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The Balance of the Constitution

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Abstract: The idea of balance in constitutional thought helps to illuminate what it is to be governed well. The article considers the idea of balance, beginning with John Finnis's engagement with Gibbon's *Decline and Fall*, and argues that the well-balanced constitution is stable rather than static, tempering public authority, which is to say disciplining and strengthening it. Anglo-American history confirms that the balance of a constitution is likely to change over time, not only because of unconstitutional action but also because of lawful exercise of power or changes in social and political conditions. In some cases, the balance may be lost, and may need now to be restored; in other cases, a new balance may have been struck. The article reflects on the institutional arrangements that characterize a well-balanced constitution, making clear the contribution that independent courts make (and the risks that misuse of judicial power may pose) and the importance of intelligently coordinating executive and legislative power. The people have a share in constitutional government, which requires a spirit of moderation and is put in doubt if the constitution is insulated from deliberate change.

Keywords: John Finnis, Constitutional Theory, Democracy

I. Introduction

This article considers the idea of balance in constitutional thought and practice. The well-balanced constitution, I argue, is stable without being static, arranging institutions in such a way as to enable good government in which the people participate. The balance of any particular constitution over time is not necessarily a function of initial design; maintaining (and restoring) balance is a continuing responsibility of officials and citizens, which may call for change. The article briefly explores the changing balance of the English (British) and American constitutions over time, before considering some of the key institutional arrangements (dynamics) in question. I argue for the importance of separating judicial power, coordinating executive and legislative power, and recognizing the central place of the people in a balanced constitution. Finally, the article considers some of the risks to constitutional balance that arise in the context of international affairs, partisanship in public life, and the entrenchment and amendment of constitutional provisions.

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II. The Idea of Balance

In his 2015 Princeton address, "On the Nature of a Free Society,"[1] John Finnis quotes Gibbon's reflections on the Roman constitution:[2]

> THE obvious definition of a monarchy seems to be that of a state, in which a single person, by whatsoever name he may be distinguished, is entrusted with the execution of the laws, the management of the revenue, and the command of the army. But unless public liberty is protected by intrepid and vigilant guardians, the authority of so formidable a magistrate will soon degenerate into despotism. The influence of the clergy, in an age of superstition, might be usefully employed to assert the rights of mankind; but so intimate is the connection between the throne and the altar, that the banner of the church has very seldom been seen on the side of the people. A martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince.

The passage takes for granted that the prince's lawful authority is limited. The free constitution that delimits his authority affirms public liberty (and the rights of mankind) but is threatened by the prince's capacity for action and his likely inclination to exceed the limits in question. What is needed are intrepid and vigilant guardians who may balance the prince's authority. In principle, the clergy might act thus, leveraging their spiritual authority, distinct from the prince's temporal authority, and their institutional structure, which makes organized action possible. But in most cases, Gibbon asserts, the church will support rather than oppose the prince.[3] One must look instead, he argues, to the prince's subjects, who have the resources necessary to resist if need be, and for whose assembly and action the constitution makes provision. Thus, the de facto capacity of the people (including the great men of the realm) to resist the prince is important, and so too is their de jure entitlement to meet and, one infers, to insist upon their lawful rights.

Later in the same chapter, as Finnis notes, Gibbon returns to the idea of balance:[4]

> As long as the republic subsisted, the dangerous influence, which either the consul or the tribune might derive from their respective jurisdiction, was diminished by several important restrictions. Their authority expired with the year in which they were elected; the former office was divided between two, the latter among ten persons; and, as both in their private and public interest they were averse to each other, their mutual conflicts contributed, for the most part to strengthen rather than to destroy the balance of the

[1] 18 May 2015, The Robert J. Giuffra '82 Conference on Law and the Culture of Liberty, James Madison Program in American Ideals and Institutions, Princeton University; Notre Dame Law School Legal Studies Research Paper No. 1709

[2] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, Volume I, Chapter III: The Constitution In The Age Of The Antonines, Part I.

[3] This assertion is certainly questionable. See further Alfred Stepan, "The World's Religious Systems and Democracy: Crafting the 'Twin Tolerations,'" in *Arguing Comparative Politics* (Oxford: Oxford University Press, 2001), 213; and Nicholas Aroney and Ian Leigh, eds, *Christianity and Constitutionalism* (Oxford: Oxford University Press, 2022).

[4] See above, note 2.

constitution. But when the consular and tribunitian powers were united, when they were vested for life in a single person, when the general of the army, was at the same time the minister of the senate and the representative of the Roman people, it was impossible to resist the exercise, nor was it easy to define the limits, of his imperial prerogative.

The passage makes clear the significance of division amongst office-holders. It is not entirely clear to me whether the second sentence places the stress on the fact that the consuls may disagree with one another, and also with each tribune likewise, such that all twelve officials may disagree, or on the fact that the consuls are likely to disagree with the tribunes. Perhaps both. Part of the reason for having two types of office and more than one office-holder is precisely to share power and avoid any one person having the capacity to do freely as he will.[5] The unity of powers in one who acts for the Senate and the People entails an absence of challenge to how he acts, which makes it hard even to articulate limits on his authority let alone to vindicate them. In this way, the balance of the constitution has been lost. Note that conflicts between the many office-holders are likely, in Gibbon's view, to strengthen rather than destroy that balance. They may destroy the balance, I suggest, if the conflicts in question make it impossible for the Republic to be governed well or even at all, which may in turn provoke (or even justify) uniting powers in one person. But even short of collapse to unlimited princely rule, the balance of the constitution will be lost if conflicts between consuls and tribunes weaken rather than strengthen the Republic.

Balance suggests equilibrium, in which opposing forces are in harmony. This might imply that balance means stasis, in which nothing changes. But a constitution may be static without being well-balanced, if dominated by a single person, or party, for example, or if it encourages a cycle of destructive conflict from which there is no obvious escape. Relatedly, a constitution will not be balanced if the arrangement of opposing forces is such as to frustrate government: absence of constitutional change may be desirable, but incapacity to govern is not. If balance entails an equilibrium between institutions (and the people), as is plausible, then it must be a healthy, fruitful equilibrium to be choice-worthy, which means it will be stable rather than static. The stable constitution will be a solid foundation, grounding political action and public life over time and helping to hold together the political community. Like the virtue of stability in the context of the rule of law, constitutional stability does not entail an absence of change, but it does entail that change is not so radical as to undercut that reciprocity between rulers and ruled without which government for common good, including self-government, is very difficult to secure.

A well-balanced sword is a more effective (and beautiful) sword than an unbalanced (ungainly) sword, making it possible for the person wielding it to strike more quickly and precisely, to recover from his or her strikes in a timely fashion, and to avoid being open to counter-attack. The same is true for a well-balanced constitution, insofar as a political community governed by means of such a constitution is to that extent better placed to act well, to recover from mistakes, and

[5] See my *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), 144-145.

to avoid disaster. One may use a sharp knife for good or ill and a well-balanced sword likewise. However, whereas a knife or sword is an instrument designed to cut, the point of a constitution is to govern the community well. Thus, a well-balanced constitution is one that is ordered to this end, which is not to say that it will necessarily secure common good, but rather that it is apt so to do.

It is difficult to speak of a balanced constitution without reflecting on a mixed constitution. Consider Aquinas:[6]

> Two points are to be observed concerning the right ordering of rulers in a state or nation. One is that all should take some share in the government: for this form of constitution ensures peace among the people, commends itself to all, and is most enduring, as stated in Polit. ii, 6. The other point is to be observed in respect of the kinds of government, or the different ways in which the constitutions are established. For whereas these differ in kind, as the Philosopher states (Polit. iii, 5), nevertheless the first place is held by the "kingdom," where the power of government is vested in one; and "aristocracy," which signifies government by the best, where the power of government is vested in a few. Accordingly, the best form of government is in a state or kingdom, where one is given the power to preside over all; while under him are others having governing powers: and yet a government of this kind is shared by all, both because all are eligible to govern, and because the rules are chosen by all. For this is the best form of polity, being partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, i.e. government by the people, in so far as the rulers can be chosen from the people, and the people have the right to choose their rulers.

All should have some share in government, for this ensures peace, commends itself to all and is enduring. The object is thus stability and legitimacy, a constitution that will not collapse. The means is the joining of the people in government. The second point commends the mixing of types of government, such that one presides, many others rule beneath him, and rulers are chosen by the ruled. The multiplicity of offices (for which all are eligible) is important, for this makes it possible for all to share. Important also is the proposition that the rules (the constitution itself, or some of the laws) should be chosen by all. The scheme Aquinas envisages introduces a kind of tension between the one who presides and the other persons set in authority, as well as between them (the rulers) and the people, a tension situated in the civil peace of shared government. The mixed constitution that Aquinas here prescribes seems to focus on mixing forms of government rather than mixing social or political classes. Making provision for different classes or groups to share in government would be consistent with Aquinas's prescription, but attends more closely to the social reality of the political community in question, and the conditions under which its members will agree to live together and to share government one with another.

The balanced constitution is one in which power is shared amongst multiple persons and offices, arranging institutions in relation to one another and the governed so as to enable good government over time. The dynamic that arises between institutions and the people, who have a share in government, should

[6] *Summa Theologiae*, I-II, q. 105, a. 1.

temper government, both in the sense of (1) disciplining it, and thus avoiding unconstitutional abuses of power,[7] and (2) strengthening it, such that it is a better means to secure the common good than government that lacks this dynamic. The two points are related for disciplined government is much more likely to be effective government, building social trust and helping unite the ruled and the rulers without need for widespread coercion. If the balanced constitution makes provision for disciplined, effective government, it should strike a balance not only between institutions and the people but also between conservative and radical modes of government. The stability of the balanced constitution is conservative, holding on to institutional forms that have proved their worth and, relatedly, helping to avoid rash action that fails to consider the importance of established goods. But the constitution must be a framework for government, which will at times require bold action to secure common good. And good government may require constitutional change, for which the constitution should make provision.

What of balance in how one governs? I have suggested that good government may have to be conservative *and* radical: concerned to preserve existing goods and to act prudently, but impatient with injustice and willing to act boldly for common good. In choosing how best to govern, rulers should consider, of course, how their choices will come to bear on the governed, on the mix of winners and losers that will result. Governing well requires the rulers to develop and defend a coherent, balanced program of government for common good, which is not to say they should attempt (incoherently) to balance public interest (general welfare) and individual rights or interests.[8]

III. The Changing Balance of the English Constitution

The history of the English (then British) constitution centers on royal authority and the changing way in which, and by whom, it is exercised. England had the very good fortune to develop a strong monarchy much earlier than many neighboring countries. Contrast France, for example, where for many years an absence of royal authority was disastrous, resulting in local abuses of power and low-level warfare. The authority of the English kings was wide but not unlimited, with periodic resistance to perceived abuses, with the great men of the realm asserting ancient rights that the king should honor as his predecessors had honored.[9] Sir John Fortescue brought Thomist thought to bear in the context of 15th century law and government, arguing that English kingship was political rather than regal, viz. subject to limits and the need for the assent of the political community to certain acts of law-making or taxation.[10] He contrasted France, by which time

[7] One might say, with some force, that an unconstitutional abuse of power is not truly an exercise of government. But it will at least be an abuse of the capacities of government.

[8] See John Finnis, "Human Rights and Their Enforcement," in *Human Rights and Common Good: Collected Essays, Volume III* (Oxford: Oxford University Press, 2011), 19; and Grégoire Webber et al., *Legislated Rights* (Cambridge, Cambridge University Press, 2018).

[9] Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Oxford: Hart Publishing, 2014).

[10] John Fortescue, *In Praise of the Laws of England*, ed. Shelley Lockwood (Cambridge: Cambridge University Press, 1997).

royal authority was robust and excessive (plenary), to the great misfortune of the French. The English kings ruled with and partly through parliaments, which were an instrument of royal authority, helping unite the realm in action, but of course also sharing authority with others. Henry VIII used his parliaments to break with Rome, shaking off an important limit on his authority and to that extent unbalancing the constitution, and yet not dominating Parliament on every point.

The Tudor constitution thus made provision for strong kings ruling in part with parliamentary assent. In the 17th century, this constitutional balance was lost, with the Stuart kings proving less adept at managing relations with their parliaments. Crown and Parliament each had the capacity to frustrate the other, prompting recourse to unconstitutional action. In two pivotal judgments, Sir Edward Coke attempted to discipline the King's authority by limiting his capacity personally to adjudicate disputes or to change the law of the land without parliamentary agreement.[11] These changes to the constitution would not be effective until taken up in the late 17th century constitutional settlement, which struck a new balance, reforming the King's prerogatives and settling authoritatively the need for parliamentary approval for taxation, legislative change and a standing army.[12]

The Bill of Rights 1689 changed the relationship between Crown and Parliament, ending the imprecision that had allowed each to insist on its lawful claim against the other, and making further royal government much more clearly dependent on parliamentary support. But monarchs, duly chastened by the Stuart debacle, continued to lead government in the following century, even as the locus of initiative and leadership began to shift towards parliamentarians. In the 19th century, the power of the Crown, including leadership within Parliament, came to be exercised by the subset of parliamentarians in whom others had confidence. Political support in the House of Commons was thus required to govern, with support in the Lords important, but not essential.

This constitution enabled radical action, including constitutional reform. The Commons was democratized by way of parliamentary reform and expansion of the franchise. The power of the Lords was limited by the Parliament Acts 1911 and 1949. Later in the century, the UK's membership of the European Union (as it was to become) overlaid the traditional constitution with a kind of outsourced constitution,[13] featuring novel hard-edged legal limits on the political authorities. The contradictions of membership led in due course to the referendum vote to leave the EU, a mode of decision widely attacked as unbalancing the constitution, displacing parliamentary for popular (populist) rule.[14] The UK's

[11] *Prohibitions Del Roy* [1607] 77 E.R. 1342; 12 Co. Rep. 63 and *The Case of Proclamations* [1610] 77 E.R. 1352; 12 Co. Rep. 74.

[12] The Bill of Rights 1689; see further John Finnis, "Judicial Power: Past, Present, Future," in *Judicial Power and the Balance of Our Constitution*, ed. Richard Ekins (London: Policy Exchange, 2018), 26, 48.

[13] Vernon Bogdanor, *Brexit and Our Unprotected Constitution* (London: Constitution Society, 2018).

[14] See the essays in *Constitution in Crisis: The New Putney Debates*, ed. D. Galligan (London: Tauris, 2017); and cf. Richard Ekins, "Restoring Parliamentary Democracy," *Cardozo Law Review* 39 (2018): 997-1017.

membership of the European Convention on Human Rights also worked a constitutional change, making human rights litigation, European and domestic,[15] an ever more significant dynamic in the exercise of public power. At the same time, the shape of the political community was changed by devolution, with authorities in Wales, Scotland and Northern Ireland introduced (or revived), serving in part as rivals to Westminster and Whitehall. In these ways, the balance of the constitution has changed, for better *and* for worse, over time.

IV. The Changing Balance of the American Constitution

The British constitution is quite clearly a work in progress. The same is true, it seems to me, of the American constitution, notwithstanding the importance of the Constitution. The Constitution vests legislative power, executive power and judicial power in Congress, the President and the Supreme Court. The framers expected the balance of powers to endure, as I understand it, partly by pitting ambition against ambition,[16] with each branch expected to fight its corner, so to speak, and equipped with the powers necessary to that end. This constitutional design predated the rise of political parties, which transformed the dynamics in question, further weakening the (wrongly) assumed close identification between members and institutions.[17]

With the Westminster Parliament in mind, the framers feared abuse of legislative power. The internal division of Congress and the presidential power to veto legislation reflect the structure of Parliament in the late 18th century but may have been envisaged to limit the risk that Congress would dominate. The fear that the legislative power would upset the balance of the constitution seems, in retrospect, misplaced, at least insofar as the Constitution made the legislative power (effectively shared between two chambers *and* the President) costly to exercise. It was perhaps therefore unsurprising that over time Congress became less and less central to deciding the policy of government, with the atrophy of Congress matched by the rise of the Presidency as the main political (elected) branch, best placed to represent the people and to act.

The legislative power has also been limited by the Supreme Court's assertion of power to review the compatibility of legislation with the Constitution. It is plausible to think some such power implicit in the idea that the Constitution asserts *legal* limits on all branches of government. However, judicial review equipped the Supreme Court to exceed the limits on its own jurisdiction, making new constitutional law in the course of adjudication, especially once the Court adopted the idea that the Constitution is a living constitution, open to

[15] The Human Rights Act 1998 gives domestic legal effect to the main provisions of the Convention.

[16] *Federalist*, No. 51.

[17] Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011); Richard H. Pildes, "Separation of Powers, Not Parties," *Harvard Law Review* 119 (2006): 2311-86.

elaboration over time regardless of intended meaning and regardless of the express provision the Constitution makes for its own amendment.[18]

American jurists and statesmen have, of course, often noted the problem of an over-mighty court, with Lincoln, for example, decrying the surrender of self-government to judicial supremacy.[19] Nonetheless, self-confident judicial review of legislation seems to have been a settled feature of American constitutional law for at least a century, with American politics increasingly reshaped accordingly, viz. presidential and Senate elections often turning on the question of judicial appointments. Competition for control of the marginal vote on the Supreme Court has emerged as one of the central dynamics of the American form of government.

Alongside the rise of judicial review, I note the rise of the administrative state. The expansion in the scope and reach of the state is clearly not just an American story. However, some jurists argue that the American administrative state involves unconstitutional delegation of legislative power and judicial power to agencies, unconstitutionally confers executive power on agencies over which the President lacks proper control, and that Chevron deference is an unconstitutional abdication of the judicial power.[20] Whatever the force of these arguments, for the time being it seems that agencies exercise a wide range of powers, subject to some presidential direction, some congressional oversight, and some judicial supervision. This is the new balance of the American constitution. It may not conform to the framer's expectations about how Congress, President and Court will interact, but seems to follow from how those institutions have chosen to exercise their powers in the centuries that have followed.[21] Such departure from originally envisaged design may well be consistent with lawful exercise of powers granted. Whether it is an improvement—a move towards a better constitutional balance—is a different question.

V. The Judicial Power

I turn now to a more direct consideration of types of institutional arrangements that characterize a well-balanced constitution, noting the contribution that each makes to maintaining balance. While many questions about how best to separate powers must be contingent on local circumstances, there is a standing general reason to separate the judicial power from political power, from the political authorities. More precisely, there is good reason to create robustly independent courts, enjoying security of tenure and authorized to settle disputes in accordance with

[18] Cf. Jeffrey Goldsworthy, "The Case for Originalism," in *The Challenge of Originalism*, ed. Grant Huscroft and Brad Miller (New York: Cambridge University Press, 2011), 57-60.

[19] Abraham Lincoln, "First Inaugural Address" (1861) in *Collected Works of Abraham Lincoln*, ed. Roy P. Basler et al. (New Brunswick, NJ: Rutgers University Press, 1953), 4: 268; see further Christopher Wolfe, ed., *That Eminent Tribunal: Judicial Supremacy and the Constitution* (Princeton, Princeton University Press, 2004).

[20] Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: Chicago University Press, 2014).

[21] Adrian Vermeule, *Law's Abnegation* (Cambridge, MA: Harvard University Press, 2016).

positive law. The point of independence is to free courts to adjudicate disputes fairly, without their decisions being distorted by pressure from litigants or third parties (including government or powerful private interests). Independent courts help uphold the rule of law by acting fearlessly to vindicate legal rights and duties, maintaining consistency with positive law in the midst of disputes, which of course encourages others outside the courtroom, including officials, to act consistently with law.

Separating the judicial power is a means to secure the good of impartial (fair) adjudication and to maintain continuity with the political community's past commitments, and thus to uphold the integrity of the past exercise of lawmaking power and of its future use. The means may fail if and to the extent that independent courts abuse their jurisdiction to act arbitrarily or corruptly. That is, the freedom of courts to adjudicate cases in accordance with positive law may be misused, setting aside positive law, or otherwise acting unfairly, for some extraneous purpose. When and how to discipline judges for arbitrariness or corruption is a difficult question, particularly in the context of political transition, where there may be good reasons to think that existing judges are not committed to impartial adjudication or scrupulous accordance with law.

The judicial power is a power to adjudicate disputes, not to interpret legislation (or the Constitution).[22] Judges will of course have to interpret legislation in order to identify the law that settles the dispute in question. But they have no distinct power to interpret as such. Instead, like other subjects of the law, they are obliged to discern the law the lawmaker has made, which should be applied to the facts of the case before them. Their application of the law may itself have lawmaking effect, if the judgments of courts are themselves a source of law, and courts may of course specify or elaborate otherwise underdeveloped or vague propositions. But it is a mistake, I suggest, to think that the constitution allocates a power of interpretation. Those constitutions, like the Hong Kong Basic Law, that do refer in terms to a power to interpret are to that extent anomalous, effectively conferring on the relevant institution a power to settle authoritatively how legislation or some other enacted provision is to be understood. In the case of Hong Kong, this power, which is separated from final adjudicative power and allocated to the People's Congress in Beijing, is an indirect lawmaking power, viz. a power to remake the law in question by asserting, in isolation from any particular occasion of its application, how it is now to be understood.

How does this intersect with the idea of authentic interpretation? As Endicott says,[23] the old learning that courts have no power to interpret legislation, which should instead be reserved to the lawmaker, has its attractions. It is driven by a concern that interpretation may provide an opportunity for new lawmaking and that to the extent one is unsure what the law requires, one should invite the lawmaker to clarify what was decided, rather than risk distortion. But of course, inviting the lawmaker to clarify what was decided is both impractical and itself likely to result in departure from what truly was decided at enactment. Separating

[22] Richard Ekins, "Objects of Interpretation," *Constitutional Commentary* 32 (2017): 21.
[23] Timothy Endicott, "Authentic Interpretation," *Ratio Juris* 33 (2020): 6-23.

judicial power and charging independent courts with the duty of upholding the law the lawmaker made is a better technique to ensure that enacted law is faithfully upheld, even when its meaning is disputed. Reasonable lawmakers see the merit of relying on courts to this end, a technique that dampens the temptation of making new choices, in new circumstances, under the guise of clarifying past choices. The case for authentic interpretation might be stronger, in principle, in relation to the Constitution, rather than to legislation, but the problem is often that the lawmaker has since disbanded.

For many jurists, the judicial power stands in opposition to the political authorities and is responsible for tempering the latter's exercise of will (fiat) by reason and principle. In English law, the late Sir John Laws and others have made this rather crude distinction, reasoning that courts should read legislation subject to established common law rights and principles unless and until the legislature spells out expressly its intention to depart from them.[24] This proposition usually marches in company with skepticism about legislative intent, which entails that courts are free to read legislation as they see fit unless this would involve outright textual contradiction (and maybe even then). This is not a reasonable account of the judicial power. Courts should be slow to conclude that the lawmaker intends to qualify or displace legal rights or basic principles, but should also recognize the lawmaker's constitutional authority to decide what the law should be.[25] Insofar as courts ignore or subvert legislative intent in the course of purporting to interpret a statute they misuse the judicial power and undercut the rule of law.

Sir John Laws argues that courts maintain the constitutional balance by tempering legislation.[26] I counter that the constitutional balance requires them to uphold the law Parliament makes, which requires them to infer legislative intent in the context of enactment, which includes relevant constitutional principle. It is a mistake for British courts to take themselves to be the guardians of the constitution.[27] They have an indispensable role to play in upholding settled constitutional law, law that recognizes Parliament's substantively unlimited lawmaking authority. They mistake their role and injure the rule of law when they collapse constitutional law and practice, remaking requirements of constitutional convention into justiciable questions of law.[28]

In the American constitution, the Supreme Court is obliged to vindicate constitutional law against Congress (and the President). Still, it does not follow that the Court is *the* guardian of the constitution, for there may be questions of constitutional law over which the Court cannot sensibly exercise jurisdiction (political questions?) and questions of constitutional practice which are not for a court

[24] Sir John Laws, *The Constitutional Balance* (Oxford; Hart Publishing, 2021).
[25] Ekins, *The Nature of Legislative Intent*, 245.
[26] See note 24 above and his Hamlyn lectures, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014).
[27] See John Finnis, "Appendix: 'Guardians of the Constitution,'" in Ekins, ed., *Judicial Power and the Balance of Our Constitution*, 129-131.
[28] Richard Ekins, "Constitutional Practice and Principle in the Article 50 Litigation," *Law Quarterly Review* 133 (2017): 347-53.

to consider. These limits aside, the Supreme Court does seem to exercise a roving jurisdiction over government, developing, elaborating and inventing constitutional restrictions in order to protect political or topical minorities from (imagined or real) majoritarian abuse. The argument runs that leaving to Congress or the President responsibility for understanding and observing constitutional limits, say in relation to the Bill of Rights, would be to let them be judge in their own cause. This may mistake the nature of the restrictions in question and the nature of the process by which the political authorities (jointly) determine what should be done.[29] If the restrictions are open-ended and imprecise, they call for specification in the course of lawmaking. While the Supreme Court might be well-placed to uphold clear limits on the authority of Congress or President, it is not well-placed to question the merits of how best to act when the limits are vague.[30]

Misuse of judicial power puts constitutional balance in doubt. If courts go beyond rigorous adherence to settled law and assert a much wider jurisdiction to supervise (second-guess) the political authorities, they compromise their core duty to adjudicate disputes fairly in accordance with existing law and trespass on the lawmaking authority of others. In this way, courts may invite political contestation into the courtroom, which not only chips away at the rule of law but also distorts political practice more widely, making control of the courts into a rational political objective. In a well-balanced constitution, the independence of courts is secured in part by a widely shared understanding of their indispensable but properly limited constitutional role.[31]

VI. Executive and Legislative Power

The reasons to separate judicial power do not apply to legislative and executive power. There is good reason to avoid concentrating executive and legislative power in one person. If conditions permit, the reasonable king will summon a parliament, only changing the general law of the land or levying taxes with its assent. Sharing decision-making about legal change more widely helps improve lawmaking and avoid tyranny; it also helps enable self-government. But how exactly are executive and legislative power to be shared or otherwise separated? Jeremy Waldron argues that the distinctive virtue of the separation of powers is that it makes possible differentiation in government, with any exercise of coercion over a person preceded by a series of stages of distinct government action, in which each type of power is properly exercised.[32] Waldron is right to reflect on the distinct virtue of different modes of governing, and on the particular demands that

[29] See Jeremy Waldron, "Legislatures Judging in Their Own Cause," *Legisprudence* 3 (2009): 125-45; and Webber et al., *Legislated Rights*, 113-114.

[30] Richard Ekins, "How to be a Free People," *American Journal of Jurisprudence* 58 (2013): 163-82.

[31] Graham Gee, "What is Judicial Independence? Some Common Mistakes about the Relationship between Judges, Law and Politics," Keynote Lecture, Policy Exchange, London, 9 February 2022.

[32] Jeremy Waldron, "Representative Lawmaking," *Boston University Law Review* 89 (2009): 335-55.

arise in the context of, say, imprisoning someone for wrongdoing. He is wrong, however, to decry executive involvement in lawmaking as some kind of constitutional impurity.[33] On the contrary, there is a standing need for executive and legislative power to be closely coordinated.

Governing well requires the exercise of a range of powers to promote the common good. The person or persons responsible for ruling must have the capacity to act decisively to defend the realm from foreign attack, to keep the peace, and to uphold the law. They must also be able to introduce and oversee changes in how the community is coordinated, addressing problems and opening up new opportunities for people to live well together. Ruling involves taking responsibility for the common good and leading others in joint action to defend or promote it. The ruler provides initiative in government and should be supported in governing, which is to say empowered and encouraged to take the action necessary for common good. The ruler(s) should also be questioned, challenged and limited in exercising said powers or contemplating relevant action. The close entanglement of executive and legislative power is essential to these ends.

I question whether it is possible in principle to make stable provision for genuinely coordinate authority: viz. a legislature to take responsibility for lawmaking and an executive to take responsibility for other modes of governing. Whoever directs government must take a close interest in legislating, because changing the existing law is necessary in order to make provision for any one of a number of reasonable plans for government. Those who govern cannot be indifferent to the adequacy of the legal regime—the mix of statutory powers, duties and limitations—under which they operate. Conversely, those who have formal authority to enact legislation or to refuse to enact it are very likely, for good reason (concern for common good), to take a wider interest in governing, not least since the merits of legislative proposals will often be impossible to divorce from wider policy questions. The persons with direct responsibility for governing, who direct the great (and lesser) offices of state, are well-placed to see the need for legal change, to work up proposals for change, and to make a public case for their merits. This is not to say that the (other) members of the legislature are passive recipients of proposals moved by officials and their masters. The flow of information and ideas runs in both directions. The point is that distinguishing sharply between governing and legislating is not possible, even if course only some acts of governing involve (primary) legislation and are thus dependent on formal legislative assent.

The government rightly enjoys far-ranging powers in relation to the defense of the realm, the conduct of foreign policy, and a host of other modes of governing. Still, the government's freedom to act is bounded. There is much that it cannot do unless and until the legislative power is exercised, both in relation to legal change and taxation and supply. Withholding assent to new taxation is an important discipline but withholding supply is no longer really feasible in view of

[33] Ekins, *The Nature of Legislative* Intent, 164; see also Richard Ekins, "Legislatures," in *The Cambridge Handbook of Constitutional Theory*, ed. Richard Bellamy and Jeff King (Cambridge: Cambridge University Press, forthcoming).

the scope of state activity and its centrality to public life. However, withholding political support, including support for legislative proposals, or withdrawing confidence, is a more promising option. The British approach is, of course, to structure the formation of government so that whoever forms a government enjoys the confidence of the House of Commons and must work with other parliamentarians in order to advance a program of government.[34] Parliament is intimately involved in lawmaking, both in relation to primary and secondary legislation, and the government is constantly exposed to political question, criticism and challenge. If or when the working relationship between government and Parliament breaks down—that is, when a majority of members of the House of Commons are willing to withdraw confidence (which includes failing to support the government's main legislative proposals)—the relationship comes to an end. Either a new government is formed or, more likely, Parliament is dissolved, and an election held, which returns a new Commons and a new set of possibilities for parliamentary government.

The working relationship between executive and legislative power in the American constitution is obviously much less close. The Constitution makes provision for independent, electorally uncorrelated institutions (at least in part), such that it is much more difficult to secure cooperation between Congress and President than is the case between Government and Parliament. It is no surprise then that rather than working closely on an ongoing program of government, which it broadly supports, Congress instead from time to time grants authority to the President or creates agencies vested with considerable power in relation to some field of public life, agencies over which control is then exercised at a distance by both Congress and President. The power to govern is thus framed by this legislative and executive interaction.

The American approach carries with it a much greater risk of inaction.[35] While legislative and executive power are not entirely separated—the President has a share in the legislative power by virtue of the veto and Congress can attempt to steer the executive power in various ways—the lack of provision for coordination makes responsible government difficult to achieve. Friction, or even outright hostility, between one or both chambers of Congress and President may be relatively likely, in which case the temptation to secure legal change, or active government, by other means may be very strong. Outside the United States, presidential government has often collapsed for this reason.[36] In Britain, the Fixed-term Parliaments Act 2011 introduced a similar dynamic, removing the prerogative power of dissolution. In 2019, the Government effectively lost the confidence of the House of Commons, which was unwilling to support its Brexit policy.

[34] Richard Ekins and Stephen Laws, *Endangering Constitutional Government: The Risks of the House of Commons Taking Control* (London: Policy Exchange, 2019); and *Securing Electoral Accountability* (London: Policy Exchange, 2019).

[35] Philip Pettit, "Varieties of Representation," in *Political Representation*, ed. Ian Shapiro et al. (Cambridge: Cambridge University Press, 2010), 82-87.

[36] Juan Linz, "Presidential or Parliamentary Democracy: Does it Make a Difference?," in *The Failure of Presidential Democracy*, ed. Juan Linz and Arturo Valenzuela (Baltimore: Johns Hopkins University Press, 1994), 3-87.

However, the Commons refused formally to withdraw confidence and the 2011 Act meant that the Government was unable to call an early election to break the impasse. This encouraged a cross-party group of parliamentarians to legislate to direct the Government's foreign policy, foisting on the Government a policy which it opposed and for which it was unwilling to take electoral responsibility. This stratagem risked provoking the Government to take its own unorthodox measures in response, proroguing Parliament before legislation could be enacted or even advising Her Majesty to withhold assent.[37] That is, the relationship between executive and legislative power had broken down and the usual means of restoring a working relationship were not available, which risked disaster. The balance of the constitution was unsettled and was only restored after the 2019 general election, in which it bears noting both main parties campaigned on a commitment to repeal the 2011 Act.[38]

VII. The People

The need for government comes before the question of who should govern and in a well-balanced constitution popular participation helps support good government and realizes self-government. Thus, in a well-ordered constitution, the people have a share in government. In governing the community, rulers should enjoy the support of the people. The power to govern is not somehow a power implicit in the people, which is transferred from them to those who rule, even if it is true that the willingness of the people to support one or other putative ruler may make it the case that he or she is able to rule and thus is entitled to rule. Legitimate government secures the common good of the political community in question and ideally will make provision for the people to participate in government, which will to that extent be self-government. But government should not wait on popular consent, which cannot reasonably be withheld if no alternative is available. What then is the place of the people in a well-balanced constitution?

In the British constitutional tradition, the rationale for Parliament's centrality to the constitution has long turned on its capacity to represent the realm. While Parliament has often been more oligarchic than democratic, it has assembled the community in a form fit for reason and choice, and the representative rationale has helped drive parliamentary reform and expansion of the franchise. In the American constitutional tradition, the people are ostensibly the font of authority. Congress, President and Supreme Court may each plausibly claim to be the people's agents;[39] even if, say, Congress and President agree, they may not necessarily speak for the people. The King-in-Parliament, led by a government that enjoys the confidence of a majority of the House of Commons, is able to speak authoritatively, although of course its choices may be undone by successive Parliaments and may be questioned or challenged in the country at large.

[37] These measures would have been unorthodox and undesirable but lawful.
[38] The Dissolution and Calling of Parliament Act 2022 repealed the 2011 Act.
[39] Victoria Nourse, "Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers," *Georgetown Law Journal* 99 (2011): 1119-77.

I have said that a well-balanced constitution will share power with the people. But one might reason that the people are a power to be checked, or even that part of the point of a constitution is to insulate them from political power, making provision for government to be carried out in their (our) name, but not by them (us). The concern of the framers of the American constitution did seem in part to be to interpose a layer of institutional complexity between popular sentiment and government action, in order to filter out irrational passion and leave cold reason.[40] In more modern form, constitutional theorists routinely take for granted that a main point of constitutional government is to limit political majorities, to prevent them from acting freely.[41] I say that the point of constitutional government is neither to maximize nor to minimize popular control. Instead, one should share power with the people in a way that makes provision for good government (oriented towards, and capable of securing, common good), which includes self-government, viz. the good of a community taking responsibility for its future and acting jointly to this end.

In his first inaugural address, President Lincoln said: "A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people."[42] The minority enjoys the security that the majority will be limited by express constitutional law, which only the whole people (acting by way of the Constitution) have authority to change. (Judicial supremacy threatens constitutional government because it supplants that authority.) Within those limits, Lincoln maintains, majority will must prevail or government must cease. Lincoln's stress on the extent to which the majority changes easily is important. The majority in question is not a fixed camp, or worse a conspiracy for its own advantage, but is simply the view taken (the decision supported) by the larger part of the whole group, a group which participates in deliberation and argument about what should be done, within which majorities form and reform constantly.[43] This will not always be the case, of course, for there may be semi-permanent minorities, where salient racial or religious minority status translates into entrenched political minority status.[44] The risk, in such cases, is that the majority may act for private good rather than common good. Managing this risk, integrating relevant minorities (many and varied) into a wider public conversation, in which they may join or leave political coalitions, is a responsibility of rulers and ruled alike.

The old fear of popular involvement in government takes modern form not only in intellectual disdain for so-called majoritarian rule but also and especially in fear of (and contempt for) populism. It is no easy task to give content to the

[40] *Federalist* No 49.

[41] See for example Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016) or Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996).

[42] Lincoln, "First Inaugural Address," 268.

[43] Finnis, "Human Rights and Their Enforcement."

[44] For further discussion, see Webber et al., *Legislated Rights*, 181-200.

idea of populism, but in brief one may frame it as an attempt to rally the people (the masses) against their rulers (elites, institutions). The attempt may underplay the complexity of the people (and of course elites are people too!), or even unjustly frame political disagreement as a kind of betrayal. Populist movements are impatient with institutions, or at least with political incumbents, impatience that may well be justified insofar as rulers are acting for private rather than common good or aim to prevent the people having a share in government. The people need institutions to be well-governed, but may rightly demand reformed institutions and rail against the abuse of incumbents. The challenge for any mass political movement is how to address abuses (including how to identify them accurately) without destroying wider goods. The best response to concern about populism, I suggest, is thus to reflect on why institutions are exposed to widespread public dissatisfaction, which may be exploited by ambitious politicians, and to strive to give assurances to voters that the government acts for their good and will engage with them as persons with a share in authority, rather than simply as subjects.

Popular involvement in government sometimes take the form of plebiscite or referendum. This is a poor means of general lawmaking and should be avoided in consequence. It is more attractive, at least in principle, in the context of constitutional change, where the change in question concerns constitutional identity (the shape of the political community) or where there are strong reasons not to let parliamentarians freely decide what should be done. In Australia, support in referendum is required before the Constitution is changed, which is a powerful brake on change. In New Zealand, the decision to reform the electoral system, and the choice of the reform in question, was made by way of a series of two referendums. Parliament made provision for them, responding to widespread public disquiet about the extent to which the old electoral system had enabled the formation of governments without broad-based political support, which had then embarked on far-ranging social and economic reforms without sufficient political opposition. That is, the public took the view that the constitution was out of balance, that in a small unicameral Parliament the risk of high-handed government should be mitigated by introducing proportional representation.

In the United Kingdom, the constitutional referendum has been deployed in the context of Scottish secession and, of course, membership of the European Union. For many scholars,[45] the use of the referendum was a failure of parliamentary democracy, abandoning responsibility and setting in motion a poisonous political dynamic in which Parliament was set against the people. In this way, the argument runs, popular sovereignty was substituted for parliamentary sovereignty and the constitution turned on its head,[46] with the general public wrongly invited to make, and then to insist upon, a decision that should not have been for them. I take a different view.[47] The decision to hold the referendum was made by a

[45] See Galligan, ed., *Constitution in Crisis*.

[46] Vernon Bogdanor, "Europe and the Sovereignty of the People," *Political Quarterly* 87 (2016):348-51.

[47] Ekins, "Restoring Parliamentary Democracy"; and Richard Ekins, "The Constitutional Dynamics of Brexit," *Notre Dame Journal of International and Comparative Law* 12 (2022): 46-74.

responsible government, with the near-unanimous support of Parliament, aiming to address a serious public question by fair means. The question was forced on the agenda by competitive politics, confirming that over time parliamentary democracy does engage with the concerns of the public. The political classes undertook to honor the outcome of the referendum, which was a fair means of settling a major question about the constitutional future of the country. The problem was that some parliamentarians, and others in the social and economic elite, were unwilling to act honorably, and instead sought to frustrate the decision to leave.

The referendum was a major political event which scrambled political allegiances and placed considerable stress on the constitution. It would have been better, had it been possible, for the decision to leave the EU to have been made by a government that had won a general election on a commitment to leave, with the decision then supported by Parliament and perhaps also the general public in a referendum. But making the decision to leave by means of the referendum was not an improper displacement of parliamentary government by plebiscitary democracy, even if the resulting political crisis did briefly put the constitutional balance in some jeopardy.

The people have a vital place in maintaining the balance of the constitution. The political authorities should be responsive to them, attempting to secure their continuing electoral support and anxious to promote their common good. The institutions of parliamentary or presidential (congressional?) government place the rulers at a distance from the ruled, but force the former to account to the latter. Under some conditions, electoral accountability may distort the reasoning and action of government, but it is an invaluable mechanism for focusing government on the good of others, for humbling (chastening) rulers, and for replacing those who act poorly. The people are not often directly the authors of the laws under which they live, but in choosing, supporting and challenging those who govern, through electoral competition and public deliberation, they exercise an editorial control such that the action of their institutions is their means of self-government.

VIII. International Affairs

The executive power to represent the political community in international affairs is an important power, for which the constitution should make provision. However, the power risks being abused to unsettle the balance of the constitution. In thinking about the power, one should note the changing character of international affairs, and the breadth and depth of different types of international commitment. In particular, note the rise of supra-national institutions, which are creatures of treaty and yet have a dynamic character of their own, capable of rising above or outrunning the treaty commitments from which they spring. The risk is that the government's power to enter treaties, or to participate in international institutions on behalf of the country, is used in ways that either escape the control which the constitution otherwise provides for executive action and/or

results in changes to the constitution that cannot be justified and cannot be either questioned or reversed.

In Australia, the federal government's power to enter into treaties has effectively resulted in expansion of federal legislative competence, displacing the constitutional balance otherwise mandated between state and commonwealth.[48] One might say that the Constitution itself provides for such change, but the provision in question long predates the modern expansion of international law. Lawful use of the power might thus unsettle the balance between institutions, and communities, that the Constitution otherwise establishes.

In the UK, the balance of the constitution has been changed by way of treaty commitments, especially in relation to European integration. Consider first the European Convention on Human Rights (ECHR), which the UK supported and signed in part to help support fledgling democracies in post-war Europe. The jurisdiction of the European Court of Human Rights (ECtHR) arose later, and the UK made itself subject to such, by executive action, without much apparent thought. Decades later, the ECtHR began to conceive of the ECHR as a living instrument, and for the past four decades has merrily departed from the terms the UK agreed in 1950.[49] The UK has continued to participate in the ECHR, likely reasoning that the costs of withdrawal were excessive, and enacting the Human Rights Act 1998 in order to minimize the likelihood of inconsistency between domestic law and the case law of the ECtHR. The UK's subjection to the jurisdiction of the Strasbourg Court has been a significant constitutional change, even if one that falls well short of imposing hard-edged limits on Parliament's authority. Importantly, for present purposes, it was a change, or series of changes, brought about by exercise of executive power, with relatively little public attention or discussion, precisely because it concerned international affairs, other than in a high-profile context such as peace and war.

Consider next the EU, as it now is, which the UK entered on 1 January 1973 and left on 31 January 2020. The significance of entry was underplayed, but nonetheless was a major political moment, with extensive discussion and challenge in Parliament. The Government did not have a free hand in deciding to attempt to enter the EU or in ratifying the treaties in question. The Opposition challenged the policy and when it came into office in the subsequent general election it made provision for a referendum on membership, a technique adopted then as later because of the importance of public assent and the internal party conflict on the question. Membership of the EU was always constitutionally objectionable, to my mind, but, as John Finnis has powerfully argued, in the process by which the UK decided to enter the EEC, as it then was, one saw a well-balanced constitution in action.[50] The EU treaties create institutions which

[48] John Finnis, "Power to Enforce Treaties in Australia—The High Court Goes Centralist?," *Oxford Journal of Legal Studies* 3 (1983): 126-29.

[49] John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR," in *Lord Sumption and the Limits of the Law*, ed. Nicholas Barber et al. (Oxford: Hart Publishing, 2016), 73-120.

[50] John Finnis, "*Brexit* and the Balance of Our Constitution," in *Judicial Power and the Balance of Our Constitution*, ed. Ekins, 134.

expand and develop a body of law over time. Thus, the UK was making itself party to a dynamic supra-national legal order, driven by institutions that shared a common centralizing agenda and which were willing to bend the treaties to this end. In addition, the body of law has been expanded over time by way of further treaty commitments and decisions of European institutions in which the Government acts, but from which Parliament (let alone the British people) is largely absent.

The constitutional problem was quickly apparent, viz. that the Government had something of a free hand in its dealings with Europe, free that is in relation to the usual disciplines of parliamentary and electoral accountability. Legislation was enacted in 1978 and then again over time to limit this freedom, to cut down the executive's power to change the shape of European law and its impact on domestic law without adequate constraint. In particular, the European Union Act 2011 sharply limited the Government's power to enter new EU treaties unless and until Parliament legislated in support and the people voted in a referendum in support.

Even the Supreme Court attempted to impose some limits on the juggernaut of European law, asserting in two judgments in 2014 and 2015 that the European Communities Act 1972 might not be interpreted to give domestic effect to *all* acts of the EU institutions. That is, the Court contemplated refusing to give effect to European legislation or judgments of the Court of Justice of the EU that either could not be squared with other fundamental parts of the UK constitution or that were brazen departures from the EU treaties and thus ultra vires. In these judgments, the Court was clearly imitating the German Constitutional Court, which had famously, and it seems effectively (at the time), refused to accept the Court of Justice's claims about the supremacy of EU law. The point is that the constitutional complications of EU membership were ever more apparent, in the run up to 2016, especially since the UK increasingly found itself on the margins of the European project.

The decision to leave the EU was justified, to my mind, in order to restore the balance of the constitution, vindicating parliamentary democracy, cutting the UK loose from the jurisdiction of the over-mighty Court of Justice of the EU, and preventing expansion of executive power. For the time being, the UK remains subject to the jurisdiction of the ECtHR, for the ECHR is a separate body of law from the EU treaties (the Council of Europe is not the EU). There is a strong case to be made for withdrawal from the ECHR or in the alternative for a robust policy of principled non-compliance with judgments of the ECtHR that brazenly misinterpret the ECHR. Arguably, prudent foreign policy requires toleration, at least for a time, of constitutional imbalance. But the point remains that abuse (or overuse) of the power to enter treaties may risk undoing the carefully worked up disciplines of parliamentary democracy, upsetting the balance of the constitution.

IX. Politics, Partisanship and Moderation

Political contest about what should be done is an indispensable dynamic of good government. Political control over what government does is a necessary means to self-government. One upsets the balance of the constitution insofar as one insulates government from politics. The European project is in part an attempt to govern without politics, to govern by rule rather than by ruler. The predictable result has been what Peter Mair terms "ruling the void,"[51] in which mass democracy is hollowed out and replaced by a politically insulated technocracy. So, one should be very slow to conclude that politics is somehow the enemy of constitutional government.

It is also true and important to stress that not *all* offices or arrangements should be subject to the same political discipline as parliamentary or congressional government. Politicization of the courts is a trend that should be deplored and resisted. It is a trend driven in part by skepticism about the political process, but is self-defeating for insofar as courts are required, or choose, to answer political questions they will quickly become objects of political interest and control. Beyond the courts, there is a reasonable (if certainly not iron cast) argument for central bank independence and a strong case for the police to enjoy operational independence. In addition, there is much to esteem in the tradition of civil service neutrality, pursuant to which the British state stands ready to act diligently in service to the policy agenda framed by responsible ministers. In each case, the challenge is to enable effective government without losing ultimate political oversight and control. Civilian control of the military is obviously important, yet this control should be exercised in ways that avoid undercutting the military's effectiveness as a fighting force.

The temptation for courts, civil service, police, central banks and the armed forces may be either to exploit their relative insulation from political interference for political advantage or to compensate for the failings of the political authorities by going beyond their jurisdiction.[52] I say this is a temptation because I think in most cases it will be a mistake (worse: a vain delusion) to think that one can compensate in this way—competence in one's narrow technical field is no guarantee whatsoever of competence, let alone virtue, more broadly, especially when the problem in question is political, and requires leadership, imagination and willingness to take responsibility for outcomes. In some cases, one institution may have to make decisions about what should be done because the elected government has not acted. This is quite different from thinking that government has not

[51] Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013).

[52] The temptation may have some grounding in (bad) constitutional design. In his doctoral research in the 1960s, Alfred Stepan, the great comparative political scientist, "studied all five Brazilian constitutions since 1891 and the debates surrounding them. He was astonished to find in all of them a clause which said that the military was responsible for maintaining the correct balance among the executive, legislative and judicial branches of government." See Archie Brown, "Alfred Stepan" *Biographical Memoirs of Fellows of the British Academy* 18 (2019): 419. The clause was often opposed by the military but seems to have been included to lay the ground for political elites to appeal to the military to carry out a coup d'état. The thesis became Stepan's *The Military in Politics: Changing Patterns in Brazil* (Princeton: Princeton University Press, 1971).

acted well, especially since in making the latter evaluation there is a strong risk one will act rashly, without understanding the problem or being subject to discipline in acting. When judges, civil servants, police officers, central bankers, or soldiers attempt to frustrate policy choices of which they disapprove, beyond giving (private) advice to responsible authorities, they pick away at constitutional government, encouraging popular and political distrust and hostility.

In exercising their share in government, the people act politically—debating ideas about how we should live together, evaluating rulers and would-be rulers and programs of government. Disagreements between citizens are a central feature of politics.[53] However, if democratic politics is to be at the heart of a well-balanced constitution, as it should, disagreements between citizens need to be nested within a wider framework of political unity and friendship. For without such a framework, groups of citizens will not be inclined to continue to share with others, to alternate in government with some assurance that all share a concern for the same commonwealth.[54] Relatedly, citizens should be charitable, slow to conclude that their opponents are wicked or hypocritical, and quick to acknowledge them as (mistaken, wrong-headed) compatriots, with whom they share much despite important political disagreements. There may be a balance to be struck between partisan intensity and apathy. That is, a political community in which citizens are disengaged and demobilized is not in a good way; but the same may be true if citizens are too partisan, too quick to see every aspect of public life through the lens of political contest. Partisans are important; political parties matter. But one needs also non-partisans, open to appeals from different partisans, who should themselves also be open to changing their minds.[55]

The shape of a community's political institutions will partly shape the politics that result. But much turns on the temper of the people, on the extent to which partisan contest has a rightful but limited place in the life of a political community which shares much despite its disagreements. A people that has such a "spirt of moderation", as Learned Hand puts it, is well-placed to support and maintain healthy institutions, to exercise self-government over time. His reflection is worth quoting at length:[56]

> What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of civilization, delicate and easily overrun by our sinful human nature; we may even now be witnessing their uprooting and disappearance until in the progress of the ages their seeds can once more find

[53] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

[54] John Finnis, "Responses and Reflections," in *Reason, Morality and Law*, ed. Robert George and John Keown (Oxford: Oxford University Press, 2013), 563.

[55] The toxic dynamics of social media should thus be a cause of major public concern. For a sketch of the problem, see Jaron Lanier, *Ten Arguments for Deleting Your Social Media Accounts Rights Now* (New York: Vintage, 2018). His call for voluntary withdrawal may be inadequate in view of the scale of the problem, which cries out for prohibition.

[56] Learned Hand, *Spirit of Liberty* (New York: Knopf, 1952).

some friendly soil. But I am satisfied that they must have the vigor within themselves to withstand the winds and weather of an indifferent world; and that it is idle to seek shelter for them in a courtroom. Men must take that temper and that faith with them into the field, into the market-place, into the factory, into the council-room, into their homes; they cannot be imposed; they must be lived.

It must be true that the courts cannot and should not be made responsible for nurturing this spirit. But it may be that the courts, like other institutions, are able to help nurture it. The courts may do so in part by making clear the virtues of upholding past commitments, which make space for future choice, the merits of which must be decided by the people through their (other) institutions. The steadfast refusal of courts to displace the latter would itself be instructive.

X. Amendment

The constitution is a framework for government over time. It should be stable but not static, for changes must sometimes be made even if only to restore a balance that was intended and yet, perhaps by lawful exercise of power, has since been lost. Alternatively, the balance that was envisaged by some earlier constitution-maker, or by past generations, may now reasonably be replaced by some alternative institutional balance, which in our judgement is more likely to secure good government and self-government. I say "may now reasonably be replaced," which takes for granted that the constitution makes provision for such change. It is part of my argument that any well-balanced constitution will make such provision, for if not it fails to do what the constitution should do, which is to frame reasonable self-government, and, moreover, it will disarm the people from defending their common good by revising their constitution.

The British constitution centers on parliamentary sovereignty, which both makes provision for radical constitutional change by way of any Act of Parliament and forecloses one type of radical change, which is any change that would bind Parliament's successors. The rationale for this constitutional provision is in part that at any point in time the polity should be free to choose its laws and that entrenching legal provisions, even constitutional provisions, would be unjust. The result is a constitution that, parliamentary sovereignty aside, can be changed quite directly by way of Act of Parliament. Yet much of the constitution continues to have the legal form of a medieval monarchy taken together with the conventions that make responsible government possible. That is, the constitution combines a host of legal rules, all subject to legislative amendment or repeal, with a well-developed body of political custom, which could be displaced by law but cannot be changed as custom by means of law. The conventions of the constitution are deeply settled. When some have been breached, such as the financial privileges of the Commons, legislation has reinforced the convention, making available legal means to avoid unconstitutional action.

Legislation may always be repealed or amended, which changes what is politically possible: a determined political party, with electoral support, has the means to hand to make radical change, such as, for example, repealing the European

Communities Act 1972 or the Human Rights Act 1998. Parliamentary sovereignty introduces a kind of self-tempering dynamic, such that lasting change requires political (and often social) change.[57] Entrenching change may turn more on changing the facts on the ground than on the formal powers of Parliament. Withdrawal from the EU was difficult and costly because of the depth and complexity of the UK's connection to the EU legal order. Likewise, it is the depth and intensity of Scottish support for their devolved institutions that would make it political costly for Parliament to abolish them, if Parliament were so minded.

It is clearly possible to imagine Parliament attempting to abrogate its sovereignty, enacting legislation that would limit the authority of its successors. The attempt will fail unless and until it is accepted by citizens and officials alike that a new constitutional settlement has been reached. In Australia and Canada, the authority of the Imperial Parliament was deployed to institute a federal compact in which neither federal nor state parliaments enjoyed substantively unlimited lawmaking competence. When the last legal connections to the UK were severed in the 1980s,[58] the Australian and Canadian constitutions were clearly entrenched against unilateral legislative change. In Australia, the Constitution is open to change by way of federal legislative action and referendums across the country, in which national support and a support of a majority of states is required. This is a difficult but not impossible means to make change—proposed changes are more likely than not to be rejected, but change is clearly possible. In addition, quite apart from changes to the Constitution, legislation may be enacted that changes the small-c constitution.

Is it still possible to change the American constitution? Yes, in the sense that the constitution changes by way of judicial interpretation of the Constitution, enactment of legislation that changes the shape and structure of institutions, and developments in political custom. No, in the sense that it is hard to imagine the Constitution ever again being formally amended. The country is too finely divided—the spirit of moderation too far gone—for proposals for change to have any prospect of success. This is contingent and with better (more imaginative) political leadership and a different set of social and economic conditions change would be possible. But for the time being it is not, which is itself highly damaging, for it means that the Constitution may be experienced more as a straitjacket than a frame for self-government and the political imperative to act by way of unconstitutional means may rise.

I do not say that each generation should make their constitution anew.[59] In many polities, we receive from our forebears a constitution and a constitutional tradition for which we should be grateful. But we may need to change the

[57] Richard Ekins, "Legislative Freedom in the United Kingdom," *Law Quarterly Review* 133 (2017): 582-605.

[58] See further John Finnis, "Patriation and Patrimony: The Path to the Charter," *Canadian Journal of Law & Jurisprudence* 28 (2015): 51- 75; and Richard Ekins "Constitutional Principle in the Laws of the Commonwealth" in George and Keown, eds., *Reason, Morality and Law*, 396-412.

[59] Cf. Jeff King, "The Democratic Case for a Written Constitution," in *The Changing Constitution*, 9th ed., ed. Jeffrey Jowell and Colm O'Cinneide (Oxford: Oxford University Press, 2019), 421-41.

constitution, including an entrenched Constitution, if we are to be governed well, either because the constitution we inherited requires reform or because the way in which it is changing calls now for a resetting of the balance. A people that lacks this option is not at all well-placed to maintain constitutional government: it is vulnerable to unconstitutional action or to lawful exercise of power that distorts the constitutional balance.

XI. Conclusion

Why consider the *balance* of a constitution? The answer, I think, is that the idea of a balance between and within institutions and the people helps to illuminate what it is to be governed well, a state of affairs in which initiative and challenge, fidelity and change, conservative and radical, are in right relation to one another, in which there is a healthy tension amongst those who share power. The balance of any particular constitution is always somewhat contingent. It is a pattern of institutional dynamics that has made, and continues to make, it possible for this political community to be governed well—to govern itself for common good. The balance may change over time, as a potted review of Anglo-American history suggests. The framers may have in mind a certain balance, which may not endure, not only because of unconstitutional action, but also because of lawful exercise of power or changes in social and political conditions. In some cases, this may call for action to restore the balance that has been lost; in other cases, the responsible (prudent) course of action may be to find a new balance. In discerning the balance of the constitution, or deliberating about how to restore or improve it, one should recall the contribution that independent courts may make by upholding settled law, the importance of intelligently coordinating legislative and executive power, and the role of the people as participants in constitutional government. The balance will be put in doubt if the spirit of moderation is lost, if the people are alienated from their government or if institutions are able to let slip the disciplines that should temper their action. The well-balanced constitution is stable but should also be to open to deliberate, reasoned change. If or when such change is made impossible, whether by reason of treaty commitments, judicial misinterpretation or an unworkable amendment procedure, the community is unjustly disarmed from exercising self-rule in revising, restoring or defending the balance of their constitution.