

## Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy

By Marco Goldoni\*

*Political constitutionalism* is often depicted as completely hostile to judicial review. It is accurate to state that the kind of political constitutionalism advocated by Richard Bellamy, for instance, portrays judicial power with minimalist strokes.<sup>1</sup> To a certain extent, this does not come as a surprise, given that the gist of political constitutionalism is represented by the doctrine of legislative supremacy and by the idea that the constitution is equivalent to the ordinary political process<sup>2</sup> with an emphasis on the political process of lawmaking rather than on judicial practice.

Nonetheless, the criticism of political constitutionalism as a rights-skeptic and radical anti-judicial review theory is incorrect. As this article intends to show, political constitutionalism does not reject any form of judicial review, though it is concerned with delimiting its power and confining it within a proper constitutional balance. The core belief of political constitutionalists is that decisions about rights are better left to the political process, while judicial reasoning should still play a role by keeping the government in check and protecting the political process itself. In a nutshell, this thesis presupposes that political reasoning on rights is superior to judicial reasoning at least in terms of the fairness of the decisionmaking process, but that judicial power can still play a role in the development of the political constitution.

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<sup>1</sup> See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007) [hereinafter *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*]. See also, Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L. J. CONST. L. 86 (2011) [hereinafter *Political Constitutionalism*]. This is another essential essay for this debate. For other major works of political constitutionalists, see ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). Another author whose work belongs to the constellation of political constitutionalism is Keith Ewing. See KEITH EWING, *THE BONFIRE OF LIBERTIES* (2010). See also, GRÉGOIRE WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009). While there are good arguments to deem popular constitutionalism as the germane U.S. version of political constitutionalism, it remains open the question whether a presidential regime can be compatible with a political constitution. This paper will limit itself to take into account the works concerned with the Commonwealth model of constitutionalism.

<sup>2</sup> See Grégoire Webber & Graham Gee, *What Is a Political Constitution?*, 30 O.J.L.S. 273 (2010).

The first part of this paper will discuss political constitutionalists' views on constitutional reasoning about rights.<sup>3</sup> The starting point is a reconstruction of the status of rights according to this theory, not limited to Bellamy's approach, but by through an analysis of the works of major authors. This reconstruction will help avoid the two common misunderstandings about political constitutionalism outlined in the previous paragraph: (1) rights protection is a critical concern for political constitutionalism, (2) the primacy of parliamentary reasoning about rights does not imply the utter rejection of judicial review. The second section will demonstrate that weak judicial forms of review are preferable from a political constitutionalist perspective, while stressing the point that, under certain conditions, some version of strong judicial review can be necessary for the protection of constitutional rights. The third section will further analyze this point by focusing on a case study regarding prisoners' voting rights. The fourth section sets forth another argument in support of strong judicial review in certain circumstances and rejects the idea that the content of constitutional rights is constantly up for grabs.

One final remark before moving to the next section is in order. These remarks are offered in the spirit of attempting to complement or expand, if possible, political constitutionalism rather than as a criticism aimed at defeating some of political constitutionalism's constitutive tenets. Nonetheless, a common thread underlies the comments offered in this article, namely that, in its current version, political constitutionalism fails to vindicate some essential aspects of political agency: In other words, the politics behind political constitutionalism is underdeveloped.<sup>4</sup>

#### **A. Parliamentary vs. Judicial Reasoning About Rights**

The kind of political constitutionalism proposed by Bellamy, Waldron, Tomkins, and others clearly enriches the debate on constitutional reasoning for several reasons. First, "political constitutionalism offers a way of identifying law and explaining its authority by associating its source with a democratically elected legislature."<sup>5</sup> The identification of a clear source of law enhances legal certainty and provides solid background for reasoning about rights. Second, as a constitutional theory, political constitutionalism has put a much needed emphasis on the analysis of institutions. In this way, political constitutionalism has scrutinized and re-evaluated the merits of political institutions for constitutional reasoning

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<sup>3</sup> For the sake of the argument of this article, constitutional reasoning is understood as comprising both constitutional justification of legal acts (constitutional argumentation) and the interpretation of constitutional norms (be they rules, principles, or conventions). See András Jakab, *Judicial Reasoning in Constitutional Courts. A European Perspective*, 14 GERMAN L.1215 (2013).

<sup>4</sup> Political constitutionalists may reply to this objection that this is not relevant to their research. Nonetheless, for an approach that puts a lot of emphasis on the political dimension of constitutionalism, a clear grasp of the dynamics of politics seems an essential component.

<sup>5</sup> Bellamy, *Political Constitutionalism*, *supra* note 1, at 110.

about rights. In that respect, the central claim of political constitutionalism is that parliaments, as political institutions, are better at reasoning and deciding about the content of rights. In light of this claim, it would be more accurate to refer to *parliamentary constitutionalism* as opposed to *judicial constitutionalism*.<sup>6</sup> This kind of constitutionalism emphasizes the properties of one particular type of politics, parliamentary politics,<sup>7</sup> and must be distinguished from other forms of understanding constitutionalism from a political perspective.<sup>8</sup> But, because the main reference in the debate goes to political constitutionalism, this article will stick to the term political constitutionalism.

Bellamy states the primacy of parliamentary politics with normative tones, in the following terms:

Political constitutionalists regard courts as being both less legitimate and less effective mechanisms than legislatures within working democracies, such as the UK, for reasoning about the most appropriate constitutional scheme of rights. They insist that it is important to ensure that the outcomes of any decisional procedure embody the equal concern and respect for all individuals, as autonomous agents, that motivate contemporary theories of rights. Such theorists insist, too, that the process whereby these decisions are made must exemplify this commitment to the equal status of citizens.<sup>9</sup>

At the constitutional level, this claim complicates the standard picture of courts as the natural fora for elaborating on normative principles.<sup>10</sup> According to legal constitutionalists, parliaments cannot decide on rights because parliamentary political ideals are, mostly, the outcome of an aggregation of preferences. As such, reasoning about rights would be left to the will of the majority will and its irrational preferences. Bargaining, rather than deliberation, is the *modus operandi* of parliamentary institutions. Courts, on the other hand, are considered truly deliberative institutions, where argumentation prevails over

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<sup>6</sup> See Michael Wilkinson, *Political Constitutionalism and the European Union*, 76 M.L.R. 191 (2012).

<sup>7</sup> See Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335 (2009).

<sup>8</sup> See, e.g., MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010).

<sup>9</sup> Bellamy, *Political Constitutionalism*, *supra* note 1, at 91.

<sup>10</sup> There is a tendency to conflate principles and rights. This point won't be expanded in this article.

political compromise.<sup>11</sup> In other words, compromise implies an unprincipled approach to argumentation.

Political constitutionalists have reversed this representation of the roles of courts and political institutions.<sup>12</sup> In order to understand this claim, it is important to note that the argument in support of legislative reasoning about rights as superior to judicial reasoning is not only concerned with the structure of legislatures, but also with the nature of rights. In most liberal constitutionalists' works, rights are individual trumps that protect legitimate individual interests. Within this tradition, there is a line of thought that tends to see constitutional rights as deontological constraints that contain correct standards of moral and legal reasoning.<sup>13</sup> According to this view, constitutional rights are "individual political goals" that ought not to be subordinated to conceptions of the "general interest."<sup>14</sup> Within the same liberal tradition, there is also another way of understanding constitutional rights, which is more teleological in character, but still rooted in liberal constitutionalism. According to this version, initially supported by Robert Alexy and then expanded later by many others, constitutional rights possess a teleological structure, a structure requiring that they be balanced in any and all instances of their application.<sup>15</sup> According to this view, in the absence of deontological constraints, constitutional reasoning basically amounts to balancing. In reality, the vast majority of constitutional scholars and many courts seem committed to this latter view.<sup>16</sup> Be that as it may, there is a common core between these two versions of liberal constitutional rights: They conceive rights by focusing exclusively on the right-holder.<sup>17</sup> Therefore, it does not come as a surprise that they both consider the

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<sup>11</sup> For an analysis of the deliberative properties of constitutional courts, see John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions Towards an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21 (Wojciech Sadurski ed., 2002).

<sup>12</sup> For a comparative survey, see TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* (2003).

<sup>13</sup> This is the view of rights as side-constraints put forward by Nozick, see ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 26–35 (1974).

<sup>14</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 91 (1977).

<sup>15</sup> Robert Alexy's main claim is that constitutional rights are principles that embody maximizing reasons. Such reasons are teleological because they strive towards optimization. For an interpretation of Alexy's law of balancing as a mix of deontological and teleological reasons which take into account his theory of legal argumentation, see George Pavlakos, *Constitutional Rights, Balancing and the Structure of Autonomy*, 24 *CAN. J.L. & JURISPRUDENCE* 129 (2011).

<sup>16</sup> DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 171 (2004) (commenting bluntly that proportionality is an "essential, unavoidable part of every constitutional text" and "a universal criterion of constitutionality").

<sup>17</sup> Another important feature of this understanding of rights is that they are deemed to own a certain peremptory force. As Waldron notes, rights seems to have special importance in normative reasoning. See Jeremy Waldron, *Introduction*, in *THEORIES OF RIGHTS* 14 (Jeremy Waldron ed., 1984).

limitation of rights as an infringement or a violation. Following this line of thought, reasoning about rights means to debate whether the infringement of a particular right—be it a principle, a value, or an interest—is justified or not. Therefore, reasoning about rights is performed in two stages: First, it is necessary to determine whether a constitutional right has been infringed; second, it is necessary to determine whether, despite the infringement of the right, legislation can be justified.<sup>18</sup> Liberal constitutionalism sees rights as pre-political and understands constitutional reasoning as an inquiry into the legitimacy of the encroachment upon the rights themselves by the political process. Accordingly, from this viewpoint, the judicial forum looks more capable of reasoning rights.

Political constitutionalists portray the activity of reasoning about rights in a rather different way. Constitutional rights are not considered to be pre-political, but, instead, deeply embedded in the political process. Two consequences result from this view. First, constitutional rights are subject to the so-called “circumstances” of politics as well. According to political constitutionalists, the circumstances of politics are: (1) a plurality of perspectives on common problems which leads to pervasive disagreement and (2) the need to make decisions that address the fact of plurality.<sup>19</sup> Rights are not excluded from this realm where disagreement is pervasive. Second, taking into account rights in political deliberation implies a different idea of public reason from the one supported by liberal constitutionalists. According to the latter, the specification of the content of certain rights should be removed from further deliberation with public reason. For example, Rawls affirms that rights are part of the language of public reason as the basis of a constitutional regime and as such they are not an “appropriate subject for political decision by majority or other plurality voting.”<sup>20</sup> Rawls’s version of public reasoning is both more restrictive and more substantive, at least when it comes to the issue of rights. This is due to his idea that some rights are understood as almost universal and beyond dispute. Political constitutionalists put forward a proceduralist conception of public reasoning.<sup>21</sup> The function of public reasoning is not so much that of justifying political decisions, as claimed by Rawls,<sup>22</sup> but rather that of providing for input legitimacy. The ambition of a proceduralist version of public reasoning is captured by the idea that it does not generate

<sup>18</sup> For the reconstruction, see WEBBER, *supra* note 1, at 85.

<sup>19</sup> For the classic references, see WALDRON, LAW AND DISAGREEMENT, *supra* note 1, at 98–100.

<sup>20</sup> JOHN RAWLS, POLITICAL LIBERALISM 151 n.16 (1993).

<sup>21</sup> According to Bellamy, a proceduralist version of public reason has seven tenets: (1) It has to be open and transparent; (2) it has to aim at the common good; (3) it has to employ a set of public rules and reasons that are agreed upon by all; (4) public reasoning should not consider private goods; (5) public reason should be accessible to all members of the public; (6) it can be undertaken by the public; and (7) it can endeavor to produce decisions all members will find acceptable.

<sup>22</sup> RAWLS, *supra* note 20, at 465.

outcomes we agree with, but rather that “it produces outcome that all can agree to.”<sup>23</sup> The best way to obtain this kind of reasoning is to follow the republican principle of “hearing the other side,” a principle that establishes a difference between oppression and domination.<sup>24</sup> Indeed, a key insight of republican democratic theory is the fact that, while oppression and domination often come together, they can be analytically and empirically separated. One can be dominated without being oppressed. The classic example is the enlightened despot who does not want to oppress his people, yet continues to dominate them. According to this republican logic, input legitimacy is a key element. Even if there were a perfect machine which could track and aggregate preferences, it would still disrespect all people equally.<sup>25</sup> A juridified culture of rights freezes the debate on their contents and limits the inputs in public reasoning in an unjustified way. The advantage of the political constitutionalist kind of public reasoning about rights is that it allows a larger plurality of views into the deliberative process. The parliamentary style of deliberation is also less constrained by legal technicalities and it opens up the debate to a wide array of arguments. In this way, any determination or limitation of rights is decided not only by making reference to legal reasons, but also by contemplating a variety of other reasons.

At this stage, it is important to note that there is a link between the openness of the deliberative process to a plurality of views and the weak epistemic status concerning the content of rights. Grasping the content of rights does not require any specific type of knowledge. In fact, following John Griffith’s famous dictum, political constitutionalism describes rights-based claims as political statements of political conflict.<sup>26</sup> This means that the content of rights is highly disputed and that nobody can claim a privileged perspective. One could put forward a case that Griffith was a rights-skeptic, but the normative turn in political constitutionalism has certainly changed this attitude. The main virtue of the political constitution, compared to the alternative legal constitution, is to protect and enhance rights in a more robust and effective way. Herein lies one of the republican tenets of Waldron’s, Bellamy’s, and Tomkins’ constitutional theories. Rights have a constitutive collective dimension; most (if not all) of them are best conceived and defended as common goods rather than mere individual entitlements. In this respect, Bellamy’s depiction of rights as a three-term relation—which “involves identifying the duty holders who must give effect to x’s right and takes into account the consequences of so doing on their rights and hence the correlative duties of x to them”—vindicates their interpersonal

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<sup>23</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 164. *Cf.* WALDRON, *supra* note 1, at 191–92.

<sup>24</sup> PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 58 (1997).

<sup>25</sup> DAVID ESTLUND, *DEMOCRATIC AUTHORITY* 76 (2008). A very similar argument is proposed by HENRY RICHARDSON, *DEMOCRATIC AUTONOMY* 63–64 (2002).

<sup>26</sup> John Griffith, *The Political Constitution*, 42 M.L.R. 1, 14 (1979). He famously remarked that Article 10 of the ECHR looked “like the statement of a political conflict pretending to be a resolution of it.”

nature.<sup>27</sup> Under this description, reasoning about rights entails reflecting and deliberating not only about the right-holder, but also about the duty whose justification is provided by the right and the interests affected by the relation between the right and the duty.<sup>28</sup> A constitutional right is better appreciated when one looks at more than just the characteristics of the right-holder. As Joseph Raz puts it, “rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them. On the contrary, they both depend on and serve collective goods.”<sup>29</sup> The difference with the liberal approach to rights can be illustrated by making reference to the right to freedom of expression. According to the liberal version, freedom of expression is an individual fundamental right that pre-exists any determination of the public interest. Any limitation on the freedom of expression is interpreted as a justified infringement of that right. Under this view, even libel or slander are seen as examples of the right to freedom of expression, but their relative normative force is outweighed by considerations of public interest. According to the political version, the right to freedom of expression is seen as a common good. This means that the interest of the right-holder does not explain away the ground of the right itself. The right to freedom of expression is not to be seen as antithetical to the public interest. On the contrary, it serves the interests of everyone who lives in a democracy and is affected by the fact that the political process is shaped by the free exchange of information. The real value of such a right rests in its contribution to the public culture, which serves the interests of members of the community.<sup>30</sup> Rights do not trump the public interest because they are valuable only as long as they contribute to the common good. Reasoning about rights by situating them in a moral and political environment allows for the explicit acknowledgement that any right is one component of a larger legal and political universe.<sup>31</sup>

Rights as common goods and their constitutive openness to politics entail the rejection of any form of constitutional entrenchment. This device for protecting fundamental rights is viewed with criticism by political constitutionalists because it preempts future political action without providing a solid justification.<sup>32</sup> But this criticism is not confined to an entrenchment guaranteed by constitutional justice. One is entitled to think that even if the

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<sup>27</sup> Bellamy, *Democracy as Public Law: The Case of Rights*, 14 GERMAN L.J. 1017 (2013) [hereinafter *Democracy as Public Law*].

<sup>28</sup> According to Raz, rights are intermediate conclusions in arguments from values to duties. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 181 (1986).

<sup>29</sup> *Id.* at 255.

<sup>30</sup> JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 55 (1994) (“[P]art of the justifying reason for the right is its contribution to the common good.”). Cf. Bellamy, *Political Constitutionalism*, *supra* note 1, at 31.

<sup>31</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 210–211 (2d ed. 2011).

<sup>32</sup> For the classic criticism of pre-commitment devices, see WALDRON, *supra* note 1, at 282–312.

entrenchment were to be enforced by parliament rather than a constitutional court, political constitutionalists would still reject it because it would violate the principle of equality and the equal participation to the process of political decision-making. Constitutional entrenchment isolates rights from the larger political context and, if coupled with a strong form of judicial review, fosters what Bellamy and other authors consider a detrimental judicial culture of rights.<sup>33</sup> Note that the rejection of constitutional entrenchment does not correspond with the rejection of a bill of rights *per se*. There is a way of reading the Human Rights Act (1998) that reinvigorates rather than hinders the political constitution.<sup>34</sup> As Bellamy puts it, weak forms of judicial review where parliamentary sovereignty is ensured but subject to judicial questioning—without any legal effect—can actually revitalize the political constitution.<sup>35</sup>

But, predictably, what is more troubling for political constitutionalists is the interpretation of bills of rights. In particular, the problem concerns the reasoning about the limitation of constitutional rights. The “qualified”<sup>36</sup> character of most rights, open to assessment of proportionality or reasonableness, does not fit well with judicial reasoning. As is well known, the proportionality test is widespread in several jurisdictions. The main problem is that the use of proportionality tests leaves too much discretion to the judiciary. This means that when rights are adjudicated according to the proportionality test, courts are performing a task for which parliaments are better suited. In particular, when courts perform the balancing test (the law of balancing)<sup>37</sup> between two competing claims, they are making political decisions under the guise of adjudication. For this reason, rights “involve an implicit appeal to democratic forms of reasoning.”<sup>38</sup> To put it in other terms,

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<sup>33</sup> Bellamy notes that constitutional entrenchment with judicial review produce an uncompromising view of rights because from this perspective. See BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 49 (“[T]here appears to be no room for acknowledging reasonable disagreements about them and looking for ways to accommodate different points of view. The collective simply has no business expressing an opinion or interfering with the individual’s legitimate sphere of personal choice.”).

<sup>34</sup> For a strong criticism of the HRA, see K.D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, 2008 P.L. 668. For a work more supportive of a legal reading, see AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT* (2009). For a conciliatory interpretation of the effects of the HRA, see ALISON YOUNG, *PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT* (2008).

<sup>35</sup> For another argument in support of weak judicial review, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL RIGHTS* (2008).

<sup>36</sup> When a right is qualified in the ECHR, three points ought to be taken into consideration: Public interference with the rights will be lawful (1) if the interference is prescribed by law, (2) necessary in a democratic society and (3) in order to protect a certain, listed, public interest.

<sup>37</sup> This is Alexy’s own formula. See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 102 (2002) (“The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.”).

<sup>38</sup> Bellamy, *Democracy as Public Law*, *supra* note 27.

while constitutional structure may still remain the province of judicial reasoning,<sup>39</sup> the main determination of the contents of rights is better left to parliamentary politics. The difference with the standard version of liberal reasoning about rights is that the principal idea here is that one engages in reasoning not *from* rights but *towards* rights.<sup>40</sup>

The core of the argument in support of parliamentary politics is that this kind of public reasoning leaves more space to present and develop arguments in the definition of rights.<sup>41</sup> While judicial reasoning (especially in common law systems) is based on an adversarial model of adjudication where rights are interpreted as “individual political goals” that should not be subordinated to notions of the general interest,<sup>42</sup> parliamentary reasoning, understood in a broad sense, can encompass a wider number of perspectives on the right involved. In this way, it ensures a more robust deliberative process. The first quality of this kind of reasoning is to recognize that rights do not necessarily have a confrontational nature, but that they concern the common interest. For this reason, Bellamy can state that “the superiority of real democratic systems over court lies in their providing a mechanism for identifying the legislative embodiment of rights most likely to track the commonly avowed interests of citizens by treating them with equal concern and respect.”<sup>43</sup> Beyond this property, three others can be deduced from the appraisal of parliamentary politics, which makes the latter more representative of the citizens’ view on rights. First is the property of publicity, which Jeremy Waldron defines as “the way law presents itself as a body of rules dealing with matters that are appropriately matters of public concern and dealing with them in a way that can stand in the name of the public.”<sup>44</sup> The public character of the law ensures the link between the representative and the represented is maintained throughout the lawmaking process. Publicity is also reflected in the rule that, despite some exceptions, voting in parliament is usually public. A representative cannot advocate a position that is not public in the sense that it cannot be articulated in public for the public. Furthermore, citizens need to know what the representatives do and say and how they vote in the assembly because this is the only way for political accountability to be established. In order to be effective, the idea of publicity has to be coupled with a certain form of visibility. The deliberative stage, in particular in

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<sup>39</sup> But see Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 O.J.L.S. 1 (2008).

<sup>40</sup> WEBBER, *supra* note 1, at 128.

<sup>41</sup> Cesare Pinelli notes that it is not clear whether legislators deal with rights in the same sense of courts. See Cesare Pinelli, *Constitutional Reasoning and Political Deliberation*, 14 GERMAN L.J. 1171 (2013).

<sup>42</sup> DWORKIN, *supra* note 14 at 91.

<sup>43</sup> Bellamy, *Democracy as Public Law*, *supra* note 27.

<sup>44</sup> Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L. J. 688, 700 (2009).

the plenary parliamentary session, is not only an exercise in public reasoning,<sup>45</sup> but it is also an opportunity for staging disagreement. In order to be effective and at the same time respectful of the multiplicity of inputs, the public feature of representative lawmaking requires that the positions around which public reasoning revolves are clearly detailed, exposed, and respected.<sup>46</sup> The third property of representative lawmaking is generality. The latter is understood as a principle that makes the law applicable across society instead of toward a specific group of people. This is also a complementary requirement of the principle of publicity. Law is general because it has to be valid for the whole political community. Generality reinforces the idea that representative lawmaking should be intended as an activity directed toward the common good.<sup>47</sup>

At this point, it is necessary to enter a note of clarification: One of the aims of political constitutionalism is to protect certain constitutional goods like the rule of law and fundamental rights by establishing clear lines of division between lawmaking and law-applying actions, or at least, as much as this is possible. The primacy of parliaments compared to courts in reasoning about rights is grounded on the premise that legislation and adjudication involve different qualities. But this does not imply that every form of judicial review has to be rejected. The next section will broach the role of judicial review in political constitutionalism.

### **B. Political Constitutionalism Between Strong and Weak Judicial Review**

The supremacy of parliamentary reasoning about rights may entail the rejection of judicial review. It is almost common sense that political constitutionalism rejects judicial review and political constitutionalists themselves have encouraged this view.<sup>48</sup> Bellamy, along with other political constitutionalists, is not completely against judicial review. The starting point for an understanding of constitutional law as democracy is that legislation still needs to be interpreted and enforced by courts. If the grounding principle of political constitutionalism is the absence of arbitrary domination upon citizens—to be obtained through real political equality—then the question of how to limit judicial discretion in

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<sup>45</sup> It has to be noted that the debate in the plenary session is now considered not a truly deliberative stage, where every part is willing to listen to the other and maybe change his mind, but it is more about showing one's position on an issue. Parliamentary records show that only during the French Third Republic and in the United Kingdom for some years after 1867 did parliamentary debates change the opinions of some participants. Cf. Suvi Soininen, *A Rubber Stamp or a Stage of Debate?*, in *THE PARLIAMENTARY STYLE OF POLITICS* 61, 63 (Suvi Soininen & Tapani Turikka eds., 2008).

<sup>46</sup> Stefan Rummens, *Staging Deliberation: The Role of Representative Institutions in the Deliberative Democratic Process*, 20 *J. POL. PHIL.* 23, 32 (2012).

<sup>47</sup> Waldron, *supra* note 44, at 690.

<sup>48</sup> For the classic statement, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1369 (2006).

order to avoid arbitrariness immediately arises. Certain limited forms of judicial review are indeed recognized as legitimate. The point, for political constitutionalists, is to delimit as much as possible the competences of judicial power. As the next section will argue, the case for the timid acknowledgement of a weak form of judicial review is not sufficiently solid and shall be extended to some form of strong judicial review for at least some constitutional rights.

Among political constitutionalists, Adam Tomkins has taken up the challenge to define what courts are allowed to do in a political constitution.<sup>49</sup> Overall, his account provides a good overview of how courts ought to act according to political constitutionalism. Basically, according to Tomkins, courts ought to stick to the control of legality: “A core function of courts in constitutional law is to declare what legal powers the government has.”<sup>50</sup> This does not automatically mean judicial restraint. Tomkins argues that courts should ensure that government acts within the scope of its legal powers and that the protection of civil liberties should be privileged.<sup>51</sup> The jurisdiction over these issues sometimes necessitates an active judicial review. Courts should also enforce absolute rights—for example, the ban on torture—with great zeal, in particular when they are threatened by executive action. From this perspective, the courts’ attitude should be assertive and not deferential toward the executive power.

The other critical task for courts is that they should nourish and support the political constitution, so that, when the government acts in a manner that undercuts or circumvents effective parliamentary scrutiny, the court refers the matter back to the legislature for a reconsideration of the matter. This kind of judicial activism would not work against the other goods protected by the political constitution such as political accountability and the democratic legitimacy of the government. In fact, vigorous control on government’s legal powers does not impede its action; at the same time, checking the legality of government’s actions does not impinge upon the capacity of Parliament to assess the executive’s performances in a political way.<sup>52</sup>

<sup>49</sup> Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. TORONTO L.J. 1 (2010).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 6.

<sup>52</sup> Which method of legal reasoning is compatible with and can enhance the political constitution? Bellamy identifies in the analogical style of reasoning the most suitable approach for a political constitutionalist reading. This kind of analogical reasoning presents three advantages. The first is that by focusing on the details of the case and looking for similar other cases, the court is avoiding eliciting political controversy over the issue. The second merit is that analogical reasoning overcomes the vagueness of rules and principles by focusing on the complexities of the case at hand. The third advantage comes from analogy’s connection to the doctrine of *stare decisis*, in a way that encourages the relevance of judicial precedent. The merits of the latter point are numerous. It respects the principle of equality before the law by dictating that we treat similar cases similarly. It also makes room for the idea of consistency in constitutional interpretation; Bellamy here explicitly endorses Cass Sunstein’s arguments. See CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

These remarks should have cleared away some of the misunderstandings concerning political constitutionalism's take on judicial review. However, on one dominant technique of judicial review, namely its proportionality analysis, the criticism moved by political constitutionalists is uncompromisingly stark. When it comes to determine the limits of qualified rights (e.g., arts. 8–11 of the ECHR), the question often revolves around whether the interference on the right is necessary in a democratic society.<sup>53</sup> The European Court of Human Rights, for example, has long since ruled that this is to be treated as a test of proportionality. Political constitutionalists believe that this is where the main problem for the legitimacy of this kind of judicial reasoning about rights lie. The proportionality assessment of the impact of a legal measure is a task for which legislatures are better equipped than courts because of the nature of the inquiry. Political constitutionalists do not reject the proportionality analysis; they just believe that it is a political rather than a judicial question. It is with respect of this type of disagreement (how to balance between different claims) that political constitutionalists view robust parliamentary debate as the best tool for decisionmaking.<sup>54</sup> High quality proportionality reasoning calls for direct focus on the moral and policy issues involved without the legalistic concerns that are inherent to judicial reasoning.<sup>55</sup> Parliamentary committees have often proved as at least decent fora for debating issues of proportionality, even if one must note that it is difficult to measure whether they have actually performed better than courts.<sup>56</sup>

It is at this stage that the distinction between strong and weak judicial review becomes relevant. One classic reproach to political constitutionalists is that by making proportionality a political question they have to reject legal instruments like the ECHR.<sup>57</sup> This is not completely accurate because political constitutionalism does not reject bills of rights. Nonetheless, the rest of this section will try to show where the difficulty lies for political constitutionalists, while the next one will tackle a concrete case study. The

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<sup>53</sup> Paul Craig has noted a contradiction between the idea that rights claims are statement of political conflicts on one side and the acceptance of some absolute rights on the other side. See Paul Craig, *Political Constitutionalism and the Judicial Role: A Response*, 9 INT'L. J. CONST. L. 112, 121 (2011).

<sup>54</sup> TOMKINS, *supra* note 1, at 27–29; Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L. J. CONST. L. 2 (2009).

<sup>55</sup> Mattias Kumm has remarked that this legalistic limit does not affect contemporary rights adjudication in Europe under proportionality analysis. See Mattias Kumm, *Institutionalising Socratic Contestation*, 2 EUR. J. LEGAL STUD. 1, 5–13; Cf. VICTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* (2009).

<sup>56</sup> In a recent report published in the AHRC Public Policy Series, it is noted that many explicit and implicit uses of proportionality-style reasoning have been registered, in particular in the Joint Committee of Human Rights. Murray Hunt et al., *Parliaments and Human Rights: Redressing the Democratic Deficit*, 5 AHRC PUB. POL. SERIES, 2012, at 40.

<sup>57</sup> Craig, *supra* note 53, at 118.

so-called “New Commonwealth model of constitutionalism,”<sup>58</sup> arisen after the introduction of a bill of rights in countries like New Zealand, Canada and the United Kingdom, represents an alternative to the two standard approaches to the limitation of constitutional rights. While strong forms of judicial review—as in the U.S. style—allow the striking down of legislation by courts, there are weaker forms of judicial review that may trigger a dialogic relation with legislatures.<sup>59</sup> Weak judicial review can be summarized in the following way: Parliaments act, courts respond by saying that the legislative action is inconsistent with a constitutional right as the courts understand it, and parliaments can counteract by reenacting the same statute. There is an iterative and dialogic structure embedded in weak judicial review. Paradigmatic examples of this kind of review are sections 3 and 4 of the British Human Rights Act (HRA) and the notwithstanding clause of the Canadian Charter of Rights.<sup>60</sup> The advantage of a weak form of contestation is that it allows courts “merely to question the compatibility on the fairness grounds outlined above and to force a reconsideration by the legislature.”<sup>61</sup> Obviously, the question about the real nature of the courts’ questioning remains open: Is it mere counseling or does it operate as a *de facto* veto? Empirically, weak judicial review tends to be unstable. It may become a hidden form of strong judicial review if the influence of the courts on parliament grows to the point where the legislature even anticipates the probable judicial outcomes for declarations of incompatibility.<sup>62</sup> If this were the case, then the aim of the dialogue between parliament and courts—i.e., creating a political culture of rights while enhancing their legal protection—would not be achieved and a sort of strong judicial review would be reinstated. As a matter of fact, the United Kingdom after the introduction of the HRA seems to veer toward a deferential attitude toward judicial decisions,<sup>63</sup> while New Zealand is deemed to be a case of persistence of parliamentary sovereignty.<sup>64</sup>

<sup>58</sup> For the classic reference, see Stephen Gardbaum, *Reassessing the New Commonwealth Constitutional Model*, 8 INT’L. J. CONST. L. 167 (2010); see also STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

<sup>59</sup> On the difference between strong and weak review, see TUSHNET, *supra* note 35.

<sup>60</sup> The Canadian version provides the model for dialogic weak form review. See Peter Hogg & Allison Bushell, *The Charter Dialogue Between the Court and Legislatures*, 35 OSGOODE HALL L.J. 75 (1997).

<sup>61</sup> Bellamy, *Democracy as Public Law*, *supra* note 27.

<sup>62</sup> Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights—And Democracy-Based Worries*, 38 WAKE FOREST L. REV 813, 818 (2003). For a survey of different versions, see TUSHNET, *supra* note 35, at 24–32.

<sup>63</sup> See Janet Hiebert, *Governing Like Judges?*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 40, 47 (Tom Campbell et al. eds., 2011) (explaining this phenomenon as a consequence of the possible appeals to the European Court of Human Rights which generate expectation of compliance with judicial rulings and “discourages government from pursuing legislation that is patently inconsistent with relevant precedents or, at the very least, forces it to make difficult political calculations as to whether it is willing to incur the risks associated with passing legislation that will likely be subject to a negative judicial ruling.”).

<sup>64</sup> Andrew Geddis, *Inter-Institutional “Rights Dialogue” Under the New Zealand Bill of Rights Act*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS*, *supra* note 63, at 87, 89.

But this is not the only problem political constitutionalists have to face. Even if the case for weak judicial review would be proved, the question as to whether political constitutionalism can do without some form of strong judicial review altogether remains open. The next two sections will try to show that there is still need for strong judicial review even in the political constitution. In fact, if possible, a blended system of strong and weak judicial review (with the mix to be determined according to the political system) could probably be seen as the best solution.

### C. A Test Case for Political Constitutionalism: The Right to Vote for Prisoners

As mentioned in the previous section, the case against strong judicial review may not be completely won by political constitutionalists. There is a legitimate doubt that for some rights a stronger judicial review may prove more helpful. A recent example shows that the assessment of parliamentary record by political constitutionalism is too optimistic. If there is a foundational right for political constitutionalists, this is certainly the right to vote because it is one of the few essential rights that ensure that citizens have equal participation in the political process. In this regard, one critical aspect of the political constitution is that it does not have the resources for taking into account those who cannot access democratic for a—or have to face serious hurdles for doing it—such as asylum seekers, stateless people and, more generally, those who belong to “pariah” groups.<sup>65</sup>

The recent debate on the prisoners’ votes case in the UK provides a paradigmatic example of these difficulties. It is necessary to discuss some underlying facts in order to understand what was at stake in this case. The complete ban on voting for all convicted prisoners was made explicit in the UK with the 1969 Representation of the People Act, which prohibited voting by persons detained in penal institutions, including those convicted abroad and repatriated to UK prisons. Parliament maintained the practice of disenfranchising prisoners in the Representation of the People Act in 1983.<sup>66</sup> The denial of the right to vote for prisoners was challenged in 2001 by John Hirst. After the dismissal of his claim by the High Court, Hirst sought remedy before the ECtHR. In 2004, the Court ruled that the ban breached article 3 of protocol 1 of the ECHR.<sup>67</sup> The British Government sought to reverse the verdict before the Grand Chamber, but the latter confirmed the breach of Article 3.<sup>68</sup>

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<sup>65</sup> Meghan Benton, *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population*, 16 RES PUBLICA 397 (2010).

<sup>66</sup> For a nuanced reconstruction, see Colin Murray, *A Perfect Storm: Parliament and Prisoner Disenfranchisement*, 65 PARLIAMENTARY AFF. 1, 6–11 (2012).

<sup>67</sup> *Hirst v. United Kingdom*, ECHR App. No. 74025/01 38 EUR. H.R. REP. 40 (2004).

<sup>68</sup> *Hirst v. United Kingdom (No. 2)*, ECHR App. No. 74025/01 (Oct. 6, 2005), <http://hudoc.echr.coe.int/>.

The Grand Chamber held that the legislation was an instrument that imposed an indiscriminate and automatic denial of a fundamental right. Therefore, the legislation fell outside any acceptable margin of appreciation.<sup>69</sup> The Grand Chamber also remarked that no evidence existed that “Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on right of a convicted prisoner to vote.”<sup>70</sup> This yielded a strong and harsh reaction of the British Government against the ECtHR, making clear that it was not willing to adopt remedial legislation. All this happened despite the reports of the Joint Committee of Human Rights (JCHR), which criticized the government for its inaction on the issue of remedial measures. In this context, the Court issued a blunt warning in a pilot case *Greens and M.T. v United Kingdom*<sup>71</sup> where it gave the UK six months after the judgment becoming final to enact legislation to comply with the *Hirst* ruling.

Despite this dialogic move from the side of the Court, opposition to its demands for legislative remedies was so wide and diffuse that, in 2011, a parliamentary motion was introduced by two MPs belonging to different parties—Jack Straw, former Secretary of State for Justice and David Davis, Conservative Member—to debate the case for maintaining the existing ban on all prisoners. Danny Nicol has examined the parliamentary debate in the House of Commons concerning this motion. His analysis proves that the debate was replete with references to constitutional principles and featured some of the finest aspects of the parliamentary style of public reasoning. In fact, at the outset of his analysis Nicol recognizes that “at first blush the House of Commons debate on ‘Voting by Prisoners’ of February 10, 2011 might have lent the impression of MPs parroting Daily Mail and Daily Express-style views on punishment and venting intemperate hostility on a conveniently-unspecified ‘Europe.’”<sup>72</sup> But, according to Nicol, a closer scrutiny of the debate reveals that “parliamentarians made their own thoughtful constitutional assessment as to whether prisoner voting was a human right . . . on the basis of British constitutional principles.”<sup>73</sup> However, in terms of the proportionality of the legislation, this parliamentary debate does not perform very well. In fact, the target of the debate seemed to be somehow misplaced. Nicol himself has noted that, instead of focusing on the proportionality of the measure, the debate was dominated by issues of separation of powers (in which the charge was that the ECtHR had acted beyond its legal powers).<sup>74</sup> In

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<sup>69</sup> *Id.* ¶ 82.

<sup>70</sup> *Id.* ¶ 79.

<sup>71</sup> *Greens & M.T. v. United Kingdom*, ECHR App. No. 60041/08, 2010 EUR. CT. H.R. 1826 (2010).

<sup>72</sup> Danny Nicol, *Legitimacy of the Commons Debate on Prisoner Voting*, 2011 P.L. 681, 681.

<sup>73</sup> *Id.* at 691.

<sup>74</sup> *Id.* at 683.

this respect, the challenge posed by the Strasbourg Court may be seen as a vector for further deliberation on controversial political issues.

In focusing on arguments concerning the claims of parliamentary sovereignty, MPs emphasized the idea that the parliamentary style of lawmaking is an essential justification, but the insistence on the primacy of its opinion fails to confront a serious legitimacy problem within the very objective of the legislation. The problem arises from claims to represent the people when a specific segment of the population was deliberately excluded from voting for their representatives. On top of this, it should be noted what seems to be a major difficulty for parliament: That those denied the vote were the same citizens who would continue to be disadvantaged by parliament's decision to refuse to enact remedial legislation. Herein lies the difficulty for political constitutionalism: Is it possible to deny the vote to prisoners on the basis of the principle of parliamentary sovereignty? The risk of circularity in argumentation is apparent because the principle of parliamentary sovereignty takes up its force from the representativity of the legislature (the House of Commons, in this case), not vice versa. Leaving the authority of deciding on the groups of people who are entitled to vote to an institution whose legitimacy is based on its election is an obvious potential conflict of interests. Such a situation is constitutively exposed to possible abuses of powers. Obviously, the classic response to this objection would be that disagreements about rights are so pervasive that it does not make sense to think of criteria for assessing parliamentary dissent on a particular right.<sup>75</sup> Despite this possible rebuttal, the difficulty inherent to this issue has been acknowledged. Waldron, in a testimony before the JCHR, was asked his opinion on whether his argument about the "right of rights" justifies Parliament maintaining the ban on prisoners voting. His answer is based on the idea that parliamentary sovereignty does not rest in theory or in history, but is rooted, instead, in the legitimacy of the democratic process. The right to vote is part and parcel of this process. He stated:

The position that I defend . . . runs into the deepest challenge where the parliament is actually addressing the right to vote and the integrity and continuance of the electoral and democratic process. . . . Parliament's legitimacy and supremacy in our constitution is not based upon history and is not an abstract proposition; it is based on the fact that . . . Parliament has electoral credibility. Parliamentary decision-making and legislation is legitimate because people have the right to vote, not the other way around.<sup>76</sup>

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<sup>75</sup> Carol Harlow, *The Concepts and Methods of Reasoning of the New Public Law: Legitimacy 1* (London Sch. of Econ. Law, Society and Economy, Working Paper No. 19, 2010).

<sup>76</sup> JOINT COMMITTEE ON HUMAN RIGHTS, HUMAN RIGHTS JUDGMENTS, 2011, H.C. 873-I, at 47–48.

In a previous work, Waldron had already pointed out that there is an element of insult and degradation in the exclusion from political participation.<sup>77</sup> The most serious challenge for the parliamentary style of lawmaking is that the legitimacy of this principle is contingent upon the integrity of the electoral and democratic process. A second point for being cautious, as noted briefly above, is that Parliament did not pay much attention to issues of proportionality. While proportionality is usually considered to be the province of courts, it is highly probable that considerations of remedial legislation will turn on proportionality questions. In this case, the parliamentary debate almost ignored the question of proportionality completely and forgot to ask whether an absolute ban on prisoners' votes is reasonable or could be conceived in a different and more balanced way.<sup>78</sup> This is not to say that, in principle, Parliament cannot perform proportionality analysis. But as this case shows, the parliamentary record of proportionality analysis is everything but consistent and coherent with the application of this principle.

Moreover, in view of the role for courts envisioned by political constitutionalists, one might treat this case as one where important civil and political rights are at stake, and where the political constitution may be weakened by the reduction of the franchise. To avoid any misunderstanding, the case of the rights of prisoners seems to be more controversial than the focus on "discrete and insular minorities" that characterized John Ely's rightly celebrated work.<sup>79</sup> In a functional political constitution, most minorities can find allies in electoral coalitions and can bargain with other political forces to obtain important outcomes on matters the minority cares strongly about. The situation of prisoners is closer to the case of "pariah groups." These are groups with whom no one will deal even if they can guarantee a fair amount of votes.<sup>80</sup> Disenfranchised people cannot influence the political process in any real effective way. Given these circumstances, it is difficult to support the idea that the same discriminatory political process ought to reform itself.<sup>81</sup>

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<sup>77</sup> Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 O.J.L.S. 18, 40 (1993).

<sup>78</sup> On May 22, 2012, the Grand Chamber handed down its judgment in *Scoppola v. Italy (No. 3)*, ECHR App. No. 126/05 (May 22, 2012), <http://hudoc.echr.coe.int/>. The implication of the ruling is that the UK would not be required to grant the right to vote to all prisoners, but a wide margin of appreciation would be afforded when deciding on the specific scope of this right to vote. The Court held a partial ban on the right to vote to be proportionate.

<sup>79</sup> JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980).

<sup>80</sup> See BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 255–258 (recognizing that this problem can affect the political process).

<sup>81</sup> Of course, the acknowledgement of this issue does not imply that courts are the best candidates. One might think, for example, at the role played by social movements. Nonetheless, the criticism still stands: The ordinary political process cannot always cope properly with this issue.

Finally, one might note that the fact that the prisoners' right to vote debate in Parliament was not based on the same constitutional template as the one that took place in Strasbourg does not mean it should be considered a failure in constitutional reasoning. After all, legislatures and courts are supposed to play different roles.<sup>82</sup> But what happens when the legislature's decisions weaken the political process? This Gordian knot cannot be cut once and for all. But a critical right such as the right to vote may be connected to the right to a hearing that Alon Harel has proposed to see as the basis of judicial review.<sup>83</sup> If those who are affected by democratic decisions are denied a voice in the process by the same institution which is the seat of the process, then it is difficult to imagine which other institution may hear their grievances but courts.<sup>84</sup>

The analysis of this case points toward the corroboration of a thesis advanced by Mark Tushnet.<sup>85</sup> According to his judgment, weak judicial review operates at its best when it triggers reasoning about social and economic rights, while it might, often, not be enough with regards to political and civil rights.<sup>86</sup> Only certain strong forms of judicial review may be able to cope with the problems posed by the restriction of the franchise.

Nonetheless, and despite its shortcomings, one can learn an important lesson from the *Hirst* case: Political constitutionalists have not taken the limited self-reflexivity of parliamentary reasoning seriously. The definition of the pre-conditions of political agency (among which one should count powers and prejudices) seems to be absent from the analysis of political constitutionalism. It is not enough to postulate that the political process can reform itself. In certain circumstances, only an external agent can intervene and fix issues. The next section will spell out what the consequences of this limited self-reflexivity are in constitutional reasoning about rights.

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<sup>82</sup> JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? 49 (2002).

<sup>83</sup> Alon Harel & Yuval Eylon, *The Right to Judicial Review*, 92 VA. L. REV. 187, 191 (2006).

<sup>84</sup> To a certain extent, how much an institution is willing to take up this kind of responsibility is a matter, at least partially, of constitutional culture. Carlo Guarnieri has stressed the fact that in some continental countries, courts have adopted a progressive and active judicial attitude thanks to their institutional setting. See Carlo Guarnieri, *Courts and Marginalized Groups: Perspectives from Continental Europe*, 5 INT'L. J. CONST. L. 187 (2007). This is not the right place to expand upon this claim.

<sup>85</sup> MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 159 (1999). For a different judgment on the role of constitutional adjudication for social and economic rights, see JEFF KING, JUDGING SOCIAL RIGHTS (2012).

<sup>86</sup> See also Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L. J. CONST. L. 391 (2007).

#### D. The Political Process and Its Premises

Political constitutionalism is a theory of parochial origin. It idealizes a model of constitutionalism that is locally and historically determined. To be fair, there is nothing inherently wrong with presenting a certain constitutional model as valuable as long as its parochial nature is recognized. The impression that one gets by reading political constitutionalists' work, though, is that the Commonwealth model, as described by them, is regarded and presented as the best possible normative model. This is exemplified by the practice of political equality as realized through party politics and as expressed in a sovereign parliament. At this stage, one may legitimately ask why it is worth investing so much in the ordinary political process even in reasoning about rights. In light of the previous sections, the answer should be clear; only this kind of parliamentary lawmaking ensures the respect of the fundamental principle of political equality in the specification of rights. From a political point of view, there is nothing questionable in granting a key role in the political constitution to the principle of political equality. But the embodiment of political equality in the electoral process and in the parliamentary style of politics seems to provide a formal and anti-historical conception of this principle. Upon closer scrutiny, it is evident that the central role played by a formal version of the principle of political equality is due to the fact that Bellamy and other political constitutionalists do not always take into account the historical aspects and developments of a political regime and its political constitution.<sup>87</sup> One of the reasons behind this gap is the dismissal of any notion of collective agency and collective deliberation as dangerous fictions.<sup>88</sup> This is not the place to properly discuss the metaphysical nature of this fiction, whether it corresponds to a certain reality or whether it requires particular beliefs. Political constitutionalists' dismissal of this notion flies in the face of the general attitude of citizens feeling as though they belong to a collective agent on the basis of a core constitutional identity.<sup>89</sup> The clearest sign of the lack of a deeper perspective on the temporal dimension of parliamentary politics is that political constitutionalists' description of the virtues of the electoral cycle is rather dry and it is often limited to a series of elections with no real common narrative holding them together. Other layers of the political life, like the symbolic or temporal-related aspects, go almost completely unnoticed within this literature. For this reason, constitutional entrenchment is unintelligible to the point of being judged as *a priori* illegitimate; it violates political equality by taking issues out of the public discussion and freezing them in some constitutional document.

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<sup>87</sup> One exception is TOMKINS, *supra* note 1, at 67–114.

<sup>88</sup> It should be noted that Bellamy rejects Pettit's version of republican democracy because the latter is based on the idea of a so-called editorial intervention of the people, but not an authorial one.

<sup>89</sup> For a recent discussion of the notion of constitutional identity, see GARY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010).

The source of this stark rejection of any type of entrenchment comes from the idea that no feature of political life escapes from the grasp of politics. If political action (and constitutional politics in particular) takes place within these circumstances, then the status and content of rights are also affected by this state of affairs. As noted above, political constitutionalists maintain that the content of rights is always open to dissent. Waldron, for example, puts it in this way: "The Bill of rights does not settle the disagreements that exist in the society about individual and minority rights. It bears on them but it does not settle them. At most, the abstract terms of the Bill of Rights are popularly selected sites for disputes about these issues."<sup>90</sup> In one relevant sense, these statements remind us that conflict between perspectives is inherent to reasoning about rights. However, to say that a declaration of rights is a vague statement that masks the underlying conflict is only partially correct. Actually, it could be a declaration that at least some of the potential conflicts on rights are, from the moment of the enactment of the declaration, ruled out as available options. Take the classic example of the Declaration of the Rights of Man of the French Revolution. Every article makes an implicit reference to an abuse of power for which the right was supposed to constitute a remedy.<sup>91</sup> Clearly, over time interpretation and the necessity of determining the content of constitutional rights will become more intricate because new cases or challenges will arise. But easy paradigmatic cases still partially inform the content of the right. These are usually the cases that are connected with the origins of the constitutional order or the enactment of the right involved. They may also be a form of ensuring a protection for the memory of the constitutional conflict that had them enacted in the first place. Even the open texture of legal rules such as "no vehicles in the park" does not undercut the strict core of rights' interpretation. Few people will doubt that cars are "vehicles" (in this sense, they are truly paradigmatic and clear cases).<sup>92</sup> The same is valid for the codification of constitutional rights that are the outcome of a constitutional conflict. The defeated interpretation is ruled out of the possible options for at least a certain period of time. This exclusion forms the core paradigmatic case upon which the interpretation of the constitutional right can be developed.<sup>93</sup> It is possible to translate these considerations in the language of practical reasoning as proposed by the so-called *planning theory*.<sup>94</sup> When a group of people has the intention of acting together, they proceed by deliberating on a plan. From the main plan others will derive in order to solve problems of coordination that may arise. While it is relatively easy to modify subplans, the revision of the main plan is more difficult because it would be costly and it

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<sup>90</sup> Waldron, *supra* note 48, at 1393.

<sup>91</sup> See NORBERTO BOBBIO, *THE AGE OF RIGHTS* (1991).

<sup>92</sup> H.L.A. HART, *THE CONCEPT OF LAW* 125 (2d ed. 1994).

<sup>93</sup> Cf. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 17–18 (2005).

<sup>94</sup> See MICHAEL E. BRATMAN, *STRUCTURES OF AGENCY: ESSAYS* (2007). In legal philosophy, the planning theory has been developed by SCOTT SHAPIRO, *LEGALITY* (2011).

would change the aim of the action. Michael Bratman describes plans as exclusionary reasons, that is, reasons that preempt acting according to some other reasons.<sup>95</sup> Once a plan is adopted, some reasons are ruled out of practical reasoning.<sup>96</sup>

Constitutional systems are often built around these kinds of exclusionary reasons, which Schmitt identified as the core of the constitution (as distinguished from constitutional law).<sup>97</sup> The idea of a political regime—and of its constitutional identity—seems to capture this intuition in a rather accurate way. The inception of a new political regime, or its radical transformation—think at the effects of the Civil War on the U.S. constitution—creates the condition for its development in a way that reverberates in the evolution of the polity.<sup>98</sup> The endurance of a certain constitutional identity is ensured by a set of beliefs that structures the possibilities of political action. It is inaccurate, at best, to affirm that the political process can decide on everything as if it were up for grabs. Bellamy tackles this issue in his book on political constitutionalism, where, in a passing reference to Belgium, he notes that, “to a degree, a working democracy is pre-constituted by agreement between a given body of people possessing enough of a collective identity and interests to be able to share common decision rules.”<sup>99</sup> While the pre-conditions of a collective identity and the core of the constitution are recognized and accepted, their impact on the political constitution is not spelled out and is left unexplored. However, these are not marginal details in the development of a constitution.

The act of voting provides a good test case because it is a constitutive aspect of the political process. As mentioned above, in order to appreciate its properties, the parliamentary style of lawmaking should be understood as a temporally extended practice based on a series of premises. It makes sense not only because it treats citizens with equal respect by giving them a chance to influence the lawmaking process, but also because it is inscribed into a larger temporal framework outside of which it would be reduced to a simple process of an aggregation of votes. In the first section of this article, the temporal dimension of parliamentary politics was emphasized. Now, the right of voting also needs to be understood within the same temporal framework. Voting occurs within an elaborate constitutional framework that connects the present to both past and future. The electoral

<sup>95</sup> For the notion of exclusionary reasons, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975).

<sup>96</sup> See MICHAEL BRATMAN, *INTENTION, PLANS AND PRACTICAL REASON* 180 (1987). The problem with the planning theory is that it requires only a form of instrumental rationality. In this respect, no claim is made here that political constitutionalism should be concerned only with instrumental rationality. But this aspect will be developed on another occasion.

<sup>97</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 77–82 (Jeffrey Seitzer trans., Duke Univ. Press Books 2008)(1928).

<sup>98</sup> This is a basic insight of the American School of Constitutional Development. See, e.g., STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1993).

<sup>99</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 235.

process is a cycle that reminds the voters of their link with the past of the polity—which is taken as the background against which the election takes place—and the possibility of future political action. Retrospectively, voting is first a judgment on the previous government; prospectively, voting is a selection of new policies and new (or confirmed) leadership. Both dimensions take for granted that the voters are concerned with the history and identity of a constitutional system. In fact, when they enter the booth they know in advance that even if their choice will not prevail, the outcome of the electoral process will be representative of the popular will.<sup>100</sup>

The core of the criticism of this section is not precisely that political constitutionalists don't recognize the exceptional nature of constitutional politics.<sup>101</sup> Bellamy recognizes the possibility of this kind of politics, in particular at the dawn of new political regimes "[C]onstitutions commonly come into being after a period of general political collapse, frequently following military defeat and often involving civil war. In this situation, a bill of rights can provide a statement of intent not to commit the errors of the past and to deal equitably with former opponents."<sup>102</sup>

However, no conclusion is drawn from that and the ordinary political process is given an uncontested primacy as the best decisionmaking procedure for rights. In fact, Bellamy notes that the drafting of a bill of rights is beneficial only at the onset of a new political regime. After this moment, the discussion of the content of rights by focusing on interpretation of written provisions can empty political reasoning out. From this perspective, leaving the determination of rights entirely to the ordinary political process would improve the quality of public reasoning. The continuous discussion and public reflection upon rights not only makes any decision on the same rights more legitimate, it also produces a better epistemic setting for the quality of the decision-making process.

The literature on political constitutionalism is replete with images that underline this openness. Grégoire Webber defines this permanent openness as the "negotiable constitution," which should be understood as "both architecture and activity; that is, both the constituting, distributing and constraining of governmental power while that self-same power re-constitutes, re-distributes, and re-constrains itself."<sup>103</sup> Bellamy resorts to the image of the ship rebuilt at sea, "employing . . . the prevailing procedures to renew and reform those self-same procedures."<sup>104</sup> But these remarks are far from being

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<sup>100</sup> PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 84 (1999).

<sup>101</sup> For a full-fledged treatment of the different layers of political action, see ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT* (2009).

<sup>102</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 50.

<sup>103</sup> WEBBER, *supra* note 1, at 54.

<sup>104</sup> BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE*, *supra* note 1, at 175.

unproblematic because they imply that the political process is self-constituting. Openness is secured by the evolutionary nature of the political constitution. The point is that this view of the constitution treats every aspect of the document as having equal importance, while some elements are typically considered essential for the identity of a constitutional order, and others, despite their importance, are not critical for its identity. The constitutive nature of some aspects of constitutions may justify a stronger protection for certain core constitutional rights. The intuition is that if courts, or even better, a constitutional court, were allowed to play a role in the protection of foundational aspects of a political system, reasoning about these critical constitutional rights would improve. In order to overcome judicial resistance, the political process ought to show consistency, strength, and persistence throughout a long period of time. In this way, the constitutional stake would become clearer to the citizens' eyes, which would allow further deliberation. As Bruce Ackerman has insightfully demonstrated, this model of constitutional change would secure publicity, deliberation and representativity.<sup>105</sup>

Another point that needs to be stressed is that constitutional law, as directly concerned with the organization of politics and the ineradicable conflict that permeates the latter, cannot be completely proceduralized. The political process does not arise simply out of a procedure, even if this procedure is the fairest possible. The constitution of a political community works under a number of assumptions and, in order to understand the content of these assumptions (which, to stress the obvious, is not to justify them), simply looking at procedures is insufficient.<sup>106</sup> Public law, as Martin Loughlin notes, is comprised of a set of practices that cannot be explained away by focusing only on their normative point.<sup>107</sup> This is not to say that the normative interpretation of constitutionalism is superfluous. To the contrary: It remains essential. But to prove that rights are common goods that ought to be discussed through wide public reasoning, Bellamy reminds us "that rights are claims made by citizens on fellow citizens within a social and political setting."<sup>108</sup> The point here is that to understand the institutional setting against which these claims are put forward is essential. In other terms, the circumstances of politics and the procedural remedies that political constitutionalism proposes do not explain away the nature, or the main content, of the political bond. This is why this aspect is missing from the picture proposed by political constitutionalists. Accordingly, the identity of the collective agent that is taken as a given within the circumstances of politics does not have anything to say on the nature of the political community or on the motivational aspect of political action.

<sup>105</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 278–280 (1991).

<sup>106</sup> Cf. Ulrich Preuss, *Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?*, in *THE TWILIGHT OF CONSTITUTIONALISM* 23–46 (Petra Dobner & Martin Loughlin eds., 2010).

<sup>107</sup> MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 4 (2003). See also Robert Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983) (making the point that constitutions need narratives for determining their content).

<sup>108</sup> Bellamy, *Democracy as Public Law*, *supra* note 27.

The recognition of what Hannah Arendt defined as the “common world”<sup>109</sup> as the ground for the development of the political process does not rule out the openness of the content of rights. Of course, there are no reasons for postulating the incompatibility of the political constitution with these preconditions: One may well be developed upon the foundation of another. Even Waldron hints at some preconditions for political constitutionalism in his well-known article on the ‘Core of the Case against Judicial Review’, where, to cut a long story short, he basically postulates that, in order to work properly, political constitutionalism needs citizens committed to some sort of constitutional values.<sup>110</sup> But isn’t the premise of some shared values the recognition that sheer political proceduralism does not have the resources for fully capturing the nature of political constitutionalism? Political constitutionalists promote robust party competition around constitutional principles. This is a valuable activity because it enhances civic education by incentivizing public reasoning on constitutional issues. But it presupposes the existence of a shared political culture. Politics, if understood only as a procedure, cannot be fully autonomous. Weak judicial review is not inherently incompatible with this kind of political culture. But, while in most of the cases these preconditions are not threatened by weak judicial review, one might think of a case for a two-track system where some core rights—and constitutional structures—are left to strong judicial review and others are left to weak judicial review. For the constitutive pillars of the political constitution (i.e., its core) one might think of a form of stronger judicial review as a more robust protection.

Of course, this is not to say that the core of constitutions is immune from change; even eternity clauses are dependent upon the life of a political regime. But some constitutional features are constitutive components of a political regime such that, without them, the constitutional identity would change and the underlying political system would likely collapse. Within the limits established by the political regime, many conflicts are still likely to arise and they ought to be solved mainly through ordinary politics. But it is not correct to affirm, as some political constitutionalists do, that the political constitution grants complete freedom of decision-making on the content of every right.

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<sup>109</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 54–55 (1958).

<sup>110</sup> Waldron, *supra* note 48, at 1405.