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**“THE DEMOCRATIC CONSTITUTION”**

by

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Does democracy need a constitution? The increasingly dominant view is that it does. Constitutions are said to enshrine and secure the rights central to a democratic society. According to this account, a constitution is a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system.<sup>1</sup> It is the constitution, not participation in democratic politics *per se*, that offers the basis for citizens to be treated in a democratic way as deserving of equal concern and respect.<sup>2</sup> The electorate and politicians may engage in a democratic process, but they do not always embrace democratic values. The defence of these belongs to the constitution and its judicial guardians. This view has been neatly summarised by Cherie Booth, speaking as a distinguished QC rather than as the present Prime Minister's consort. As she puts it: 'In a human rights world ... responsibility for a value-based substantive commitment to democracy rests in large part on judges ... [J]udges in constitutional democracies are set aside as the guardians of individual rights ... [and] afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness ... in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy'.<sup>3</sup>

That the wife of a democratically elected political leader should express such a condescending view of democratic politics may be a little surprising, but it all too accurately reflects the prevailing opinion among what I shall call legal constitutionalists. Roberto Unger has remarked how 'discomfort with democracy' is one of the 'dirty little secrets of contemporary jurisprudence'. This unease is manifest in:

the ceaseless identification of restraints on majority rule ... as the overriding responsibility of ... jurists; ... in the effort to obtain from judges ... the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national re-foundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room ... [and] in the ... treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies.<sup>4</sup>

I believe both the concern over democracy and the proposed remedy to be largely misconceived. The one overlooks the constitutional role and achievements of democratic politics, while the other places an impossible task upon the judiciary. Against the dominant view I want to present an alternative understanding of the relationship between democracy and constitutionalism – one that sees the democratic system itself as the constitution.

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<sup>1</sup> E.g. J. Raz, 'On the Authority and Interpretation of Constitutions' in L. Alexander (ed), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, 1998, p. 153-4.

<sup>2</sup> R. Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise', *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press, 1996, pp. 24, 32-35.

<sup>3</sup> C. Booth, 'The Role of the Judge in a Human Rights World', Speech to the Malaysian Bar Association, 26 July 2005.

<sup>4</sup> R. Unger, *What Should Legal Analysis Become?*, London: Verso, 1996, p. 72. See too J. Waldron, 'Dirty Little Secret', *Columbia Law Review*, 98 (1998), pp. 510-30 and his *Law and Disagreement*, Oxford: Oxford University Press, 1999, pp. 8-10.

### Legal and Political Constitutionalism

Many of our current assumptions and, I shall argue, misconceptions about constitutions come from the idealisation of the Constitution of the United States by distinguished American legal and political philosophers, especially those who reached intellectual maturity during the Warren Court era of the 1960s. The US Constitution can make a good claim to be the first modern constitution, and its longevity has turned it into a model for many of the ways we think about the role and very form of a constitution. In particular, it is the source of the view that constitutions provide both the foundation for democracy and necessary constraints upon it. Yet, in certain crucial respects its design and rationale is pre-democratic and of doubtful legitimacy in a democratic age.

There are two elements within most written constitutions, the US constitution included. One element consists of an enumeration of basic rights that are held to constitute the fundamental law of the polity and with which no ordinary pieces of legislation or executive acts must conflict. The second element – often the greater part – is given over to a detailed description of the political and legal system, setting out the electoral rules, enumerating the powers and functions of different levels and agencies of government, and so on. As many of you will know, the American constitution initially consisted of this second element alone, with the Bill of Rights added later as a series of amendments. So far as I'm aware, Australia is now the only country to have a constitution consisting solely of this second element. However, as the quotation from Cheri Booth indicates, constitutionalism is increasingly identified with the first element - a Bill of Rights - and read as defining the political morality of a democratic society that upholds the necessary requirements for all citizens to be treated with equal concern and respect. Many legal theorists regard the second element of the constitution as 'nominal', being of little weight unless read through the first. After all, a dictatorship could have a constitution in the sense of a description of the organs of government. Nevertheless, a school of thought does exist that argues that we should read the first, rights element, merely as a guide to understanding the second, system of politics element. In other words, we should see rights as indicating what a political *process* that treats citizens with equal concern and respect should be like, rather than as what a democratic legislative *outcome* should contain. However, the difficulty with this argument is that there will be a tendency to make the perceived fairness of the outcome the guide to the fairness of the process that gave rise to it, so that the two approaches become indistinguishable. Moreover, as with the first, the second also makes the judiciary rather than citizens the guardians of the procedural constitution.

Despite having a certain sympathy with this second position, therefore, I want to reject both of these legal constitutionalist approaches. Instead, I am going to argue that we should see the political system itself, not its legal description in a written constitution but its actual functioning, as the true and effective constitution. This third approach appeals to an older tradition of what I shall call political constitutionalism. Though they departed from it in certain respects, the drafters of the US Constitution also took inspiration from this third approach when designing their system of government. The political constitutionalist tradition took the metaphor of the body politic seriously. Just as a healthy human body depended on a good constitution and a balanced way of life, so it was claimed a healthy polity required its constituent parts to be in balance. The problem was that this view of the constitution also predates the democratic age. And although, slavery to one side, the American constitution is premised on the democratic principle of equality, the founders were ignorant of the workings of modern mass democracies and somewhat apprehensive about their emergence. So the system they advocated was largely premised on what they feared would be democracy's chief drawbacks, in particular 'majority tyranny' and factionalism. However, in so doing they overlooked the constitutive importance of majority rule as the embodiment of political equality, on the one hand, and the constitutional role of the balance between competing parties, on the other. It is these two qualities of the twenty-two or so established working democracies that lend them their constitutional quality and form the basis of a contemporary political constitutionalism.

### Political Equality and Majority Rule

The 'constitutive' importance of majority rule can best be understood against the background of certain inherent difficulties with legal constitutionalism. As we have seen, two related claims motivate legal constitutionalism. The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the democratic process at identifying these outcomes. Both claims are disputable.

The desire to articulate a coherent and normatively attractive vision of a just and well-ordered society is undoubtedly itself a noble endeavour. It has inspired philosophers and citizens down the ages. But though all who engage in this activity aspire to convince others of the truth of their own position, none has so far come close to succeeding. Rival views by similarly competent theorists continue to proliferate, their disagreements both reflecting and occasionally informing the political disagreements between ordinary citizens over every conceivable issue from tax policy to health care. The fact of disagreement does not indicate that no theories of justice are true. Nor does it mean that a democratic society does not involve a commitment to rights and equality. It does show, though, that there are limitations to our ability to identify a true theory of rights and equality and so to convince others of its truth – that we lack an epistemology able to ground our different ontological positions. John Rawls has associated these limitations with the 'burdens of judgement'. Even the best argued case can meet with reasonable dissent due to such factors as the complex nature of much factual information and uncertainty over its bearing on any case, disagreement about the weighting of values, the vagueness of concepts, the diverse backgrounds and experiences of different people, and the variety of normative considerations involved in any issue and the difficulty of making an overall assessment of their relative weight. Such difficulties are likely to be multiplied several fold when it comes to devising policies that will promote our favoured ideal of democratic justice. In part, the problem arises from the complexity of cause and effect in social and economic life, so that it will be hard to judge what the consequences of any given measure will be. But as well as the difficulty of specifying what policies will bring about given values, disagreements about the nature of these values also mean it will be difficult to identify those political, social and economic conditions that best realise them. For example, both types of difficulty are in evidence when philosophers or citizens debate the degree to which markets arrangements are just or the modifications that might be necessary to render them so. How far they can or should reflect people's efforts, entitlements or merits, say, are all deeply disputed for reasons that are both normative and empirical.

These problems with the first claim of legal constitutionalism raise doubts regarding its second claim about the responsibilities of judges. If there are reasonable disagreements about justice and its implications, then it becomes implausible to regard judges as basing their decisions on the 'correct' view of what democratic justice demands in particular circumstances. There are no good grounds for believing that they can succeed where political philosophers from Plato to Rawls have failed. At best, the superior position legal constitutionalists accord them must rest on courts providing a more conscientious and better informed arbitration of the disagreements and conflicts surrounding rights and equality than democratic politics can offer. However, this shift in justification moves attention from outcomes to process and suggests a somewhat different conception of the constitution within a democratic society. Instead of seeing the constitution as enshrining the substance of democratic values, it points towards conceiving it as a procedure for resolving disagreements about the nature and implications of democratic values in a way that assiduously and impartially weighs the views and interests in dispute in a manner that accords them equal concern and respect. Rather than a resource of the fundamental answers to the question of how to organise a democratic society, the constitution

represents a fundamental structure for reaching collective decisions about social arrangements in a democratic way. That is, in a way that treats citizens as entitled to having their concerns equally respected when it comes to deciding the best way to pursue their collective interests.

Political constitutionalism enters at this point and makes two corresponding claims to the legal constitutionalist's. The first is that we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. The second is that the democratic process is more legitimate and effective than the judicial process at resolving these disagreements. I have already described the sources of our reasonable disagreements about rights. What about the competing merits of courts and democratically elected legislatures as mechanisms for resolving them? Courts can obviously make a good claim to offer a fair and impartial process for resolving disputes, where all are treated as equals. But when it comes to making decisions about our collective life, as constitutional courts implicitly do when they strike down legislative or executive measures or decide test cases, I believe they lack the intrinsic fairness and impartiality of the democratic process – that of treating each person's views equally. They restrict access and unduly narrow the range of arguments and remedies that may be considered, and are neither accountable nor responsive to citizens in ways that ensure their opinions and interests receive equal concern and respect. Litigation is a time consuming business, with constitutional courts perforce having to be highly selective as to which cases they hear. When they do so, the case is presented as a dispute between two litigants and the only persons and arguments with standing have to relate to the points of law that have been raised by those concerned. Such legalism is vital in what one might call the 'normal' judicial process, being intimately linked to the rule of law in the formal sense of rule by known and consistently interpreted laws. But it is inappropriate for determining the bearing of fundamental political principles on the collective life of the community. In this sort of decision, the limits imposed by the legal process risk excluding important considerations in ways that may be arbitrary so far as the general issues raised by a case are concerned. Restricted access to and standing before the court, means not all potentially relevant concerns have an equally fair chance of being presented. Finally, and most importantly, it is the judges who decide. Moreover, they disagree. They differ over the relevance and interpretation of the law, the weight of different moral values, the empirical evidence – indeed, all the factors that produce principled disagreement among citizens. Meanwhile, they resolve their disputes by the very democratic procedure they claim to supersede – majority vote. We never hear about the potential dangers of a tyrannous judicial majority, yet it is far more likely than among legislatures or the electorate. Among judges a majority vote is simply a closure device among a haphazard assortment of views. It has none of the intrinsic virtues that attach to it within a democracy as a fair way of showing equal concern and respect to the ideas and interests of every member of the population. Indeed, a single judge's vote can alter a decision dramatically – something that has never happened in an election and is very rare even in a legislature.

Here we come to the nub of what is wrong with constitutional judicial review – its arbitrariness. There is no adequate basis to ground the superiority of a given legal constitution and its interpreters over the rest of the citizen body. Not only may the process itself be inappropriate for obtaining a full and equitable consideration of the rights and interests involved, but also – and most significantly – it does not involve citizens as equals. Citizens are to be 'taught' their obligations, to employ Ms Booth's revealing term, rather than to define and enter into them on an equal basis. A key advantage of a democratic vote lies in its overcoming this arbitrary arrangement. Under majority rule each person counts for one and none for more than one. All citizens are treated equally in this respect – including judges and members of the currently incumbent government. The reason that the legislature favours certain peoples' views more than others is because more people have voted for a given party's representatives than for those of other parties. Such aggregative accounts of democratic voting are sometimes criticised as mechanical or 'statistical'. But whatever the supposed failings of democratic decision-making, this very mechanical aspect of democracy has a decided advantage in the context of

disagreement. It allows those on the losing side to hold on to their integrity. They can feel their views have been treated with as much respect as those on the winning side, counting equally with theirs in the vote, and that the winners are not thereby 'right', so that they are 'wrong', but merely the current majority. It has been argued that this position is paradoxical.<sup>5</sup> Yet, any real world, and hence fallible, decision procedure involves accepting some distinction between the legitimacy of the process and one's view of the result. After all, courts can and do produce results litigants or observers disagree with, but demand their judgments be accepted nonetheless because they satisfy norms of due process. The distinctiveness of the democratic process lies in its fostering precisely the political morality of mutual respect that legal constitutionalists claim they wish to foster. For it involves accepting one's own view as just one among others - even if one feels passionately about it, because others feel just as passionately on the other side. Democratic citizens must step back from their own preferred views and acknowledge that equal concern and respect are owed to their fellows as bearers of alternative views. It is only if we possess some such detachment that we can live on equal terms in circumstances of political disagreement by finding workable ways to agree even though we disagree.

### The Balance of Power and Party Competition

Now, majority rule may be a legitimate constitutive process – that is, a fair way for making collective decisions – but it is not necessarily a valid constitutional process – one that avoids majority tyranny by upholding individual rights and treating all in relevant ways as equal under the law. Indeed, as I noted the constitutional design of political institutions has generally assumed it is not and built in counter-majoritarian checks. Here too, as I also noted, the influence of the American constitution casts its long shadow. The classic doctrine of the 'mixed constitution' provided the pre-democratic form of the political constitution. This idea assumed the division of society into different classes with distinct interests: namely, the people, the aristocracy and the monarchy. The crux was to achieve a balance between these three groups. The majority in this context referred to the largest group – that of the common people. Later theorists, prominent among them the authors of the *Federalist Papers*, then attempted to apply this thinking to a formally classless society. However, they continued to fear the propertyless had distinct interests from the rest of the population and in a democracy might use their electoral muscle to redistribute resources from the rich to the poor. A related worry concerned various self-interested factions who might exploit populist policies to obtain power and pursue their own ends. They saw counter-majoritarian measures, which mainly reworked the older ways of dispersing power, as necessary to guard against these possibilities.

The separation of power between different branches of government was an adaptation of the 'mixed constitution' and the attempt to balance the interests of different social groups. It was supposed to prevent either the majority group in the legislature or a populist executive being in a position to enact laws in their own interest. Bicameralism offered a further check, with the second chamber supposedly representing both longer term interests and, within a federal system, those of different regions. Yet, a prime effect of such mechanisms has been to multiply veto points and produce *imbalances* that favour vested interests and privileged positions. For they advantage the *status quo*. As such, they invariably have a regressive impact. For example, in the US it enabled the state and federal courts to strike down some 150 pieces of labour legislation between 1885 and 1935 of an analogous kind to those passed by western democracies free from such constraints over roughly the same period. Change only came when chronic economic depression and war allowed a hugely popular President with a large legislative majority to overcome judicial and other barriers to social reform.

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<sup>5</sup> R. Wollheim, 'A Paradox in the Theory of Democracy', in P. Laslett and W G Runciman (eds), *Philosophy, Politics and Society*, second series, Oxford: Blackwell, 1969, p. 84.

Of course, opponents of such social legislation rarely argue on self-interested grounds. Rather, they contend they are upholding the property rights necessary for a dynamic economic system that it is in the public interest to keep. Hence the need to give these rights constitutional protection against myopic majoritarian calls for redistribution. However, proponents of social justice mount a similarly principled case that also appeals to arguments for economic efficiency, and seek likewise to constitutionalise social rights. Such debates are a prime source of 'reasonable disagreement' in contemporary politics – indeed, the ideological divide between Left and Right provides the principal political cleavage in most democracies. The enduring character of this division arises to a large degree from genuine difficulties in specifying what a commitment to liberty and equality actually entails in terms either of social arrangements or particular policy recommendations. Views on both tend to be subject to a certain amount of guess work and constant updating in the light of experience and evolving circumstances. Constitutionalising either position simply biases the debate towards the dominant view of the time, usually that of the then hegemonic groups, by constraining the opportunities for critique and the equal consideration of interests.

By contrast, we have seen how a prime rationale of democracy lies in its enshrining political equality by providing fair procedures whereby such disagreements can be resolved. That this is also a constitutional process arises from the way it embodies the old notion of balance in a new and dynamic form, so that affected individuals are moved to abide by the classical injunction of 'hearing the other side' that lies at the heart of procedural accounts of justice. This requirement calls for the weighing of the arguments for and against any policy, and the attempt to balance them in the decision. It also involves opportunities to contest and improve policies should they fail to be implemented correctly, have unanticipated consequences – including failure, or cease to be appropriate due to changed circumstances. Finally, it renders rulers accountable and responsive to the ruled, preventing them seeing themselves as a class apart with distinct interests of their own. These qualities offer a procedural approach to showing individuals equal concern and respect.

All three senses of balance are present in majority voting in elections between competing parties. This mechanism promotes the equal weighing of arguments in order to show equal respect, produces balanced decisions that demonstrate equal concern, and involves counter-balances that offer possibilities for opposition and review, thereby providing incentives for responsive and improved decision-making on the part of politicians.

Let's take each in turn. I have already remarked how one person, one vote treats people as equals. As the economist Kenneth May put it, it is anonymous, neutral and positively responsive as well as decisive. However, notorious problems potentially arise with three or more options. As another economist, Kenneth Arrow, and his followers have shown, in these circumstances any social ordering of individual preferences, not least majority rule, is likely to be arbitrary. Yet, though logically possible, cycles and the resulting problems of instability, incoherence or manipulation turn out to be rare. The range of options considered by both the electorate and legislatures is considerably fewer than the multifarious rankings people might offer of the total range of policy issues. Instead, they choose between a small number of party programmes. Parties and the ideological traditions they represent have the effect of socialising voters so that their preferences resemble each other sufficiently for cycles to be unusual and eliminable by relatively simple decision rules that help voters select the package of policies containing their most favoured options. And though voting systems may produce different results, the choice between them need not be regarded as arbitrary – all the realistic contenders can make legitimate claims to fairness and possess well known advantages and disadvantages that make them suited to different social circumstances.

It might be objected that these effects result from elites controlling party agendas, making them instruments of domination. Yet party programmes have been shown to alter over time in ways frequently at variance with the interests of entrenched social and economic groups. To a

remarkable degree, election campaigns determine policy, with party discipline rendering politicians far more like electoral delegates than trustees. Party competition also plays a key role in the production of balanced decisions. To win elections, parties have to bring together broad coalitions of opinions and interests within a general programme of government. Even under PR systems, where incentives may exist for parties to appeal to fairly narrow constituencies, they need to render their programmes compatible with potential coalition partners to have a chance of entering government. In each of these cases, majorities are built through the search for mutually acceptable compromises that attempt to accommodate a number of different views within a single complex position. Such compromises are sometimes criticised as unprincipled and incoherent, encouraging 'pork barrel politics' in which voters get bought off according to their ability to influence the outcome rather than the merits of their case. Despite a system of free and equal votes, some votes can count for more than others if they bring campaigning resources, are 'deciding' votes, or can ease the implementation of a given policy. However, different sorts of political resource tend to be distributed around different sections of the community, while their relative importance and who holds them differs according to the policy. Democratic societies are also invariably characterised by at least some cross-cutting divisions, such as religion, that bind different groups together on different issues. Many of these bonds relate not to interests in the narrow economic sense, but shared values. After all, the purely self-interested voter would not bother going to the polls.

These features of democratic politics create inducements to practice reciprocity and so support solidarity and trust between citizens. Aptly described as mid-way between self-interested bargaining and ethical universalism, reciprocity involves an attempt to accommodate others within some shareable package of policies. This attempt at mutual accommodation does not produce a synthesis or a consensus, since it contains many elements those involved would reject if taken in isolation. Rather, it responds to the different weights voters place on particular policies or dimensions of a problem – either allowing trade-offs to emerge, or obliging those involved to adopt a mutual second best when too many aspects are in conflict. In sum, the best is not made the enemy of the good. So, those opposed on both public spending and foreign policy, but ranking their importance differently, can accept a package that gives each what they value most. Likewise, civil partnership can offer an acceptable second best to opponents and proponents of gay marriage.

In circumstances of reasonable disagreement, such compromises recognise the rights of others to have their views treated with equal concern as well as respect. They legitimately reflect the balance of opinion within society. Naturally, some groups may still feel excluded or dissatisfied, while the balance between them can alter as interests and ideals evolve with social change. The counter-balances of party competition come in here. The presence of permanent opposition and regular electoral contests means that governments will need to respond to policy failures and alterations in the public mood brought about by new developments. The willingness of parties to alter their policies is often seen as evidence of their unprincipled nature and the basically self-interested motives of politicians and citizens alike. However, this picture of parties cynically changing their spots to court short term popularity is belied by the reality. Leap-frogging is remarkably rare, not least because they and their core support retain certain key ideological commitments to which changes in policy have to be adapted. Nevertheless, that parties see themselves as holding distinctive rather than diametrically opposed views renders competition effective, producing convergence on the median voter, which is generally the most preferred of all voters, being what is technically known as the Condorcet winner. By contrast, the separation of powers removes (in the case of courts) or weakens (in the case of elected bodies) such incentives, for the various branches of government can hardly be viewed as competing. The ability of courts particularly to isolate themselves from public pressure is often seen as an advantage. But it can also lead to blame shifting as responsibility gets divided, with each branch seeking to attribute the political and financial costs of their decisions to one or more of the others. Federal arrangements can often have similar drawbacks.



### Majority Tyranny?

Of course, the more polarised social divisions are, the harder it will be for such mechanisms to work. The danger of majority domination increases in societies deeply divided on ethnic, religious or linguistic lines. In these conditions, democratic arrangements generally require measures to secure minority influence. Strictly speaking, many of these need not be considered as anti-majoritarian. Enhancing proportionality simply represents a fairer way of calculating the majority than plurality systems such as ours, while greater regional autonomy for territorially concentrated minorities merely devolves decision making over certain policies to a different majority. Where it proves necessary to go beyond proportionality by giving minorities a veto or an equal or much inflated role in executive power or federal law making, the danger arises that the checks and balances arising from party competition get eroded. The elites of the different social segments gain an interest in stressing the particular divisions they reflect over other differences or any shared concerns, with debates about the organisation of government undermining accountability for its conduct. However, a legal constitution is unlikely to counter such tendencies. It will either reproduce them, its legitimacy depending on the degree to which the court and constitution reflect the main political divisions, or it will rightly or wrongly become identified with the dominant elite who have the greatest interest in preserving unity.

What about 'discreet and insular minorities'? As the American jurist Mark Tushnet counsels, 'we have to distinguish between *mere* losers and minorities who lose because they cannot protect themselves in politics.'<sup>6</sup> Within most democracies, the number of minorities incapable of allying with others to secure a degree of political influence is very small. However, there are undeniably certain groups, such as asylum seekers or the Roma, who have little or no ability to engage in politics. In such cases, the necessity for legal constitutional protection might appear undeniable. Even here, though, such protection will only be necessary if it is assumed that such minorities are at risk from widespread prejudice from a majority of the population and their elected representatives, and the judiciary are free from such prejudices. However, most defenders of legal constitutionalism accept it is unlikely to have much effect unless the rights it enshrines express a common ideology of the population about the way their society should be governed – are the 'people's law', not just 'lawyers' law'. As the example of Nazi Germany reveals, widespread popular prejudices against a minority are likely to be shared by a significant proportion of the ruling elite, including the legal establishment and where they are not the judiciary is unlikely to be able to withstand sustained popular and governmental pressure. So judicial review will only afford protection where there is a temporary lapse from commonly acknowledged standards. Such cases – which need to be balanced against those where the judiciary may similarly fall short – do not offer a basis for a general defence of strong judicial review. Yet, it may be difficult to distinguish the exceptional case, where it may be legitimate and beneficial for the judiciary to intervene, from the standard cases where it is not.

Judicial foreclosure can also impair or distort political mobilisation, yet is rarely successful in its absence. The key 'liberal' US Supreme Court decisions of the 1960s to which most contemporary legal constitutionalists refer, such as *Roe v. Wade* and *Brown v. Board of Education*, all reflected emerging national majorities. Liberal legislation in most states meant that well before *Roe* some 600,000 lawful abortions were performed a year. The narrow terms in which *Roe* was decided had the negative effect of 'privatising' abortion rather than treating it as a social issue requiring public funds. It has also centred political activity on capturing the court rather than engaging with the arguments of others. By contrast, the extensive moral discussion in the Commons of the Medical Termination of Pregnancy Bill, that occupies some 100 pages in Hansard, compares favourably with the couple of paragraphs of principled, as opposed to legal, argument in *Roe*. In particular, it led opponents to acknowledge the respectful hearing given to their views, which went some way to reconciling them to the decision. Indeed,

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<sup>6</sup> M. Tushnet, *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press, 1999, p. 159.

the eventual policy includes numerous forms of principled 'compromise' to accommodate a range of moral concerns, including the evolving status of the foetus. Likewise, the civil rights movement had far more impact than *Brown*. Ten years after this landmark decision no more than 1.2% of Black children attended desegregated schools in the Southern states. Desegregation only truly gained momentum following the passage by large majorities in Congress of the Civil Rights Act and the Voting Rights Act in 1964 and 1965.

Do we not need courts, though, to protect individual rights from exceptional exercises of executive discretion – most notably to protect national security in states of emergency? Once again, the belief that courts offer a calmer setting that is more attentive to rights considerations than legislatures proves misplaced. On the one hand, in both the US and the UK courts have overwhelmingly upheld such measures. Indeed, in general the US courts have proved more likely to curtail rights and civil liberties during such crises than when peace prevails. Notwithstanding the questionable justifiability of such measures as the internment of Japanese Americans during the Second World War or the ban on the Communist Party during the Cold War, the judiciary deferred to executive authority. Yet, in many respects it would be hard for them to do otherwise - they neither have access to the intelligence nor the responsibility for assessing such risks. By and large they have concentrated on the procedural propriety of such measures. On the other hand, though, elected legislatures have not been as unquestioning as is often assumed. Party loyalty frequently breaks down in such cases precisely because representatives acknowledge issues of constitutional principle may be at stake. For example, as with counter-terrorism measures in Northern Ireland, the UK parliament imposed a sunset clause on the Anti-terrorism, Crime and Security Act 2001 and the even more draconian measures introduced by the Terrorism Bill following the London bombings of 7 July 2005 led to Tony Blair's first defeat in the Commons since coming to power in 1997. Far from these measures attracting populist support, there is every indication that this policy has become an electoral liability.

### Conclusion

This article has defended 'actually existing democracy' as an effective constitutive and constitutional mechanism. Yet, even a sympathetic listener might wonder if this defence of modern democratic politics against eighteenth century constitutionalism comes a little late, when the 'owl of minerva' has well and truly flown by. Though vibrant in the nineteenth and twentieth centuries, party politics is now in a sorry state. Trust in politicians and parties is at an all time low in most advanced democracies, with party membership and voter turn out in steady decline, albeit haltingly and with variations between countries. Quite apart from the shortcomings of the actors involved, these mechanisms are also felt to be ill-suited to securing effective and equitable government in today's complex and globalising societies. The electorate is too vast and diverse, the problems too technical, the scale of government too large for citizens to be able effectively to relate to each other, the tasks of politics or the institutions and persons assigned to tackle them.

I have two observations to make of this pessimistic scenario. First, even constitutionalised 'guardianship' has the potential to be dominating. Professionalism and technical expertise are inherent to government in the modern world and politicians, themselves professionals, have either to acquire such specialised knowledge or learn to rely on those who have done. However, though the ship of state may require a skilled captain and a trained crew, the citizen passengers are entitled to dictate its course and can judge by results when they are failing to perform well. A system that does not provide citizens equal political resources to influence the direction and complexion of policy, or offer incentives to the rulers to track the interests and concerns of the ruled in as balanced and efficient a manner as possible, will be arbitrary. There are no clear, commonly recognizable guidelines for how to get to the good society or any infallibly great and good persons able to take us there. Second, the constitutionality of competitive party democracy lies precisely in its providing realistic mechanisms to overcome

such arbitrariness: fostering an equal in put, on the one hand, and a control over politicians and their out put, on the other, which encourages a balanced government that shows citizens equal concern and respect. Perhaps if we praised its normative qualities more it would prove more popular. If its days are indeed numbered, though, the weaknesses of the alternative proffered by its detractors still stand. The case for remaking the democratic constitution in a way that preserves its necessary virtues remains as compelling as ever.