.

The second movement is the encouragement of that very renunciation *by* the political elite: Be it by the king, who proclaims it to be *his* duty, ordained by God, "to procure the weale and flourishing of his people,"¹⁹ and therefore an act *against* God where that people grows "weary of subjection [and] casts off the yoke of government that God hath laid upon them";²⁰ by the revolutionaries who reduce the will of the revolutionary people to an infallible and indivisible *volonté générale* (general will);²¹ or by the Parliament who calls *itself* the people and therefore resistance to that institution an act of suicide *by* the very same.²² In each case, sovereignty—divine, monarchic, popular or parliamentary—is revealed as something of a Hobbesian pact: A useful myth invoked as a device by which conflict is contained and even escaped. As Constant himself said:

[T]he holders of authority are only too anxious to encourage us to [surrender to them our right to share

¹⁷ *Id.* at 310–11.

¹⁸ *See id.*

¹⁹ KING JAMES VI, *The Trew Law of Free Monarchies: Or The Reciproock and Mutuall Dutie Betwixt a Free King, and His Naturall Subjects*, in JAMES VI AND I: POLITICAL WRITINGS 62, 76 (Johann P. Sommerville ed., 1994) (1598).

²⁰ *Id.* at 81.

²¹ *See* HANNAH ARENDT, ON REVOLUTION 240–44 (1963). Arendt's critique of Robespierre and Sant-Just is particularly striking here.

²² *See e.g.*, HENRY PARKER, THE CASE AGAINST SHIPMONY (1642); HENRY PARKER, JUS POPULI (1644). The writings of Parliament's propagandist-in-chief, Henry Parker, amid the 17th century conflicts between Parliament and the Crown.

in political power]. They are ready to spare us all sort of troubles, except of course of obeying and paying! They will say to us: what, in the end, is the aim of your efforts, the motive of your labours, the object of all your hopes? Is it not happiness? Well, leave this happiness to us and we shall give it to you.²³

It was precisely this double-movement that compelled Griffith both to describe society as “naturally authoritarian”²⁴ and to bemoan, throughout *The Political Constitution*, the lengths to which those who hold authority will go in order to “hide in a midst of words, the conflict which is characteristic of our society.”²⁵ Given what it is that is at stake here, it is no wonder that this is so. “Politics,” Griffith said elsewhere, “is not a game; it’s a harsh business because it is about power and money. And you don’t find people who like power and money relinquishing their control over these commodities.”²⁶ To stir conflict is to disturb that settlement and unleash boundless possibilities about the distribution and redistribution of that power and money. *This* is why conflict—ubiquitous, inevitable, intractable thought it may be—must be hidden behind myths, symbolic of stability; why the holders of authority are so anxious that we exchange our political liberty for peace in our private pursuits.

When Griffith wrote in 1969 that only revolution could deliver us from the failures of the current political system and those who manage it—he spoke of war in Vietnam; tacit support for Apartheid; inaction in Rwanda, Nigeria, and in Bihar; poverty at home and inadequate care for the most vulnerable in our society,²⁷ his answer not only betrayed his belief that the constitution as he knew it had become corrupt, but placed him in a line of political thinkers for whom conflict was to be celebrated as a means of liberty and certainly not rejected as its antithesis. As one reflects on war in Iraq and in Afghanistan, on tacit support for Gaddafi and then for the rebels who displaced him, on inaction in Syria and in Bahrain, on the plight of the Chagos Islanders, on the banking crisis and on the austerity measures that have so devastated the most vulnerable in our society, one might confidently say that, despite the significant changes to our constitution that have taken

²³ CONSTANT, *supra* note 18, at 326. For a more detailed account of the often ignored nuances to Constant’s position and the argument that he should be seen not only as a defender of negative liberty, but as one of the most forceful proponents of political liberty in the civic republican tradition, see Christopher McCorkindale, *Recovering the Public: The Curious Case of Benjamin Constant*, in *THE PUBLIC IN LAW* 35 (Claudio Michelson et al. eds., 2012).

²⁴ See Griffith, *supra* note 2, at 3.

²⁵ *Id.* at 11.

²⁶ Griffith, *supra* note 12, at 389.

²⁷ *Id.* at 383.

shape in the last thirty years or so—membership of the EU, the Human Rights Act, devolution to Scotland, Wales and Northern Ireland, the Constitutional Reform Act, freedom of information and more besides—the *revolution* has not yet taken hold. These are reforms which, in the main, shift power between elites: Be that the strengthening of existing ones (the powers granted to the judiciary by sections 3 and 4 of the Human Rights Act, for example) or the creation of new ones (take the legislatures and executive bodies created to facilitate devolution). Even those reforms which do the most to enhance the capacities of citizens to influence and contest the decisions made by those who hold authority over them retain a certain centripetal force. The Freedom of Information Act 2000, for all of its successes,²⁸ is constrained in its application by an extraordinarily broad range of exemptions as well as by a government veto on the release of information.²⁹ The Scotland Act 1998, despite its generous devolution of power to Scotland, retains for Westminster the right to legislate for Scotland over any matter whatsoever, reserved or not (s28(7)), whilst *within* devolution the radical vision of a new politics based on creative sites of active participation beyond the four walls of the Scottish Parliament has quickly come closely to resemble politics of the traditional Westminster form.³⁰ The Human Rights Act 1998 empowers judges to declare a statute to be incompatible with Convention rights, but not to disapply it—leaving the last word with Westminster.³¹ None of this would have surprised Griffith in the slightest. “Those who exercise authority within society,” he said, “must in their own self-interest prevent radical change the purpose of which is to reduce that authority.” Revolution, radical change, for Griffith, “must come at their expense,” and because “it must reduce their power,” it is in their interests to contain it.³² Here, in their

²⁸ MINISTRY OF JUSTICE, MEMORANDUM TO THE JUSTICE SELECT COMMITTEE: POST-LEGISLATIVE ASSESSMENT OF THE FREEDOM OF INFORMATION ACT 2000, 2011, Cm. 8236 (U.K.), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162298/post-legislative-assessment-of-the-foi-act.pdf (assessing the Freedom of Information Act 2000 post-legislation).

²⁹ It is the combination of these exemptions and the veto power that led Rodney Austen to deride the Freedom of Information Act 2000 as no more than “a fraud on democratic accountability.” Rodney Austin, *The Freedom of Information Act 2000—A Sheep in Wolf’s Clothing?*, in THE CHANGING CONSTITUTION 401, 415 (Jeffrey Jowell & Dawn Oliver eds., 2000). On the other hand, long-time Freedom of Information proponents Carol Harlow and Richard Rawlings have described the 2000 Act as being “one of the world’s more restrictive pieces of information legislation.” CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 474 (2009).

³⁰ See PAUL CAIRNEY, THE SCOTTISH POLITICAL SYSTEM SINCE DEVOLUTION: FROM NEW POLITICS TO THE NEW SCOTTISH GOVERNMENT (2011); see also Stewart Davidson, Alastair Stark & Gordon Heggie, *Best Laid Plans . . . The Institutionalisation of Public Deliberation in Scotland*, 82 POL. Q. 379 (2011) (describing the “failure” of a new politics to take hold).

³¹ It seems to be the case that a section 4 declaration will almost certainly attract some form of remedial action, usually through the ordinary legislative process as opposed to the expedited process provided for in section 10 of the HRA. See Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. CONST. L. 167 (2010). It is, of course, no part of our argument to suggest that the judiciary ought to be empowered to strike down primary legislation. The point here is no more and no less about the gravitational pull towards the center that occurs even here.

³² See Griffith, *supra* note 12, at 391.

mistrust, we see on behalf of the political class the modern expression of an ancient fear: The fear that, left unchecked, the people would tend to license, lawlessness and the rule of the mob.³³ For Griffith, however, it is not the *hyperactivity* of the people but their apathy—their *inactivity*—that aids and abets this (ongoing) corruption.

By taking this line Griffith, perhaps unwittingly and certainly not explicitly, joined an undercurrent that flows—strongly if inconspicuously—somewhere below the mainstream of political thought. This is the republican tradition of those such as Machiavelli, Arendt, Crick and Taylor, who, differences aside, celebrate rather than castigate the *activity* of politics, and the political *action* of the people themselves. Machiavelli's account is particularly illustrative here, for reasons that we will now explain.

According to Machiavelli, in every republic there are, generally speaking, two classes: An upper and a lower class, the nobility and the common people, the “haves,” as he called them, and the “have-nots.”³⁴ What it was that the upper class “had,” and the lower class “had not,” was power, through the holding of political office. This being the case, Machiavelli posed himself the question: In whose hands, the “haves” or the “have-nots,” is best placed the safeguarding of liberty. Answering the question, the Florentine addressed himself to the ambitions of each. Amongst the nobility, he said, there was “a great desire to dominate.” That is to say, there was an insatiable desire to acquire more power still. Amongst the common people, however, was simply “the desire not to be dominated.”³⁵ For this reason, Machiavelli advised that it was in the hands of the common people that the safekeeping of liberty should be left:

³³ See Polybius, *Book VI.4*, in *THE RISE OF THE ROMAN EMPIRE* (Ian Scott-Klivert trans., 1979) (describing the final stage of *anacyclosis*). Polybius' classic account states:

The first of these to come into being is one-man rule, and developing from it with the aid of art and through the correction of its defects, comes kingship. This later degenerates into its corrupt but associated form, by which I mean tyranny, and then the abolition of both gives rise to aristocracy. Aristocracy by its very nature degenerates into oligarchy, and when the populace rises in anger to avenge the injustices committed by its rulers, democracy is born; then in due course, out of the license and lawlessness which are generated by this type of regime, mob rule comes into being and completes the cycle.

Id.

³⁴ See NICCOLÒ MACHIAVELLI, *Book 1.5*, in *THE DISCOURSES* 115 (Bernard Crick ed., Leslie J. Walker trans., 1970). Walker translates this from “*chi vuole acquistare o chi vuole mantenere*,” that is, those who want to acquire or those who want to keep—which he equates with the typical English distinction of haves and have nots.

³⁵ See *id.* at 116.

If the populace be made the guardians of liberty, it is reasonable to suppose that they will take more care of it, and . . . since it is impossible for them to usurp power, they will not permit others to do so.³⁶

Where Machiavelli distinguished himself from his peers, who equated discord with faction, and faction with unfreedom,³⁷ was his insistence that the, often violent, clashes between these classes was *constitutive of*, and not—as was traditionally thought to be the case—destructive to, liberty. Thus, for Machiavelli, conflict was the very dynamic by which the republican constitution prospered. Take, as a case in point, his praise for tumult in the streets of Rome:

Look how people used to assemble and clamour against the senate, and how the senate decried the people, how men ran helter-skelter about the streets, how the shops were closed and how the plebs en masse would troop out of Rome—events which terrify, to say the least, anyone who read about them.³⁸

Unlike others who “read about them,” however, Machiavelli saw these seemingly anarchic scenes as being the very means by which the common people defended, indeed enhanced, their liberty. He was perfectly willing to accept that “someone may object” to what looked, on the surface, like “extraordinary and almost barbaric” acts, yet he was unwilling to concede the point. No republic, he said, can be “stigmatized in any way as disordered” in which tumult leads to the creation of good laws.³⁹ “To me,” he continued, “those who condemn the quarrels between the nobles and the plebs, seem to be caviling at the very things that were the primary cause of Rome’s retaining her freedom.”⁴⁰ Chastising those who “pay more attention to the noise and clamour resulting from such commotions than to what resulted from them,” for Machiavelli what *did* result from them was legislation favorable to liberty, his named example the creation of the tribunes. Charged with mediating between the plebs and the senate, and vested with such prerogatives as necessary to protect the former from arbitrary interference by the latter, the Roman tribunes were born of this conflict between constituted and constituent power:

³⁶ *Id.*

³⁷ See QUENTIN SKINNER, *MACHIAVELLI* 66 (1981).

³⁸ *MACHIAVELLI*, *supra* note 36, at 116.

³⁹ *Id.* at 114.

⁴⁰ *Id.* at 113–14.

Hence if tumults led to the creation of the tribunes, tumults deserve the highest praise, since, besides giving the populace a share in the administration, they served as the guardian of Roman liberties.⁴¹

In other words, the constitution of Rome was greater than the sum of its institutions and the relationships between them. It was a far more dynamic construct by which, in extraordinary moments, the people emerged as an active political force, a final check on the corruption of those institutions and upon which the constitutional *status quo* was always contingent. It follows that, in Machiavelli's reading, where there is *no* conflict there is *no* liberty—or, at least, that in such a condition liberty is contingent always upon the good will of those who govern. And so, when Machiavelli described the people of Rome, his “have nots,” as *il governo popolare*, he was neither invoking a mythical, sovereign people—a source of authority in a distant past with no register in the constitutional present—nor the popular government of Athens, in which the citizens were actively engaged in the day to day decision making of republic. Rather, and as Bernard Crick has said, the connotation is better understood as “our ‘the governor’ on a lorry or other engine, the ultimate restraining force, the final limitation—but also . . . the *real* power, both civic and military, behind republics.”⁴²

What has obscured this tradition, and its celebration of conflict as an inherently political activity, is at least two-fold. On the one hand, the work of its protagonists is often tainted by less appealing facets: The militarism of Machiavelli or Arendt's infamous, and deeply troubling, social question, to take but two examples. On the other hand, the republican revival in contemporary political science, inspired by the concurrent work of Philip Pettit and Quentin Skinner,⁴³ has attempted to fit, rather than to challenge, (what they call) the

⁴¹ *Id.* at 115.

⁴² *Id.* at 15, 27–28 (introduction by Bernard Crick) (emphasis added).

⁴³ See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); see also QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998). Both authors have refined their views in subsequent work, moving closer, if tentatively so, to the position described in this article. See, e.g., PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012); QUENTIN SKINNER *VISIONS OF POLITICS: VOLUME II: RENAISSANCE VIRTUES* (2002). For recent accounts of republicanism, see *LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES* (Samantha Besson & José Luis Martí eds., 2009) and *REPUBLICANISM AND POLITICAL THEORY* (Cécile Laborde & John Maynor eds., 2008).

Pettit's claim, and it is one that has dominated republican scholarship over the past fifteen years or so, is that republican freedom as non-domination is essentially a negative liberty, a freedom from domination—including domination by the sovereign monarch, government, legislature or people—with the twist that something more than a purely negative liberty is needed in order to maintain that freedom—that being institutional channels through which citizens might challenge decisions, policies and laws which run counter to their interests. Thus he is able to distinguish his republican variant with the tradition liberal understanding of freedom as non-interference in the following way:

“circumstances of liberal modernity,” defined by its moral individualism, ethical pluralism and above all a purely instrumental way of political life,⁴⁴ explicitly distancing itself from the “populism” of civic republicanism of this sort.⁴⁵ This will not do. In 1969, Griffith’s warning was “not only [that] there is no will in those having authority to share it more widely,” but that “there are no means by which this sharing can be insisted on.”⁴⁶ This was to say that the constitution had “lost” its constituent voice and had been reduced to an elite set of institutions—to that which is constituted. Indeed, under present conditions, perhaps irretrievably so. The warning here is that by sacrificing too much of the political (of the radical potential of disagreement and conflict) to “fit” the circumstances of liberal modernity we are in danger of losing the very language, as a tradition of political science, through which such an insistence might be imagined, rationalized and articulated—might, to invoke Griffith, be insisted on.

Whilst Pettit himself is no political constitutionalist (not least of all because his model of “contestatory” democracy has, at its apex, a strong rights based review by courts, placing substantive limits on the scope of political disagreement),⁴⁷ this point is at the heart of this paper precisely because *this* republican strand has breathed new life into the study of the political constitution. Whilst this re-animation of the political constitution is to be welcomed, both Richard Bellamy and Adam Tomkins have themselves followed Pettit in downplaying the role of conflict and the very possibility of extraordinary action—indeed, Bellamy is explicit in his *denial* of the extraordinary politics, more on which below—by firmly locating the politics of the political constitution in its *parliamentary* form. In Parliament, as it actually and currently exists, they see already these institutional channels of contestation: Whether that is because Parliament and not the court room is seen as the institution best able to hold the government of the day to account (Tomkins),⁴⁸ or because the conditions of parliamentary politics—the principle of equality enshrined in “one

It may just happen that my master is of a kindly and non-interfering disposition. Or it may just happen that I am cunning or fawning enough to be able to get away with doing whatever I like. I suffer domination to the extent that I have a master; I enjoy non-interference to the extent that that master fails to interfere.

PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT at 23.

⁴⁴ See Cécil Laborde & John Maynor, *The Republican Contribution to Contemporary Political Theory*, in REPUBLICANISM AND POLITICAL THEORY 1 (Cécile Laborde & John Maynor eds., 2008) (introduction).

⁴⁵ See PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT, *supra* note 45, at 17–21.

⁴⁶ Griffith, *supra* note 12, at 391.

⁴⁷ PETTIT, *supra* note 45, at 276–78.

⁴⁸ See ADAM TOMKINS, PUBLIC LAW (2003); ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005). As Tomkins explains in this collection, however, his position has somewhat shifted since those books were published. Adam Tomkins, *What’s Left of the Political Constitution?*, 14 GERMAN L.J. 2275 (2013).

person, one vote”; the legitimacy assured by competition between parties; the duty to “hear the other side” during the course of debate—are best able to galvanize popular support around even controversial and socially transformative legislation.⁴⁹ At this point, let us be clear: It is no part of our argument to suggest that Parliament should not stand at the apex of the political constitution. On the *primacy* of Parliament we are in complete agreement with both Bellamy and Tomkins. Our point of departure is that, in our view, politics cannot be—or, perhaps better put, should not be—*reduced* to its Parliamentary form. To put it another way, where the latent but real power of the people is buried under the myth of Parliament’s political omnipotence, the danger is that in their stupor those very people sleep walk through the degeneration of that constitution. Where it is the political constitution itself that fails—where Parliament fails to hold the government to account, where the two party-system fails to provide real alternatives, or even where that failure is perceived, where political representation is inadequate or unequal, or where debate is imbalanced or even non-existent, there the virtues of conflict—the willingness to contest not only the policies of the government but the very form of the political constitution itself—are essential. If this ground is not to be conceded to the legal constitution and to notions of *judicial* supremacy (whose claims often begin with an attestation to the failures of parliament and of the political constitution) then the re-awakening of these virtues becomes, in our view, the most urgent task to which political constitutionalists must attend.⁵⁰

⁴⁹ See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007), available at <http://m.friendfeed-media.com/3378a4e1b5895d2695de77fb46c0d7278bc308a8>; see also Richard Bellamy, *Republicanism, Democracy and Constitutionalism*, in *REPUBLICANISM AND POLITICAL THEORY* 159 (Cécile Laborde & John Maynor eds., 2008).

⁵⁰ For we can be sure that, if the antithesis of the political constitution is a constitution of judges, then those judges are well prepared to act on those same failings and to redefine the constitution on their terms. Indeed, in a Hamlyn Lecture delivered in 1949, Mr. Justice Denning—as he then was—had this to say about the failings of the political constitution:

No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us, what is the remedy? Our procedure for securing our personal freedom is sufficient, but our procedure for preventing the abuse of power is not . . . [Resolving this predicament] is not a task for Parliament. Our representatives there cannot control the day to day activities of the many who administer the manifold activities of the State: nor can they award damages to any who are injured by those abuses. The courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised the new powers of the executive lead to the Welfare State; but abused they lead to the totalitarian state. None such must ever be allowed in this country.

SIR ALFRED DENNING, *FREEDOM UNDER THE LAW* 126 (1949).

C. The Normative Core of Political Constitutionalism

It may sound somewhat counter-intuitive to suggest that political constitutionalism is a moderate theory; one which unduly reduces the scope of political action. But in order to understand this argument, it is necessary to take a step back and to sketch out why it is that recent accounts of the political constitution fail fully to capture the transformative potential of conflict.

As is true for every constitutional tradition there exists, in the work of its proponents, many variations on the core themes of the political constitution. Nonetheless, some common strands can easily be identified—traits which form the core of the *normative* account of the political constitution: That provide the political constitution with its *-ism*, so to speak.⁵¹ It is our argument, then, that despite their differences political constitutionalists can be said to accept these tenets as a sort of common constitutional denominator, the close scrutiny of which will reveal that political constitutionalism, in its re-interpretation, has either “forgotten” or denied the *radically* creative potential of conflict. In so doing, we will show why political constitutionalists are prone to idealize (even, in the language of Morgan and of Griffith, to mythologize) a particular institutional design. These three tenets of political constitutionalism (as we see it) can, then, be described as follows:

(1) At the core of political constitutionalism lies the principle of political equality. The content of this principle is translated in institutional terms as the right to vote in an open and free electoral competition, contested amongst political parties. The centrality of political equality stems from the assumption that the most salient feature of the political condition is (reasonable) disagreement.⁵² In contrast with classic liberalism, whose starting point is either the consent expressed in a social contract or in a series of innate rights, we have seen that—strongly influenced by the republican tradition—political

These same suspicions of the executive, and of Parliament’s failings, run through the extra-judicial writings and speeches of many judges to this day. See, e.g., Lord Woolf, *supra* note 13; Lord Woolf, *The Rule of Law and a Change in the Constitution* (Mar. 3, 2004), available at: <http://www.law.cam.ac.uk/faculty-resources/download/lord-woolf-squire-centenary-lecture-the-rule-of-law-and-a-change-in-constitution-transcript/1415/pdf> (transcribing his Squire Centenary Lecture). The same tone runs through the judgments delivered by Lord Steyn, Lord Hope, and Baroness Hale in *Jackson v. Attorney General*, [2006] 1 AC 262 (H.L.) (appeal taken from Eng.) (U.K.) and repeated about the Scottish Parliament, by Lord Hope in *AXA General Insurance v. Lord Advocate*, [2012] 1 A.C. 868 (appeal taken from Scot.) (U.K.).

⁵¹ On the shift from the analysis of the political constitution to political constitutionalism as a normative approach see TOMKINS, *supra* note 4, at 38–40.

⁵² For a detailed and insightful treatment, see SAMANTHA BESSON, *THE MORALITY OF CONFLICT* (2005).

constitutionalism takes dissent or disagreement as its point of departure.⁵³ From this premise political constitutionalists ground the legitimacy of the political constitution in its capacity to channel (or at least to cope with) this phenomenon of pervasive disagreement. So, they claim that an equal right to vote, paired with majority rule and competition among parties with regular elections, secures for all citizens an equality of opportunity to enter the political realm and to register their claims, their consent and their disagreement. In institutional terms this means that the political constitution is the best way to manage the conflict which ensues from disagreement by ensuring that the polity can—by virtue of that opportunity—at least agree *to* if not *with* the outcomes of the political process. Note, here, that politics comes to be seen as mainly a way to *cope* with conflict, a point on which we will come back below.⁵⁴

(2) The second tenet of political constitutionalism is the primacy of parliament, seen as being the best institutional design for the realization of that principle of political equality. Only political action taking place through parliamentary representation provides for the appropriate institutional forum wherein political equality is respected. Some political constitutionalists take parliamentary sovereignty to be the expression of the underlying principle of popular sovereignty,⁵⁵ but this is not an essential claim. What is essential, however, is the claim that the political constitution ensures through parliamentary representation a dual dialogue which enables voices from civil society to be heard through and within the political system. Moreover, in a connection with what has been noted under point (1), political constitutionalists view their theory as “a preference for a representative and sovereign legislature as the ultimate site of political struggle.”⁵⁶ In this way, political equality comes to be realized through a fully democratic electoral process: “A defining characteristic of a democratic vote,” it is argued, “is that each person counts for one and none for more than one. In elections for local or national legislatures, all citizens are treated equally in this respect.”⁵⁷ Constitutional courts cannot provide the same opportunities for political equality, and this for intrinsic reasons. Even when they are

⁵³ See Adam Tomkins, *In Defence of the Political Constitution*, 22 OXFORD J. LEGAL STUD. 157 (2002) (powerfully advocating the central place of contestation in the political constitution). Contestation was already placed at the core of republican political philosophy by Thomas Paine. See, e.g., THOMAS PAINE, PAINE: POLITICAL WRITINGS 186 (Cambridge Univ. Press 1989) (1790). The same principle, even though in a rather diluted version, is of course taken up by Pettit. See PETTIT, *supra* note 45, at 183–201.

⁵⁴ This is the view of Bernard Crick, who defines politics as a precise thing which “arises from accepting the fact of the simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under common rule.” BERNARD CRICK, IN DEFENCE OF POLITICS 17–18 (1962).

⁵⁵ This is the case, for example, in the United States. See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). It might also be possible to see popular constitutionalism as a variation on political constitutionalism that is particular to the United States. See, e.g., LARRY KRAMER, THE PEOPLE THEMSELVES (2004).

⁵⁶ K.D. Ewing, *The Resilience of the Political Constitution*, 14 GERMAN L.J. 2099 (2013).

⁵⁷ BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 51, at 165.

composed of political or representative members, courts remain possessed of an essentially *adjudicative* function, determining disputes about rights—or, some or other controversial claim—according to the inherent constraints of that function. So, courts operate according to a confrontational logic where two competing claims upon legality and/or constitutionality are assessed. When they decide upon the content of fundamental rights, or constitutional law, they are constrained by their institutional design and function only to hear two of the parties affected by the decision, in a winner takes all, zero-sum game incapable of registering the poly-centricity of political disagreement. Be it for formal (for example, restrictive rules on standing) or informal (say, the cost of counsel) reasons, the parties who appear in litigation are unlikely to be truly representative of the manifold interests affected by the most controversial measures. What is more, the arguments put by those parties who do (or can) make it to court are chosen not primarily because they advance this or that public interest, but because strategically those arguments are most likely to *win* that zero-sum game as against other available options, in the *private* interests of one party. Finally, then, we can see that the political/constitutional *issues* which come to be decided before the court are highly selective and contingent. Hence, a general distrust of the virtues of judicial review as a truly *political* forum by political constitutionalists.⁵⁸ Only a parliamentary system based on competition between parties and majority rule, they say, can provide citizens with an equality of political resources and an equality of political voice.⁵⁹ Or to put it another way, parliamentary lawmaking is the only source of law which respects these core democratic values.⁶⁰

(3) In light of the two previous points, one can conclude that the center of the political constitution is the ordinary political process, which is both constitutive and regulative of the constitution. Put differently, political constitutionalists tend to conflate constitutional and ordinary politics, collapsing the former within the latter, denying the existence of a distinct, higher order constitutional politics,⁶¹ nowhere better stated than in Bellamy's claim that "the democratic process *is* the constitution. It is both constitutional, offering a

⁵⁸ This said, there seems to be a growing consensus among political constitutionalists of the legitimacy of weak judicial review. See Stephen Gardbaum, *The Case for the New Commonwealth Model of Constitutionalism*, 14 GERMAN L.J. 2217 (2013); Janet Hiebert, *The HRA: Ambiguity About Parliamentary Sovereignty*, 14 GERMAN L.J. 2253 (2013); Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2237 (2013). For a criticism of the rejection of judicial review, see Paul Craig, *Political Constitutionalism and the Judicial Role: A Response*, 9 INT'L J. CONST. L. 112 (2011).

⁵⁹ For a philosophical elaboration of this point, see the sophisticated account offered by Thomas Christiano. THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY* (2008).

⁶⁰ See Jeremy Waldron, *Can There be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2009); see also RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 119–40 (2012).

⁶¹ In this respect, the political constitution might seem to come closer to what Costantino Mortati defined as the "material constitution" or "*costituzione materiale*." COSTANTINO MORTATI, *LA COSTITUZIONE MATERIALE* (1944).

due process, and constitutive, able to reform itself.”⁶² Thus Bellamy agrees with Jeremy Waldron that democratic political systems contain already the capacity to “build the ship at sea”—to renovate, in other words, from within without violating the principle of political equality. The source of power in the political constitution is therefore innate. Power does not emerge from an alternative kind of politics and therefore it does not require a level of extraordinary politics nor the expression of a constituent power. Given the fact of disagreement, this is to say, no higher law (itself beyond disagreement) can be admitted or recognized to guide us. In the tradition of modern constitutionalism, this higher law most saliently takes the form of a written constitution—usually the outcome of a social contract and therefore of a consent to common recognizable interests.⁶³ For political constitutionalists, the problem here is twofold: First, and as it was put by Henry Richardson, in politics the reasons that everyone can accept or consent to are an empty set;⁶⁴ second, the juridification of higher laws serves to shield them against possible future disagreement, unduly limiting the scope of politics and its deployment as the best means *both* to continue and to resolve those disagreements. These claims are no different where that higher law takes the form of constitutional rights as opposed to public policies⁶⁵—a depoliticizing strategy that attempts to place rights *beyond* politics, *beyond* political institutions, and therefore *beyond* the scope of reasonable disagreement.

The nature of the constitution envisaged by political constitutionalists is therefore mainly concerned with two overarching constitutional “goods”: Political representation (Bellamy) and political accountability (Tomkins), *both* of which are needed to galvanize support around the political system and its outputs. Political representation through parties ensures that lawmaking and legislation is bolstered by the support of the (political) majority, whilst accountability puts government under scrutiny and provides a visible site for contestation. In one sense, the political constitution grounds this legitimacy in a neutral procedural form. Accordingly, Keith Ewing (in this edition) notes that the political constitution can be read as the apotheosis of liberalism. In light of the tenets sketched out above, this sounds perfectly plausible. The political constitution, he says, offers:

[A] site for discussion and debate, and the reconciliation of conflict. It is a recognition that everyone matters, that there is no monopoly of wisdom on ideas, and that differences can be reconciled in a deliberative assembly. It can

⁶² BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 51, at 5.

⁶³ Interestingly, this is the case both for liberal and republican legal constitutionalism. See JOHN RAWLS, POLITICAL LIBERALISM 214 (1993) (referencing “constitutional essentials”); see also PETTIT, REPUBLICANISM, *supra* note 45, at 56.

⁶⁴ HENRY RICHARDSON, DEMOCRATIC AUTONOMY 53 (2002).

⁶⁵ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

accommodate the politics of both post-war socialism and modern-day neo-liberalism.⁶⁶

Ewing, rightly, is here eager to stress the resilience of the political constitution. In itself, a political constitution can represent the seat for different philosophies—a versatility that both strengthens the *idea* of the political constitution and allows it to endure. Thus, it is seen as a constructive way to cope with the phenomenon of disagreement because it takes into account *already available* political options. Bellamy, for example, is clear that his is a defense (and not a radical re-thinking) “of actually existing democracy.”⁶⁷ However, if republicanism is to be taken seriously by political constitutionalists then, in our view, the building block of the constitution should become *radical* disagreement. This is not to say that the political constitution as an instrument for the expression and resolution of moral and political differences is without value. Parliamentary politics still constitutes a precious instrument for the staging and solving of these conflicts.⁶⁸ What we do argue here though is that the British tradition of political constitutionalism, being more concerned with social practices and custom, has paid insufficient attention to the concept of constituent power,⁶⁹ exercised in “extraordinary moments, [when] politics opens up to make room for conscious popular participation and extra-institutional, spontaneous, collective intervention”⁷⁰—in those moments, that is to say, when Parliamentary politics proves itself to be *incapable* of containing or tackling (this or that) radical disagreement. In part E we will suggest that devolution to Scotland began with such an extraordinary moment, revealing the potential of that constituent power radically to interact with the political constitution both to break down existing and then to build up new constitutional fictions. Before we do so, however, we will first turn our minds to the *limiting* force of politics as it is preferred in the variant of political constitutionalism just described.

⁶⁶ K.D. Ewing, *The Resilience of the Political Constitution*, 14 GERMAN L.J. 2099 (2013).

⁶⁷ BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 51, passim (describing “actually existing democracies”); see also Bellamy, *Republicanism, Democracy and Constitutionalism*, *supra* note 51, passim (describing “actually existing democratic processes”).

⁶⁸ *C.f.* THE PARLIAMENTARY STYLE OF POLITICS (Suvi Soininen & Tapani Turkka eds., 2008), available at <http://tocs.ulb.tu-darmstadt.de/211472263.pdf>.

⁶⁹ See Martin Loughlin, *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*, in THE PARADOX OF CONSTITUTIONALISM, 27 (Neil Walker & Martin Loughlin eds., 2007) (reconstructing the debate on constituent power in Great Britain).

⁷⁰ ANDREAS KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, & HANNAH ARENDT 7 (2008).

D. The Reflexivity of Politics

If the starting point (that is to say, the ontological precondition) of the political constitution is the recognition that plurality, and the disagreements and conflicts produced by that condition, is itself *constitutive* of the political,⁷¹ then we will begin with something of a controversial claim: That in order to take politics seriously, political constitutionalists should discard (or at the very least refine) the notion of *reasonable* disagreement so central to the accounts offered by Griffith,⁷² Bellamy⁷³ and, of course, Waldron.⁷⁴ Allow us to explain.

The continental tradition of political constitutionalism has put the emphasis on a distinction of powers hitherto largely ignored in the British discourse: The distinction between *constituent* and *constituted* powers. There is much of to learn by following this approach, which rests on the premise that constituted powers (with regard to the political constitution these being the forms of ordinary political representation which Bellamy and Tomkins set out to defend) cannot contain, indeed cannot even predict, all possible disagreements. By definition, if disagreement and conflict is necessarily coupled with the condition of politics, then the possibilities of disagreement and conflict must also be applied to the political constitution itself. However, by limiting disagreement to that which is *reasonable* (and how are we to determine precisely what is reasonable and what is not without falling back on politics—on disagreements *about* reasonableness—to help us decide?) political constitutionalism seems to place limits on what might validly be contested. That is to say, we are limited to a set of disagreements which are already contained through a specific form of political representation. Nonetheless, there is always a residue that cannot fully be captured by ordinary representation.⁷⁵ A constituent impulse is always operating, overtly or latently, outside of parliamentary politics, capable of disturbing and challenging the preconceptions which underpin it.

By taking into account the role of constituent power, we learn two important lessons about politics. First, that new beginnings—the *raison d'être* of that power—are an essential part of political action and by definition cannot be contained or fully announced

⁷¹ On the plurality as defining characteristic of the human condition, see ARENDT, *supra* note 5.

⁷² Griffith, *supra* note 2.

⁷³ BELLAMY, POLITICAL CONSTITUTIONALISM, *supra* note 51; see also Bellamy, *Republicanism, Democracy and Constitutionalism*, *supra* note 51.

⁷⁴ JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

⁷⁵ See ANTONIO NEGRI, INSURGENCIAS (1999) (radically interpreting constituent power as an absolute alternative to constituted power).

by existing laws and institutions.⁷⁶ Secondly, that whilst politics is based on disagreement, this is not limited to simply *coping* with the conflicts which those disagreements generate. Rather, politics is also about the transformation of that conflict into a creative, generative force. The constituent moment—when constituent power exercises this constitutive capacity—exceeds constituted powers in order to transform them, working as an ‘irritant’ against existing institutions and the ordinary modes of representative politics. This is what Machiavelli saw and praised in the tumults of Rome: The extraordinary exercise of a constituent power *against* the Senate (and other institutions) in order to create a better condition for freedom. Putting these two lessons together, then, it is not only the new beginning as a singular *event*, but the continuing, latent, possibility of new beginnings that both engender and require the virtues of constitutional conflict.

We are now in a position to see why the gravitational pull which draws political constitutionalists towards parliamentary politics must be re-thought. If, as we have said, political constitutionalism is to take politics seriously, then this must be predicated upon a recognition that politics is not only about managing conflict but also about imagining possible alternatives to the *status quo*; alternatives generated *by* conflict. To let political imagination flourish, the possibility of *radical* disagreement must be left open. This means that if political conflict is taken to be (at the very least potentially) a productive (as opposed to entirely destructive) force, then the political constitution needs to leave other non-parliamentary channels of contestation open. So, for example, where the idea of public reason that is proposed by political constitutionalists becomes too formal and rigidly institutionalized,⁷⁷ the danger is that it becomes blind to the (often unpredictable) challenges that might be posed *to* those formalities and *to* those institutions. Let us explain, taking the example of one of the political constitution’s core principles—political equality.

At this stage we can go back to the three main tenets of the political constitution outlined in part C. With regard to the first tenet, it is clear that political equality is taken as a given within the model because it is the best way to cope with reasonable disagreement. This conception of political equality is a tailor-made construct, useful in the critique of the rise of legal constitutionalism. The main thrust of this criticism, of course, is that legal, or judicial,⁷⁸ or common law constitutionalism pays lip service to any meaningful notion of political equality. So, for example, where decisions on the content of rights are taken by the courts, then only the subjects involved in the legal controversy will be able to offer their interpretation of the rights at stake in the litigation. This is what happens, for

⁷⁶ Arendt was rather adamant on the importance of new beginnings. See ARENDT, *supra* note 23, at 206; see also JASON FRANK, *CONSTITUENT MOMENTS* (2010); KALYVAS, *supra* note 72, at 10.

⁷⁷ For a reconstruction of public reason, see GRÉGOIRE WEBBER, *THE NEGOTIABLE CONSTITUTION* (2009).

⁷⁸ See Tushnet, *supra* note 60.

example, when constitutional courts adjudicate on the content of fundamental rights. After having heard the parties involved in the proceedings, they make a decision which impacts upon other citizens without giving them any possibility of influencing the content of the decision. In this way, the principle of equality—for political constitutionalists the very basis of constitutional—is violated. Citizens affected by institutional decisions ought to be able to put their claims on the table, equally with others. So it is that parliamentary politics is offered as a platform where disagreements about rights can properly be expressed in a way that at least makes it possible for citizens, if not to agree with, at least to agree to certain outcomes.

The problem with this position—and here we get to the heart of how interpretations of the political constitution have been constrained by efforts always to *defend* the political from the legal or judicial constitution, rather than to promote it on its own terms—is that this interpretation of political equality ignores the logical conclusion that the same principle (equality) itself is open to disagreement and therefore (again, at least potentially) exposed to contestation. The productivity of political conflict is therefore severely undermined and, oddly, a juridical pre-condition—the right to vote as the ultimate expression and even pre-condition of political equality—is taken to be bedrock upon which the political constitution rests. To put this another way, it is our view that by limiting the scope of disagreement to that which is *reasonable* (whatever that means), political constitutionalists lose sight of the *reflexivity* of politics, according to which *any* issue can be politicized, political equality included.⁷⁹

We can now revisit the second and third tenets of the political constitution. The second, we recall, is the primacy of Parliament. While parliamentary politics embodies several virtues, it is far from true that in that institution is already and always secured the realization of political equality. Not only might permanent minorities risk a *de facto* disenfranchisement, but path dependence and the monopoly of political parties as the conduit of parliamentary politics limits also the possibility of any radical re-constitution of political power.⁸⁰ For these reasons, the ordinary political process may not be able to reform itself in cases of severe violations of political equality. The third tenet, that is, the negation of any space for extraordinary or revolutionary politics, is a necessary symptom of the reductive role that political constitutionalism bestows on potential constitutional change, whereby democratic politics comes to be seen through the prism of institutional politics, and whereby “real democratic processes” are entirely captured by parliamentary politics. Yet, and as we have seen in part B, the difference between institutional politics as

⁷⁹ The idea of reflexive politics is developed in EMILIOS A. CHRISTODOULIDIS, *LAW AND REFLEXIVE POLITICS* (1998) and in Emilios A. Christodoulidis, *Republican Constitutionalism and the Reflexivity of Politics*, 92 *ARCHIV FUER RECHTS—UND SOZIALPHILOSOPHIE* (ARSP) 1 (2006).

⁸⁰ ARENDT, *supra* note 23, at 268 (finding the British parliament to be an expression of the elite rather than the seat of authentic political action).

it is and as it might become is the essential political question.⁸¹ It is at this point that political constitutionalists reach an impasse: Even the admission that beyond “the constitution [as] a basic framework for resolving our disagreements,”⁸² the very framework is itself the subject of political debate, falters with the failure to recognize that the *terms* of that debate cannot fully be captured by the representation offered by already existing democratic institutions.⁸³

As we turn now to our case study, the political constitution of a devolved Scotland, we will see that this very tension—between the possibilities of constituent power and the inclination towards closure by constituted power—has both driven and contained the radical nature of that shift in the constitutional landscape.

E. The Political Constitution of Scotland

I. *The Case Against Poll Tax*

Griffith himself was no proponent of devolution to Scotland (nor, indeed, to Wales, Northern Ireland or to the English regions). Published just two months before the controversial repeal of the Scotland Act 1978, in *The Political Constitution* he expressed the view that devolution was one amongst a number of proposed constitutional reforms (more on which below) which, if implemented, would serve radically to alter the core principal at the heart of the political constitution: That the government of the day “may take any action necessary for the proper government of the United Kingdom, as they see it, subject [only] to two limitations.” Those limitations were first, that in doing so they may not infringe the legal rights of others unless expressly authorized to do so by law, and secondly, that should they wish to change the law, the government must obtain the assent of Parliament.⁸⁴ However, when (some twenty years later) devolution to Scotland was delivered by the New Labour government in the shape of the Scotland Act 1998, it was as a particularly and peculiarly *political* answer to a particular and peculiar constitutional problem—the breakdown of political equality and the consequent failure of the existing political constitution adequately to channel Scottish disagreement with and opposition to the policies of the then Conservative government. Before we spell out what is at stake here, allow us say a little more on this.

⁸¹ See JACQUES RANCIÈRE, *DISAGREEMENT* (2008). Rancière, as many other authors, distinguishes between politics and the political and places disagreement at play in the distinction between the former and the latter.

⁸² BELLAMY, *POLITICAL CONSTITUTIONALISM*, *supra* note 51, at 5.

⁸³ Rather interestingly, in his recent restatement of a theory of republican democracy, Pettit is compelled to close the book by introducing the distinction between constituent and constituted powers as unavoidable. See PETTIT, *ON THE PEOPLE’S TERMS*, *supra* note 45, at 279–91.

⁸⁴ See Griffith, *supra* note 2, at 15.

James Mitchell has said that “the thinking that led to devolution was political, rather than constitutional, in the sense that it was informed by political pressures rather than any coherent system-wide constitutional thinking.”⁸⁵ So, for example, asymmetries as to how (and how much) power has been devolved to Scotland, Wales, and Northern Ireland suggest a somewhat ad-hoc approach grounded in the political context of each region, rather in grand constitutional design, whilst the constitutional problems left behind (or at least for another day)—not least of all the oft cited West Lothian Question⁸⁶—indicate that there is much more in the way of constitutional thinking to be done. However, in at least two senses those political pressures were inescapably (and, for our purposes, *significantly*) constitutional in nature. On the one hand, they stood as a reaction against the imposition of what was perceived to have been an unfair and unjust tax on the people of Scotland by a government that they had roundly rejected at the ballot box (and what could be more constitutionally contentious than the relationship between taxation and representation); on the other, the realization that a new constitutional settlement was needed in order to satisfy the idiosyncratic needs of that people. Let us address each in turn.

There are many points from which the study of executive and legislative devolution to Scotland might begin, each with some merit: With administrative devolution and the creation of the Scottish Office in 1885 (and the revival of the post Secretary of State for Scotland, which had existed briefly following the Acts of Union); with the breakthrough election to the House of Commons of the Scottish National Party (SNP) candidate, Winnie Ewing, at the Hamilton by-election in 1967; with the Royal Commission on the Constitution which followed; with the Scotland Act 1978 and the resulting referendum and repeal of that legislation. For our purposes, it is what followed the repeal of the Scotland Act 1978 which is most relevant, for it was the failure to deliver legislative devolution to Scotland which brought about the downfall of Jim Callaghan’s Labour government and which precipitated the political *and* constitutional crisis from which devolution as we now know it would eventually emerge: The rejection by the Scottish electorate of the utterly dominant Conservative government which followed.

Scotland’s constitutional position throughout the 1980s and early 1990s was precarious at best. The 1987 general election had brought about the so-called “doomsday scenario” whereby Conservative victory across the United Kingdom stood in stark contrast to the party’s showing in Scotland. Nationwide, the Conservative Party had won the election convincingly, with 42.2% of the share of votes giving them 376 seats in the Commons, and a majority in the House of 101. In Scotland, however, the picture was quite different.

⁸⁵ JAMES MITCHELL, DEVOLUTION IN THE UNITED KINGDOM 220 (2009).

⁸⁶ However, for a persuasive answer to this question, see JIM GALLAGHER, HOW AND WHY TO ANSWER THE WEST LOTHIAN QUESTION (2012), available at http://www.ippr.org/images/media/files/publication/2012/04/west-lothian-question_Apr2012_8954.pdf.

There, the Conservatives had won just 24% of the share of votes, and were down eleven seats on their last outing in 1983, winning just ten of seventy-two available Scottish seats. Labour, with 42.4% of the Scottish vote and fifty Scottish seats (a majority of fourteen) could, with some legitimacy, claim to be the chosen party of government in Scotland, yet the Scottish Office, its minister and the policies it pursued would be Conservative, whilst the Conservative government at Westminster, with its majority of 101 did not need the seventy-two Scottish votes in order to pursue its legislative agenda.⁸⁷ If, then, these results reflected a broader trend in Scottish politics, the rejection of Thatcherism,⁸⁸ it was a trend that barely registered at a constitutional level. A nation which had a large public sector on the one hand, and which needed state intervention to maintain the competitiveness of its heavy industries on the other, found itself threatened by a government which sought the contraction of the public sector, which refused to prop up struggling industries, and which—by virtue of its large majority of seats in the House of Commons—had the absolute power to legislate contrary to Scotland's specific interests and wishes, *notwithstanding* the Conservative *minority* in that country. The watershed moment—when the Scottish predicament revealed itself not only to be a *political* one but also a *constitutional* one—was the passage of the Abolition of Domestic Rates *etc.* (Scotland) Act 1987, and its disastrous introduction to Scotland (one year prior to its introduction in England) of the so-called Poll Tax.

The Poll Tax, or Community Charge, reformed the collection of domestic rates so that each elector would pay a flat rate, rather than a rate based on wealth. In many respects, this was the final straw for a Scottish working class who, already devastated by the government's reluctance to aid the struggling steel, coal, and shipbuilding industries, would now be asked to pay the same rate of tax as their wealthiest neighbors. With only the most limited *institutional* channels available through which the imposition of the charge could be contested, *extra-Parliamentary* resistance to the charge was both immediate and fierce. Opinion polls revealed that as many as three-quarters of Scots were opposed to the charge,⁸⁹ whilst the Scottish Trades Union Congress (STUC) was able to mobilize a march of 30,000 people upon Edinburgh on 1 April 1989, the date of implementation. Anti-tax graffiti became a feature of town-centers, whilst an array of protest groups and campaigns were formed to organize resistance to the charge.⁹⁰ Some of those, such as the Stop It campaign organized and orchestrated by the by the Labour Party

⁸⁷ For more information on the results of the 1987 general election, see House of Commons, Public Information Fact Sheet, No. 47, *General Election Results, 11 June 1987, available at* www.parliament.uk/documents/commons-information-office/m11.pdf.

⁸⁸ James Mitchell, *From National Identity to Nationalism, 1945–99*, in *THE CHALLENGE TO WESTMINSTER: SOVEREIGNTY, DEVOLUTION AND INDEPENDENCE* 154, 160 (H.T. Dickinson & Michael Lynch eds., 2000).

⁸⁹ LYNN G. BENNIE, UNDERSTANDING POLITICAL PARTICIPATION: GREEN PARTY MEMBERSHIP IN SCOTLAND 22 (2004).

⁹⁰ For more detail, see DANNY BURNS, *POLL TAX REBELLION* (1992).

and STUC, had little effect. Whilst this campaign had pledged to stop the tax by encouraging spoiled returns, thus clogging up the machinery of collection, its chances of success were haunted by an internal contradiction: The Labour Party's desire to appear as a responsible, respectable, law abiding and electable party of opposition meant that, at the regional level, Labour led councils were already taking the measures needed to ensure smooth implementation and collection of the tax.⁹¹ Interestingly, it was those campaigns sprung from the ground up, impromptu gatherings at a local level of those affected by the charge, that had the greatest effect. Though it did not last long, the Maryhill and Somerston Anti Poll Tax Union (APTU) was created by local residents opposed to the tax who met wherever they could—in bus stops, in shops, even on traffic islands⁹²—and who aimed to bring an end to the tax by organizing resistance in the form of non-payment. By engaging participants in a dialogue with one another, by providing them with information about the tax and its imposition, and by organizing a collective non-payment, that union—and others which surely followed⁹³—were able to organize an effective campaign of non-payment, rendering the tax uncollectable long before its repeal by Parliament. So, whilst it was estimated that twelve percent of those eligible to pay had paid in 1989-1990,⁹⁴ that number rose to twenty-three percent in 1990-1991 and jumped to seventy-seven percent by 1991-1992.⁹⁵ In the end, some 1.5 million people were estimated to have withheld payment, with 700,000 summary warrants issued as a result.⁹⁶ This was not, in other words, the action of an unlawful few: Isolated and determined individuals out to protect their capital; rather, this was action-in-concert by a people opposed to the very legitimacy of that tax. What was made possible by bringing individuals together in that way was the capacity to make sense of the two-fold domination at play here: The domination of a Parliament capable of making laws morally or politically repugnant to the people, beyond the (institutional) scope of their consent or contestation;⁹⁷ but also the domination of the

⁹¹ For more on this, see Michael Lavalette & Gerry Mooney, "No Poll Tax Here!": *The Tories, Social Policy, and the Great Poll Tax Rebellion*, in *CLASS STRUGGLE AND SOCIAL WELFARE* 199, 212 (Michael Lavalette & Gerry Mooney eds., 2000).

⁹² See the account of this coming together given by Tommy Sheridan, chair of the Pollock Anti Poll Tax Union and later MSP. *Id.* at 218.

⁹³ While the initial Maryhill and Somerset APTU was a short-lived affair, its very coming into being inspired the creation of similar associations across the country, many of which last the course.

⁹⁴ Given that a huge number of Scots fell off the electoral register altogether in order to avoid detection for non-payment, official figures were impossible to gather.

⁹⁵ HUGH PARKER ATKINSON & STUART WILKS-HEEG, *LOCAL GOVERNMENT FROM THATCHER TO BLAIR: THE POLITICS OF CREATIVE AUTONOMY* 71 (2000).

⁹⁶ *The Poll Tax in Scotland: 20 Years On*, BBC NEWS, Apr. 1, 2009, available at <http://news.bbc.co.uk/1/hi/scotland/7976782.stm>.

⁹⁷ As Lord Reid put it in *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645, 723 (appeal taken from Eng.):

government within and controlling that parliament. Hannah Arendt was fond of saying that the coming together of men in shared experience and discourse has a world-disclosing effect. "For us," she said, "appearance—something that is being seen and heard by others as well as by ourselves—constitutes reality," and this she called publicity.⁹⁸ Isolated, atomized even, the individual elector might have been left to rue an instance of interference with her property; yet brought together with others in the APTUs and in other campaigns besides—in the shining light of publicity—the reality of the situation came to be seen: That it was not the poll tax which had rendered Scots unfree, but the very governing arrangements by which that tax could be imposed upon them. So it was that, as "the perception grew in Scotland that the Conservative government, with limited support north of the border, was imposing policies on Scotland," as it became clear too that only in *dissent* could Scots effectively register their (lack of) consent to the policies of that government, "opposition to the poll tax became aligned with the case for a [Scottish] parliament."⁹⁹ So it was, in other words, that Scots came to see the reality behind the fiction: That in Parliament their interests were not adequately represented, their voice inadequately heard; that political equality within that body was a myth and that they could neither participate equally in the making of the law (of which 1987 Act was but the most pernicious example) (Bellamy's political constitution) nor effectively contest the execution of policy by the government of the day (Tomkins' political constitution). In both senses, the political constitution had failed.

II. "We are the Scottish People"

Of course, it is true that resistance to the Poll Tax was not exclusive to Scotland. Indeed it is probably the case that it was the spread of that resistance in to England that forced the government to rethink and eventually to repeal the legislation. Nevertheless, and as Andrew Marr has said, "at least in England it was a bad tax brought in by the party with the most seats and the most support. In Scotland it was a bad tax brought in by a minority party with minimal support beyond its own ranks."¹⁰⁰ More than this, however, what made resistance to Poll Tax in Scotland *constitutionally* significant was not only the reaction *against* the tax—the people as Machiavelli's *il governo*—but what emerged in the space

It is often said that it would be unconstitutional for Parliament to do certain things, meaning that the moral, political and other reasons against it are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts would not hold the Act of Parliament to be invalid.

⁹⁸ ARENDT, *supra* note 5, at 50.

⁹⁹ See BBC NEWS, *supra* note 98.

¹⁰⁰ ANDREW MARR, THE BATTLE FOR SCOTLAND 180 (1992).

created by that conflict: The opportunity, indeed the quite revolutionary capacity, to shift the constitutional fiction to meet reality—to constitute anew.

The Scottish Constitutional Convention, launched in 1989 and encompassing the Labour Party, the Liberal Democrats, the Green Party, trade unions, local authorities, churches and a number of others across a broad range of civic bodies,¹⁰¹ emerged as a direct and extra-parliamentary response to Scotland's constitutional conundrum. As the institutions of Scottish civil society wilted under the weight of Thatcherism—institutions, it must be said, such as trade unions, universities, local government, which were of particular value to a nation without a (representative) national government and a (representative) national parliament¹⁰²—Scots increasingly became unwilling to suspend their disbelief and support that fundamental myth that Parliament, the voice of the people themselves, may make or unmake any law whatever. Rather, as Michael Keating has said, legislation came to be seen as an oppressive tool of the government *over* the people: “[A]n abuse of parliamentary sovereignty and therefore a violation of the unwritten norms of the constitution.”¹⁰³ Reacting to this, the Scottish Constitutional Convention (SCC) made an explicit attempt to assert a new fiction: A claim for the sovereignty of the Scottish people, and not of (the Westminster) Parliament. This was a claim with roots in Scotland's constitutional past. Whilst Sir Robert Filmer had warned Englishmen passively to obey the rule of the tyrant and to accept him as a punishment delivered from God in response to *their* misdeeds, the Scots, as early as 1320, had warned their monarchs that the continued obedience of the Scottish people was tied to his preservation of their freedom;¹⁰⁴ whilst the English Bill of Right in 1689 allowed for the *abdication* of the English throne by King James VII, the Scots' Claim of Right Act asserted the peoples' right to remove him. But this was also a claim with a certain currency in the present, building as it did on the proposals of a quite remarkable document, Scotland's *Claim of Right 1988*.¹⁰⁵

¹⁰¹ The Conservatives, understandably, sat out and lobbied Scottish business interests to do the same. The Scottish National Party (SNP), early supporters of a convention, sat out too, fearing that Labour domination of the agenda could be used counterproductively to attack the SNP's policy of “independence within Europe.” See DAVID DENVER ET AL., SCOTLAND DECIDES: THE DEVOLUTION ISSUE AND THE SCOTTISH REFERENDUM 32-33 (2000).

¹⁰² See Ewen A. Cameron, *Civil Society, Protest and Parliament: Housing and Land in Modern Scotland*, in THE CHALLENGE TO WESTMINSTER: SOVEREIGNTY, DEVOLUTION AND INDEPENDENCE 123 (H.T. Dickinson & Michael Lynch eds., 2000).

¹⁰³ Michael Keating, *Managing the Multinational State: Constitutional Settlement in the United Kingdom*, in THE DYNAMICS OF DECENTRALIZATION: CANADIAN FEDERALISM AND BRITISH DEVOLUTION 21 (Trevor C. Salmon & Michael Keating eds., 2001).

¹⁰⁴ See generally NATIONAL ARCHIVES OF SCOTLAND, *Translation of the Declaration of Arbroath* (Alan Borthwick trans. 2005), available at <http://www.nas.gov.uk/downloads/declarationArbroath.pdf>.

¹⁰⁵ A CLAIM OF RIGHT FOR SCOTLAND (Owen Dudley Edwards ed., 1989).

Launched in July 1988 by what came to be known as the constitutional steering committee—a group representative of the Scottish political parties and civil society, which would set out the framework (and, for the most part, participate in) the SCC—the *Claim of Right* set out the case for a new constitutional settlement in both negative and positive terms. In the negative sense, it “described a situation in which [the constitutional status quo was] no longer being honoured; in which the wishes of the massive majority of the Scottish electorate are being disregarded.” With a nod to anti-poll tax sentiment and action, the *Claim* went so far as to hint at a justified resistance: “In such a situation,” it continued, “one would expect to see signs of a breakdown of respect for law. They are beginning to appear.”¹⁰⁶ In the positive sense, making explicit their rejection of the Diceyan orthodoxy, the *Claim* reaffirmed Scotland’s right to self-determination: The right “to articulate its own demands and grievances, rather than have them articulated for it by a Government utterly unrepresentative of the Scots.”¹⁰⁷ In that respect, it concluded with the call for a Convention to draw up the framework for a Scottish Assembly, and to mobilize Scottish public opinion behind that scheme. Duly convened, the Constitutional Convention opened proceedings by re-emphasizing the voice of the constituent *against* constituted power—the convention chair, Canon Kenyon Wright, in a moment of great rhetorical flourish, telling the assembled body, and more pointedly the watching public, that, should the Conservative government say to the Conventions proposals, “No, and we are the state,” the response should be “Well, we say Yes, and we are the Scottish people.”¹⁰⁸

In a flurry of activity, in particular between 1989 and the general election of 1992, the Convention set to work, drawing up the blueprint for a devolved Scottish assembly, operating within the framework of a reconstituted United Kingdom. In spite of the various interests present, the group was able to achieve substantial consensus in the face of disagreement: On the policy areas which should be devolved; on the tax raising powers which the parliament should enjoy (powers to implement a small increase in income tax (3p in the £1 no power to control corporation tax); on the parliament’s relationship with the European Union, and with the European Convention on Human Rights; on gender equality; on the models of openness and consultation to be adopted; on the number of seats in the chamber; and, on the issue where there was most disagreement to be

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ CHRISTOPHER HARVIE & PETER JONES, *THE ROAD TO HOME RULE* 154 (2000). In surrendering to opponents of the First Past the Post system, the Labour Party was consoled by the knowledge that, with the adoption of this compromise, it would be almost impossible for the SNP ever to win a majority in the chamber. That conventional wisdom (pun not intended), of course, was shattered at the 2011 elections to the Scottish Parliament, which defied all odds (and indeed the electoral system itself) to return a single party, SNP majority, to the chamber. The result of the Scottish independence referendum on 18 September 2014 will tell us just how historically significant (and transformative) that anomaly might be.

overcome; on the electoral system to be used to elect MSPs. Here, the Liberal Democrats favored a system known as single transferable vote (creating large, multi-member constituencies with a share of seats proportionate to the share of votes won at the election). The Labour Party—which had already conceded an in-built majority by agreeing *against* the adoption of a First Past the Post system—feared that this system was too complex, and that it lacked a sufficiently robust link between the elected MP and the constituency, and so proposed a variant on a party list system. In the end, something of a compromise was struck: The system agreed upon being part first-past-the-post (seventy-three members would be elected in this way), and part drawn from a list (fifty-six members elected on a regional basis in this way). Beyond the specific disagreements here, however, what is remarkable is that, when tensions were at their highest—when both Labour and the Liberal Democrats were ready to walk away from the Convention altogether—it was the presence of other voices, other interests, which channeled their energies back towards the resolution of that disagreement, retraining focus on the wider public interest.¹⁰⁹ Beyond the impressive framework set out by the Convention, there are three points that we would like to note in concluding the discussion, which take us back to the heart of this paper.

First, what was being expressed by the Convention was a constituent voice. Rather than make any grand separatist claims which stood *outside* the constitution (hence, the non-participation of the SNP), the Convention represented a “paradoxical linkage” between on the one hand, “a commitment to constitutional form,” and on the other, “a claim that the sub-state national society is *constitutionally* entitled to revive the pluralized version of constituent power with which it and other national societies entered the union.”¹¹⁰ Indeed, it would seem that the Convention was the final, self-constituted expression of a voice that had no other agent to carry it. In Parliament, the overwhelming Tory majority ensured that Scottish MPs could have little or no impact on legislation as it passed through the House from the government to the Royal Assent. In Parliament House meanwhile, litigants had found the Court of Session unsympathetic to their attempts to challenge the validity¹¹¹ and damaging effects¹¹² of primary legislation. And yet, rather than sink in to lethargy and accept their lot, the Scottish people invoked the only *power* that they retained: Their spirit

¹⁰⁹ See generally BRIAN TAYLOR, *THE SCOTTISH PARLIAMENT* (1999) (discussing the negotiating framework of the Convention). The final report of the convention, containing the details of the agreed framework, was published as *Scotland's Claim, Scotland's Right*, SCOTTISH CONSTITUTIONAL CONVENTION (1995).

¹¹⁰ Stephen Tierney, “*We the Peoples*”: *Constituent Power and Constitutionalism in Plurinational States*, in *THE PARADOX OF CONSTITUTIONALISM* 229, 242–43 (Neil Walker & Martin Loughlin eds., 2007).

¹¹¹ *Murray v. Rogers*, 1992 S.L.T. 221.

¹¹² *Pringle*, Petitioner 1991 S.L.T. 330. For more on these cases, see generally Denis J. Edwards, *The Treaty of Union: More Hints of Constitutionalism*, 12 *LEGAL STUD.* 34 (1992); Chris Himsworth & Neil Walker, *The Poll Tax and Fundamental Law*, 36 *JURID. REV.* 45 (1991).

of resistance. In both the well attended gatherings of the anti-poll tax unions¹¹³ and in the more formal setting of the Scottish Constitutional Convention, Scottish people were saying, indeed took the initiative themselves to say, “*we want to participate, we want to debate, we want to make our voices heard in public, and we want to have a possibility to determine the political course of our country.*”¹¹⁴

The second important point is the remarkable sense in which the power of that voice endured even after the Convention’s own dispersal. The Conservative Party’s (not altogether unsurprising) general election win in 1992 knocked the stuffing out of the Convention as a continuingly productive force. Public attention drifted away, and little of great value was added to the (substantial) meat of the proposals agreed upon before the election, with politicians on all sides believing that the Convention had run its course.¹¹⁵ And yet, when the devolution agenda was again, and this time decisively, kick-started by New Labour’s landslide general election victory in 1997, and their manifesto commitment to deliver to Scotland (as well as to Wales and to Northern Ireland) devolved power, the will of the Scottish people *expressed by the long defunct Convention* seemed to place a restraint on what Parliament was willing to do: A number of legislative amendments suggested by members of the House of Commons being rejected on the basis that they ran counter to the settled will of the Scottish people set out in the Constitutional Convention.¹¹⁶ As a matter of law, Parliament may have retained the right to “make or unmake” any law it so pleased; yet the *power* of that action-in-concert had created a political limit on the exercise of that (sovereign) right.

The third point, however, is a more pessimistic one. If the resistance to poll tax created the space within which the Scottish people could contest and ultimately restate their constitutional relationship with the United Kingdom, the devolution legislation itself at

¹¹³ As Lavalette and Mooney report it:

The local ATPU organisers were nearly always taken aback by the response. In apparently “demoralised” working-class communities which had suffered from unemployment, poverty and deprivation, and within which the struggle for daily survival was immense, there were mass meetings of between 200 and 500 people, all of whom were bitterly opposed to the poll tax and determined to fight it.

Lavalette & Mooney, *supra* note 93, at 218.

¹¹⁴ Here, I borrow for this context a phrase used by Hannah Arendt to describe the voice of council system of democracy that emerged in revolutions as diverse as those in the United States, France, Russia, and Hungary. See HANNAH ARENDT, *Thoughts on Politics and Revolution*, in HANNAH ARENDT, *CRISES OF THE REPUBLIC* 199, 232 (1972).

¹¹⁵ JAMES MITCHELL, *STRATEGIES FOR SELF-GOVERNMENT: THE CAMPAIGNS FOR A SCOTTISH PARLIAMENT 287–90* (1996).

¹¹⁶ See Brigid Hadfield, *The United Kingdom as a Territorial State*, in *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* 623 (Vernon Bogdanor ed., 2004).

best fudged the sovereignty question,¹¹⁷ and at worst closed it off altogether: Section 28(7) of the Scotland Act 1998 seemingly reaffirming the classic doctrine of parliamentary sovereignty with the assertion that the existence of a Scottish parliament, with extensive legislative power over a vast policy base, “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” Notwithstanding the achievement of devolution then, it would appear that the constituent power of the (Scottish) people remains (only) in reserve. Obscured but not subverted however, the lesson of this episode is that even from under the weight of Parliamentary sovereignty, and contrary to the myth of an apathetic citizenry, the action of the people in concert is capable of being re-called, and registering at the level of a reconstructive constitutional dialogue between constituent and constituted power. Rather than downplay the significance or even the existence of extraordinary politics then, it seems to us that the challenge for political theory generally, but for political constitutionalists more specifically, is to bring these moments out in to the open, and to understand them as legitimate expressions of an otherwise unheard constitutional voice.

F. Conclusion

It is a well-known and oft-commented upon fact that having given his 1979 paper the title *The Political Constitution*, Griffith then proceeded, over the 21 pages which followed, neither to repeat nor to define the term. Our claim in this article is that the political constitution is best seen as the juxtaposition of that which is closed (the constitution), accounting here for the narrow definition that Griffith *does* give to that term, and that which is always open (the political). Or, put another way, we can say that the political constitution is uniquely capable of capturing *both* constituted and constituent power: That through the expression of disagreement, the occurrence of conflict, the *activity* of politics, that which is constituted is always contingent upon the boundless possibilities that conflict might bring. Contrary to the views of Bellamy, for whom political constitutionalism describes already existing democratic practices and who allows no space whatsoever for the extraordinary, as well as those of Tomkins for whom the political constitution is (more or less) reducible to the relationship *between* constituted powers (the executive, the Parliament and more recently the courts), it is our view that the political *cannot* be contained by a particular set of institutions and the interaction between them without harming *both* our politics and our constitution. If the response comes that this is precisely the view that Griffith took of the constitution—that even he described the constitution as “the working relationships between their principle institutions”¹¹⁸—then our answer is this: That Griffith himself stared over the precipice and in *Why We Need a Revolution* discovered that the ‘genius’ of the British constitution was itself a myth unable to withstand its exposure to reality. This is to say that if, as Arendt put it, “[t]he obvious

¹¹⁷ Loughlin, *supra* note 71, at 48.

¹¹⁸ Griffith, *supra* note 12, at 42.

advantages of [the British] system are that there is no essential difference between government and state, that power as well as the state remain within the grasp of the citizens organized in the party," and that consequently "there is no occasion for indulgence in lofty speculations about Power and State as though they were something beyond human reach,"¹¹⁹ and that this is the dynamic which drives the political constitution from within, then where the choice of party is perceived to be meaningless, where "we are left with a device for replacing one set of political leaders with another who are barely distinguishable,"¹²⁰ or (in the case of Scotland) where the government was (almost) entirely unrepresentative of the people over whom it governed—where the principles of political equality and political accountability broke down—then the political constitution itself is endangered.¹²¹ For Griffith it was only a radical re-imagination of the political that could cure it.

¹¹⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 324 (Schocken, 2004) (1951).

¹²⁰ Griffith, *supra* note 12, at 386.

¹²¹ No wonder then that when Arendt re-visited the party system in *On Revolution*, a book dedicated to the study of constituent power, her views on the two-party system had shifted quite markedly. No longer the dynamic of political liberty, her view was much more pessimistic:

[W]hile it may be true that, as a device of government, only the two-party system has proved its viability and, at the same time, its capacity to guarantee constitutional liberties, it is no less true that the best it has achieved is a certain control of the rulers by those who are ruled, but that it has by no means enabled the citizen to become a "participator" in public affairs. The most the citizen can hope for it to be "represented," whereby it is obvious that the only thing that can be represented and delegated is interest, or the welfare of the constituents but neither their actions nor their opinions.

ARENDT, *supra* note 23, at 268.