Political constitutionalism

Richard Bellamy

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For ‘legal constitutionalists’, written constitutions, constitutive of the legal and political system, superior to other legislation, entrenched against change, and enumerating justiciable rights, guarantee equal respect and concern for all citizens. Judicial review is thus an essential support of democracy. In this book, Richard Bellamy offers a robust argument against this view of constitutions, and particularly of judicial review. The book is driven by a deeply engaged argument against the movement towards constitutionalization in the European and British contexts and the contempt for politics which he sees this as implying.

Bellamy argues that this view relies on questionable normative and empirical assumptions. The extent of reasonable disagreement about basic values, interests, rights themselves and what counts as a fair outcome, as well as courts’ lack of public accountability mean that such systems, rather than reliably protecting fundamental democratic ideals, constitute a form of arbitrary rule. ‘[W]e cannot see an agreed constitutional framework of rights as somehow offering the basis and limits for the ordinary political process’ (p. 25). The ‘political constitutionalism’ that he sees as more legitimate and more effective gives citizens an equal say in shaping legislation and framing constitutional change through the democratic mechanisms of open elections between competing parties and decision-making by majority rule. Thus he offers a procedural defence of democracy, in which the democratic process is the constitution, providing due process and able to reform itself continually.

The book first criticizes the emphasis on the guarantee of constitutional rights through judicial review and the argument that this supports democracy either substantively or procedurally. Bellamy criticizes counter-majoritarian arguments for judicial review, showing that in practice the differences with respect to majorities between courts and legislatures are less than often assumed. Judicial review does not provide security for minorities. In practice, what have been seen as landmark judicial decisions on civil rights were less significant than contemporary political decisions and legislation. Against allegedly more dialogical forms of ‘commonwealth’ judicial review, Bellamy argues that, even in these systems, the judiciary tends to dominate the legislature.

The second chapter provides an extended argument on the rule of law, often the basis for justifying a central role for courts. Bellamy argues that, as there is no inherently 'good' law, and no rule of law independent of persons, the validity of law depends on it being subject to appropriate processes, which are always politically determined. 'In both politics and law, a concern for the public interest and equality before the law comes from the balancing of particular interests and views rather than from the imposition of a general or universal perspective from outside the political or legal system' (p. 89). So he claims that the rule of law, rather than requiring an entrenched constitution, is in many respects identical to rule by democracy.

He then engages with accounts in which judicial review is an integral part of democracy, either substantively or procedurally. He examines and rejects in turn arguments that depict judicial review as realizing democracy (Dworkin and Rawls), as protecting democratic values (Ely), as providing the preconditions for democracy (Habermas), or as the outcome of an exceptional democratic process (Ackerman). He concludes that although liberals aim to show citizens equal concern and respect, whether this can be achieved through judicial review is neither established theoretically nor borne out in practice.

The second half of the book elaborates the theory of political constitutionalism, and defends it from the legal constitutionalists' fear of majority tyranny. Although paralleling Waldron's critique of judicial review in the name of self-government, this is distinctively based on the republican idea of freedom as non-domination. Given the 'circumstances of politics', strategies of depoliticization constitute a form of domination – either by setting boundaries to the political sphere, or applying an 'apolitical politics' to discuss and settle particular issues (p. 147). Freedom is threatened not only by interference (or the broader notion of oppression), but also by domination, the power to interfere with others or to override their opinions and interests, which makes oppression more likely, and which Bellamy sees as neglected by legal constitutionalists (p. 151).

While applying the republican idea of freedom as non-domination developed by Pettit, Bellamy draws interestingly different conclusions on the legal and political institutions necessary to promote freedom. The former has endorsed a version of contestatory democracy incorporating the separation of powers and judicial review. Bellamy argues that Pettit's theory also relies too heavily on an objectivist idea of 'common recognizable interests' and 'an idealized politics from which all the sources of reasonable disagreement have been removed' (p. 175). This too provides a source of judicial domination. Thus '[w]e cannot rely on a constitution to secure the participatory conditions of equal concern and respect. Not only is there no clear way, including that of a special democratic process, whereby we might reliably frame such a constitution, but there is also no legitimate expertise for interpreting such a framework with

unfailing reliability so 'it tracks the interests' of those concerned' (p. 220). Instead the equal right of all to decide on issues concerning them requires that no difference of status exists between citizens and decision makers, and that all views can be heard as equal; this can be realized only through 'normal democratic processes'. In outlining this, Bellamy first addresses the kind of reasoning appropriate to politics. He defines seven ways in which reasoning can be public, distinguishing the form of public reason in politics from those embodied in mathematics, science and criminal justice. He dismisses what he sees as the stipulative accounts of public reason embodied in most theories of deliberative democracy.

A second crucial feature of normal politics is that, instead of a vertical or functional *separation* of power that multiplies veto points and assumes clearly distinct functions or groups, it relies on a *balance* of power among those, who rather than being entirely separate may be part of cross-cutting groups, and have an incentive to appeal to other interests.

The final chapter provides a robust defence of electoral politics, arguing that it favours the construction of cross-cutting coalitions, the responsiveness of political actors to citizens and compromises that allow the incorporation of minorities: 'Rather than crude mechanisms whereby majorities ride roughshod over the rights of minorities, democratic practices offer incentives for building compromises that are attentive to the diverse concerns of a broad range of groups in society' (p. 259). Thus this chapter provides a defence of majority rule, based on equal votes in an electoral competition among parties. It addresses issues in social choice, including the conditions of legitimacy of majority decision-making, and draws on contemporary comparative political science literature to set out the ways in which party competition may create a balance of power and an incentive to public reason, and to address criticisms of political elitism, the power of economic interests and the isolation of the politically powerless. Although Bellamy admits shortcomings in electoral politics, he argues that it is better to work towards its reform than to rely on constitutional procedures: 'When it comes to the procedural virtues of equality of participation, equity in representation and influence, accountability and contestation ... then competitive party, parliamentary democracy with majority rule outperforms courts significantly without their having substantive advantages' (p. 244). He argues that we must accept that the protection of rights and the rule of law cannot be achieved through an extra-political process: we must accept a proceduralism that goes all the way down (p. 175).

Some readers may not be wholly convinced by the defence of 'normal' politics against charges of short-termism, party cartels, the marginalization of minorities and the predominance of economic power. Although the book offers important reasons to reconsider the power of judicial systems, there may be a need for more radical critique and reconstruction of contemporary electoral

politics to allow equal (if indirect) access to all citizens than seems to be implied here. Furthermore, the critique of ‘depoliticization’ strategies seems rather sweeping, including in the same category the very different approaches of Rawls’s public reason, Pettit’s contestatory politics and a range of theories of deliberative democracy. In particular, not all contemporary advocates of deliberative democracy will recognize their accounts in the critique here.

This is a complex and sometimes dense argument, which takes considerable trouble to engage with hard cases and to address potential criticisms. In particular, it constitutes a significant contribution to discussion of the institutional requirements of non-domination. Even those who disagree with Bellamy’s conclusions will be challenged by his arguments, and will benefit from following his close engagement with a comprehensive range of arguments in legal theory and political philosophy, and the way in which evidence from political science is brought to bear on these debates.

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