

Three Waves of Political Constitutionalism

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I. Introduction

It is now commonplace to examine the evolution of political constitutionalism in two distinct phases. The first phase was that which – as Loughlin says in his contribution to this collection – culminated with the delivery by JAG Griffith of his famous Chorley Lecture, ‘The Political Constitution’.¹ In that lecture, Griffith sought to describe *and to defend* the United Kingdom’s political constitution by adopting a functionalist methodology against those – at that time from the political right - who agitated for reform in ways that sought to contain the radical potential of political action through law. The second wave was that which emerged in reaction to the rise of (so-called) legal constitutionalism, given form by the aggressive development of the common law as well as the transfer of power from parliament to the judiciary that was given form in the Human Rights Act 1998 and in the concurrent devolution of power to Scotland, Wales and Northern Ireland. The task for Adam Tomkins and Richard Bellamy in particular was to examine the failure of the political constitution to resist these advances and to propose as a solution a normative case for Parliament as the pre-eminent institution.² In this paper, we contend that a third – and in our view a *reflexive* - phase of political constitutionalism has emerged. Whereas the protagonists of the first and second waves adopted a defensive posture, setting out their stall *against* the advance of the legal constitution, those of the third wave have instead looked inwards and engaged with the political constitution on its own terms. Neither a functionalist interrogation of the location and exercise of power, nor a normative exercise directed at the legitimacy of political institutions, theirs is an exercise in *understanding*: understanding not only the grammar of public law but in so doing understanding precisely what it is that is *political* about the political constitution. What is at stake here is the freeing up of a political constitutionalism fixated on the role of parliament vis-à-vis courts in order to examine a broader and a more deep set of constitutional questions, from the very foundations of public law itself to the (sometimes spontaneous and unpredictable) sites of political action that exist outside of that well-trodden dichotomy. We prefer to think of the evolution of this debate not

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¹ JAG Griffith, ‘The Political Constitution’ (1979) 42(1) MLR 1.

² See, *inter alia*, Adam Tomkins, *Public Law* (OUP 2003) and *Our Republican Constitution* (Hart Publishing 2005) and Richard Bellamy *The Political Constitution: A Republican Defence of the Constitutionality of Democracy* (CUP 2009).

in terms of distinct phases, but in terms of waves, which feed into and which lap back upon one another and so, in our closing section, we argue that the reflexive wave laps back into the first wave in interesting and productive ways that might allow us to set new agendas for thinking politically – and in radical and expansive ways - about constitutional law.

II. The Normative Turn in Political Constitutionalism

A. The functionalist wave of political constitutionalism

The first – what we call *functionalist* - wave of political constitutionalism was most famously articulated by Griffith in his 1978 Chorley Lecture, ‘The Political Constitution’. Although he did not repeat, let alone define (at least not explicitly so), that titular phrase in the lecture, Griffith’s approach, here and elsewhere, was to defend the political constitution against those who agitated for its reform. In 1978 this meant tackling head on a series of reform proposals that included, *inter alia*, a Bill of Rights, an elected second chamber, legal limits to Parliament’s legislative competence, devolution to the nations of the UK and to the regions of England, a more sophisticated system of administrative law, the creation of a Supreme Court, and an entrenched written constitution.³ Later, it was the advance of the common law, as advocated by Sir John Laws⁴ and Sir Stephen Sedley,⁵ and the enhanced judicial powers created by the Human Rights Act 1998 that drew his ire.⁶

It was Griffith’s view that, taken together, the object of this ‘new constitution’ would be to institutionalise a theory of government *limited* by law.⁷ By way of contrast the function of the ‘old’ constitution – flexible, uncodified, with legislative power centralised at Westminster and executive power at Whitehall, and underpinned by the unlimited legislative supremacy of the Crown-in-Parliament – was, he said, precisely the opposite: to *enable* government. Indeed, for Griffith it was the ‘very heart’ of the political constitution – its definitive feature - that ‘Governments of the United Kingdom may take any action necessary for the proper government of the United Kingdom’,⁸ subject only to two limitations: first, that the Government would require express legal authority - from statute or from prerogative - in

³ Griffith (n 1) 8-9.

⁴ Sir John Laws, ‘Law and Democracy’ [1995] PL 72.

⁵ S Sedley ‘The Sound of Silence: Constitutional Law Without a Constitution’ (1994) 114 LQR 270.

⁶ See Griffith’s response to Laws (n 17) and to Sedley, ‘JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 LQR 42.

⁷ Griffith (n 1) 8.

⁸ Ibid 15.

order legitimately to infringe the legal rights of others; second, that in order to change the law, including where it sought to expand the reach of executive power, the Government would require the assent of Parliament.⁹ Put another way, Griffith's fundamental *political* objection to the shift from a political or parliamentary constitution towards a legal or judicial constitutionalism was that this would amount to a fundamental (and, as a reaction from the right to the power and efficiency of *Labour* governments to initiate socialist policies, an undesirable) constitutional change, one that would 'prevent Her Majesty's Government from exercising powers which hitherto Government has exercised.'¹⁰

Whilst Griffith wrote with the UK constitution firmly in mind, it is possible to extrapolate from a second, *philosophical*, objection to this reform agenda a more general view about the nature of constitutions and of politics more broadly. This is so because his defence of the political constitution neither begins from indigenous constitutional principles nor does it spring from a moment of revolution unique to the constitutional history of the UK or of its constituent parts. Rather, this objection stems from the human condition itself. The reality of politics, Griffith said, is one of conflict: ubiquitous, inevitable, and intractable conflict. The ubiquity of conflict was self-evident to him: 'All I can see in the community in which I live,' Griffith said, 'is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement'.¹¹ That these conflicts, such as they exist, are *inevitable*, in Griffith's view, is because they arise from our very nature, and this in two ways. First, because we are—all of us—*both* individual and social animals, and the rights, principles and interests that we hold dear in each capacity are neither (necessarily) comparable, co-equal, nor, and this is the point, compatible. We are born and we are conflicted, indeed, *inherently* so. Second, because we seek a life lived with others. Be it in the company of the family and friends with whom we are surrounded in our private lives, or the communities in which we live, work and act, socially, economically and politically, our interactions with others serve only to multiply the differences and disagreements, conflicts and compromises that characterize our living together. Indeed, it was the recognition of these tensions which led Griffith to the view that conflict is not only inevitable but intractable. 'We find this [condition] difficult to accept,' he said, 'and so we continuously seek the reconciliation

⁹ Ibid 15. Though here Griffith acknowledged a contested third limitation, 'that the Government is bound by the regulations and directives which emanate from the Commission and the Council of Ministers under the Treaty of Rome.'

¹⁰ Ibid 16.

¹¹ Ibid 12.

of opposites and become frustrated and aggressive when this fails'.¹² For Griffith, neither politics, 'what happens in the *continuance* or resolution of those conflicts', nor law, which is but 'one means, one process, by which those conflicts are continued or *temporarily* resolved,'¹³ are capable of delivering us from conflict. Here Griffith's account closely aligns with that of his contemporary, Bernard Crick, whose own defence of politics neatly dovetails with this first wave. For Crick, a truly political form of government is one which accepts 'the fact of [the] simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under common rule' and whose method is to conciliate those interests 'as far as possible.'¹⁴

By taking such an approach Griffith and Crick each attack what they see to be the lie at the heart of the project of legal (or liberal) constitutionalism: the fiction that these conflicts ought to be contained - and can be contained - by law. For Crick, the liberal 'wishes to enjoy all the fruits of politics without paying the price or noticing the pain,' without in other words engaging in the conflicts, disagreements and conciliations that define political life.¹⁵ The liberal, he says, sees politics as being the stuff of political parties and politicians who may act in their distinct sphere in any way they please so long as they do not infringe upon the rights of the private citizen. In this way, Crick holds that the liberal is guilty of 'narrowing the scope of politics drastically and unrealistically'.¹⁶ For Griffith, a liberal approach to the constitution 'looks first to the individual and seeks to protect him and his "rights"' from the tumult of politics.¹⁷ Yet because conflict is inevitable – because disagreement *about* rights (which rights are to be protected, to what extent, in what circumstances, with what exceptions, trumping which others in the event of a clash) is itself a political disagreement; because statements of rights are so abstract as to restate political conflict whilst posing as its resolution;¹⁸ because so called rights are but political claims to be considered alongside the claims of others¹⁹ – any project which seeks to contain political conflict by the means of entrenched, and therefore supposedly apolitical, legal rights will succeed only in displacing political decision making from representative and democratically accountable politicians into the hands of

¹² Ibid 3.

¹³ Ibid 20.

¹⁴ Bernard Crick, *In Defence of Politics* (Weidenfeld and Nicolson 1962) 17-18.

¹⁵ Ibid 123.

¹⁶ Ibid.

¹⁷ JAG Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159 at 176.

¹⁸ Griffith (n 1) 14.

¹⁹ Ibid 17.

unrepresentative and unaccountable judges. Political institutions might need to be strengthened to meet the task²⁰ but for Griffith, as for Crick, they are to be preferred for the ways in which they channel conflict productively in order to enable government (left or right, if it so dares) to initiate radical societal change.²¹ Griffith's defence of parliament as the political institution *par excellence* therefore turned on its capability to institutionalise two key tenets of his constitutional thought. First, the *capacity* of legislators organized in a two-party system designed for alternate rule to represent that 'wearisome'²² but defining contest between our individual and our social selves. 'Presumably,' he said, 'no one nowadays doubts that the Conservative party exists primarily to promote the [individual] interests of private capital and the Labour party the [social] interests of organized trade unions.'²³ Second, the *accountability* of government to parliament, and of both to the electorate, as a working reality rather than to the application of abstract principles by an unelected and, in Griffith's view, an unaccountable judiciary. 'Political decisions,' he said, 'should be taken by politicians. In a society like ours this means by people who are removable.'²⁴

With its outright rejection of natural law and natural rights thinking, and a focus on the function of constitutional law in securing the stability of the public realm, the underlying legal theory of the first wave recalls the utilitarian positivism of Bentham. The functionalism of the first wave is therefore to be seen in the stripping away of (what its proponents see to be) legal fictions – that this or that right is so fundamental as to be beyond disagreement; that judges are neutral arbiters of disputes and not themselves political actors; that in the Rule of Law is to be found (as one judge has subsequently put it) the 'ultimate controlling factor' of our constitution²⁵ – in order to uncover and to analyse the realities of political power. For Griffith, a substantive conception of the rule of law was 'an invaluable concept for those who wish not to change the present set-up': a liberal 'fantasy' thrown up to protect certain legal and political institutions themselves from becoming the subject of disagreement.²⁶ To prioritise and to protect, in other words, their private rights over public interests. By contrast, to rule politically was to embrace and to harness the power generated by political conflict:²⁷ the function of law

²⁰ Ibid 16.

²¹ Ibid 12.

²² Ibid 3.

²³ Ibid 12.

²⁴ Ibid 16.

²⁵ *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [107] (per Lord Hope).

²⁶ Griffith (n 1) 15.

²⁷ Ibid 12.

to achieve the objectives decided by the political process in the face of reasonable disagreement.²⁸

B. The Normative Wave of Political Constitutionalism²⁹

The second wave of political constitutionalism emerged in the late 1990s and early 2000s as a reaction to the hegemonic position attained by (so-called) legal constitutionalism during the period that followed the publication of ‘The Political Constitution’. Indeed, it is striking to consider just how much of that which Griffith railed against in that lecture quickly came to pass: an aggressive expansion of administrative law and judicial review, the carving out by the judiciary of common law rights, enhanced powers for the judiciary to protect human rights under both the Human Rights Act 1998 and in the devolution legislation into which the ECHR has been hard wired, not to mention the creation of a Supreme Court that at least in some respects has taken on the character of a constitutional court.³⁰ For this new generation of political constitutionalists their predecessors had made it too easy for those of a liberal disposition to win the day. In particular, it was said that by failing to articulate a convincing *normative* case for the political constitution ‘the legal constitutionalists have never had to show that the loss of the political model entails risking anything of value’.³¹ In this second wave can be included, among others, Jeremy Waldron, Richard Bellamy, Adam Tomkins and Keith Ewing. What gathers this literature is the authors’ shared view that parliamentary government is not merely (to paraphrase Griffith) *what happens*,³² but that parliamentary government happens for good normative reasons. However, where these works differ is in the identification of precisely what it is that they believe the normative value of parliamentary government to be (and what therefore is at stake where the political is supplanted by the legal).

For Waldron, the political constitution is normatively attractive because of what he calls ‘the dignity of legislation’.³³ His argument aligns with Griffith in the identification of (1) the need to agree upon a common course of action (2) in the face of reasonable disagreement within a political community about what that course of action should be. This condition of plurality –

²⁸ Ibid 15.

²⁹ Nb for a more detailed analysis and critique of the second wave see M Goldoni and C McCorkindale, ‘Why We (Still) Need a Revolution’ (2013) 14(12) *German Law Journal* 2197 at 2209-2217.

³⁰ See Lord Reed, ‘The Supreme Court Ten Years On’ at the Bentham Association Lecture 2019 (6 March 2019), available online at: <https://www.supremecourt.uk/docs/speech-190306.pdf>.

³¹ Tomkins, *Our Republican Constitution*, (n 2) 39.

³² Griffith (n 1) 19.

³³ Jeremy Waldron, *The Dignity of Legislation* (CUP 1999).

which for Waldron defines the ‘circumstances of politics’ - calls for a fair decision-making process for the management of conflict.³⁴ Parliamentary government provides the best normative solution because it ensures that the plurality of opinions is respected through the legislative process. The emphasis here is put on the virtues of parliamentary law-making vis à vis judicial law-making. According to Waldron, only the former process recognises the plurality of the human condition and provides for a procedure for settling normative disagreements. Under certain conditions, parliamentary politics delivers important goods: epistemic accuracy in deciding upon rights, deliberative legitimacy and representativity. Therefore, rights are better protected through legislative means. On the contrary, judicial law-making cannot deliver most of these goods and violates plurality in a fundamental way. As a consequence, it should be admitted only in weak forms.³⁵

Bellamy, like Waldron, takes as his starting point the proposition that the circumstances of politics are those of reasonable disagreement. However, whereas for Waldron this condition is redeemed by the dignity of legislation, in Bellamy’s account it is political equality that conditions us to live together notwithstanding our disagreements about the outcomes of the political process.³⁶ Here we are not talking about substantive political equality – it is not that the political process produces outcomes that we can all (equally) agree *with*. Rather, it is an equality of input: in a system of majority rule, in which two (dominant) parties compete with one another both for the opportunity to govern and for the votes of citizens that are required in order to do so, organised in such a way as to require those parties to ‘hear the other side’, and in which each citizen’s vote counts equally, are produced outputs that we can agree *to*.³⁷ In this way, Bellamy says, the political constitution is best placed to secure our freedom from arbitrary domination: be that domination by a powerful political elite (whose power might be protected by means of constitutional entrenchment),³⁸ or by a constitutional court with a ‘privileged evaluative viewpoint’ to determine - with a liberal bias³⁹ - the proper balance between individual rights and the public interest.

³⁴ Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016).

³⁵ See also Mark Tushnet, ‘The Relation between Political Constitutionalism and Weak-Form Judicial Review’ (2013) 14(12) *German Law Journal* 2249.

³⁶ Bellamy (n 2).

³⁷ See Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *ICON* 89.

³⁸ On this, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

³⁹ JAG Griffith, *The Politics of the Judiciary* (Fontana Press 1977).

In common with Bellamy, Adam Tomkins offers a republican defence of the political constitution. Taking as his starting point the (contentious) proposition that, '[w]hen it came to discussing constitutional questions, Griffith only ever described – he never prescribed,'⁴⁰ for Tomkins Parliamentary government does not merely *happen* but *ought* to happen as the surest way to protect the freedom of citizens from domination. However, for Tomkins the source of domination – *contra* Griffith's enabling account, that *against* which the political constitution is set – is the ever expanding scope and reach of executive power. The 'reality of government,' in Tomkins' analysis, is that 'the government of the day will try to do whatever it thinks it can politically get away with'⁴¹ and so he reassesses the historical and contemporary accounts of the common law constitution (in which the government was held to account primarily by the judicial branch) in order to demonstrate both the failures of juristocracy and the underrated strength of Parliament as an institution capable of democratically and effectively holding government to account. Tomkins' is a critique of liberal-legalism (according to which political activity ought to be constrained by law)⁴² and the prominence which it gives to a conception of freedom – freedom from interference – that undermines the public realm. Where, for Tomkins, the liberal/legal constitutionalist portrays the relationship between the government and its citizen as having a contractual nature capable of being adjudicated in the dualist and zero-sum environment offered by the courts, the political constitutionalist believes the government to hold power in trust on behalf of the citizens. Thus freedom from domination is not the infrequently exercised 'liberty of the moderns' engaged only when the interests of private actors are directly interfered with, but is an altogether more demanding freedom: a plural conception of freedom that requires 'an active and engaged citizenry and a deep participation in political affairs.'⁴³ However, when Tomkins re-visits the constitutional tumults of 17th century England the depth and the meaning of that participation can be questioned. His historical inquiry, this is to say, was conducted in order to demonstrate that – once upon a time – Parliament itself was the vehicle by which such a pluralistic form of freedom could be exercised against a tyrannical monarch⁴⁴ before making the case that Parliament can, does and ought still to exert itself to such ends.⁴⁵ The task of public law, for Tomkins, is (contra his common-law counterparts) not to repel government but neither is it (contra Griffith) to enable

⁴⁰ Tomkins, *Our Republican Constitution*, (n 2) 37.

⁴¹ Tomkins, *Our Republican Constitution*, (n 2) 10.

⁴² Amongst the primary antagonists in Tomkins' account is Trevor Allan. See, for example, TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001).

⁴³ Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157 at 175.

⁴⁴ Tomkins, *Our Republican Constitution*, (n 2) ch 3.

⁴⁵ *Ibid* ch 4.

it. Instead, for Tomkins the task is open government, by strengthening the accountability of executive power to the legislature. Indeed, by the time of his later work, Tomkins' ambition to 'move on from...a rather outdated contrast between the political and the legal constitution' eschews any consideration of alternative sites or means of participation and instead closes off the space in which those sites might take hold, favouring instead a 'mixed system' of parliament and courts.⁴⁶

The political constitutionalism of Keith Ewing shares with those above the view that parliamentary government does not just happen. However, for Ewing it is the legislative supremacy of the Crown-in-Parliament that is key. Expressing his frustration that Griffith himself did not directly engage with the principle, for Ewing it is 'the legal principle of parliamentary sovereignty,' what he calls the 'core legal principle of the political constitution,' that explains the normative value of the political constitution. Indeed, Ewing says, 'it is difficult to see how a political constitution could operate' unless underpinned by this 'legal principle [that underpins] the political principle that in a democracy there should be no legal limit to the wishes of the people'.⁴⁷ Thus, on this account political constitutionalism is not only about responsible and accountable government – about removing 'them' (though this undoubtedly is an important feature) – but more than this it is about empowering 'us'.⁴⁸ It was this capacity for radical change, the 'transformative potential' of the political constitution which he attributes to its very openness, that was once so attractive to progressive lawyers such as Griffith and that remains so appealing to Ewing. In general, however, and beyond the shift from a functionalist to a normativist methodology, there are two further important shifts that take place between the first and second waves. First, the attention of Bellamy, Waldron and Tomkins is focused much less on the question of *power* than was the case for Griffith or for Ewing. Instead, and in response to the claims by legal constitutionalists that rights are best protected by means of constitutional adjudication, the defensive crouch of the second wave is directed towards the most efficient means – political or legal, legislative or judicial – to protect (civil and political) *rights*. Second, law - across these accounts - is still seen in positivist terms. In the second wave, however, it is a normative positivism,⁴⁹ according to which the sources of law cannot stand in contradiction with the already existing forms of democratic politics.

⁴⁶ A Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) *German Law Journal* 2275.

⁴⁷ Keith Ewing, 'The Resilience of the Political Constitution' (2013) 14(2) *German Law Journal* 2111 at 2118.

⁴⁸ *Ibid* 2117.

⁴⁹ Bellamy (n 2) 90.

Parliament therefore dominates and on some accounts even monopolises the space for political action. As Bellamy put it, ‘the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself.’⁵⁰ Thus, the latent constituent power of the people is rejected instead for a ship that is built (and rebuilt) at sea.⁵¹

III. The Reflexive Wave of Political Constitutionalism

Whilst the second wave injected a healthy polemical force into the case for the political constitution against the advance of judicial constitutionalism, the defensive posture taken by the second wave soon showed its limits.⁵² Its preoccupation with the role of judicial review and its normative endorsement of a unitary form of parliamentary government that was largely oblivious to the political reality of devolutionary (opposed by the first wave and – despite their concurrence - ignored by the second) and federalist modes of governance, led the second wave to lose traction. However, during the last decade and half a third wave of political constitutionalism has emerged, with the intention of retrieving some precious insights from the first whilst, at the same time, overcoming the normative limits of the second.

Crucial both for its current relevance as well as for its future agenda-setting capacity, the third wave can be seen not as the upshot of a reaction but as a reflexive exercise over the conditions of the political. Put differently, rather than define the political constitution *against* its critiques – liberal, or legal, or judicial constitutionalism – this new turn is characterised by an *internal* reflection which addresses the political constitution on its own terms. Not quite a constellation, the third wave resembles a *nebula* which can be identified, despite its uncertain and blurred boundaries, by observing certain traits common to different contributions to the debate. The first of these relates to the operative context: the third wave appears to be much less concerned by the rise of judicial power and juristocracy and instead is more focussed on analysing the circumstances which make possible the emergence, the development and the preservation of a political constitution. In this way, a fixation with the legitimacy of judicial review as the foundational constitutional question is overcome, opening up a space in which to ground a more promising set of constitutional questions. In terms of their content, the works of the third wave are more prone to look beyond formal institutional arrangements and to

⁵⁰ Bellamy (n 2) 5.

⁵¹ Bellamy (n 2) 175.

⁵² Panu Minkinen, ‘Political Constitutionalism versus Political Constitutional Theory’ (2013) 11 *International Journal of Constitutional Law* 585.

inquire into political practices, governing arrangements and customs. Methodologically, however, the works which belong to the third wave are not functionally-driven nor do they aim primarily at a normative outcome. At their core, these works constitute an exercise in *understanding*, which contain a two-fold reflexive quality. First, the method of this third wave is based on the analysis of the contexts and conditions which enable or stifle the political constitution; secondly, and substantively, the emphasis is now placed on the activity itself, as opposed to the institutional form, of politics. Thus, the third wave embraces explicitly a question hitherto (and surprisingly) taken for granted in each of the first and second waves: what, precisely, is *political* about the political constitution. Answering this question requires those who we call reflexive political constitutionalists to look beyond parliamentary legislation and political accountability as the exclusive *means* of political constitutionalism in order to account for the rise of modern constitutions themselves as political objects.

The most coherent and developed effort towards a reflexive take on political constitutionalism is visible in Martin Loughlin's 'political jurisprudence'.⁵³ Loughlin's reflection aims primarily to reconstruct the rise and development of modern public law in the first place. This entails a shift from concern about rights review to a focus on the generative mechanisms of political power, as well as the conceptualisation of that space within which political constitutions can emerge. According to Loughlin, the place of political constitutions in modern times has been the European state. Contrary to Griffith, Loughlin takes the modern state as the main *juridical* unit and the separation between sovereign and government as the enabling dynamic which generates political power. Therefore, even the development of the British model of constitutionalism is rightly placed within the wider context of modern European constitutionalism. Furthermore, the history and the emergence of parliamentary sovereignty is presented as being part of a framework that allows us to see the points of convergence and divergence with other European models of constitutionalism. In so doing, Loughlin suggests that parliamentary supremacy is not reducible to a normative doctrine; nor is it fully understandable if not studied against the background of the institutionalisation of the political unity of England (extended later to other nations by treaties or by colonisation). The reason for the success of the model of parliamentary government rests on its state-building capacity, not on its normative quality, which might just become a legitimating factor at a later

⁵³ See Martin Loughlin's *The Idea of Public Law* (OUP 2003), *Foundations of Public Law* (OUP 2010) and *Political Jurisprudence* (OUP 2017).

stage. For Loughlin, then, the task of political jurisprudence is not to provide a normative justification but to reconstruct the *grammar* of public law.⁵⁴ It is not by chance that Loughlin writes of a grammar of public law, which provides a scheme of intelligibility for political power, according to which power and freedom are observed as political creations *par excellence*:

Just as the rules of grammar are not restrictions on speech but are possibility-conferring rules that enable us to speak with greater precision, so too should the rules and practices of public law be seen not as restrictions on power or liberty but as rules that are constitutive of the meaning of these terms.⁵⁵

However, this grammar is a local and not a universal knowledge, as it is more the product of prudential reasoning than of morality. In other words, each constitutional tradition produces its own grammar. Through the study of the grammar of public law ‘we acquire knowledge of the words and symbols of the language in conjunction with an understanding of the appropriate circumstances in which to use them.’⁵⁶ Here, Loughlin implies that knowledge of the practices of public law can be acquired only by paying attention to their implicit assumptions and background conditions. The pay off, again, is hermeneutic and not normative: that lawyers can understand better the nature of their own constitutional orders. Loughlin’s reflexive approach shows that law and politics are actually intertwined because they form the backbone of the constitutional order. Law is part of a wider order whose function, in modern times, is to create political power. In the end, the constitutional order is an achievement and knowledge of its basic tenets is therefore political and legal at the same time: it is a *juristic* knowledge. The political stake of modern public law is therefore that of being a productive force, and to achieve this Loughlin reminds us that two enabling factors are necessary: a juridico-political unity (a *nomos*) immanent to sovereignty, and the effective exercise of the art of governing society.⁵⁷ The relation and the tension between these two polarities is enabling in a double sense: it both constitutes and limits the art of public law. Political jurisprudence operates in between this tension. Apart from its reflexive inner quality, political jurisprudence does not thematise the relation between society and the constitutional order as an external one. Rather, one of the main

⁵⁴ For an extended analysis of Loughlin’s work see Michael Dowdle and Michael Wilkinson (eds), *Questioning the Foundations of Public Law* (Hart 2018).

⁵⁵ Loughlin, *Foundations*, (n 53) 178.

⁵⁶ *Ibid* 179.

⁵⁷ See Martin Loughlin, ‘Nomos’ in David Dyzenhaus, Tom Poole (eds), *Law, Liberty, and the State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015).

functions of modern public law is described, paradoxically, as the ability of governing society by creating an autonomous space for politics. This, for Loughlin, is the most political achievement of political constitutionalism.

In a series of articles, Graham Gee and Grègoire Webber have also urged political constitutionalists to direct their attention toward the grammar of public law.⁵⁸ Their starting point is epistemic: that knowledge of a constitutional order and the possibility of making sense of it depends heavily upon having an understanding of its language. Their target is the dominant form of abstract rationalism in constitutional studies. This, they say, is the case because public lawyers tend to adopt a sloppy and vague language, which does not reflect the underlying and working realities of the constitution as we encounter it. According to Gee and Webber, a ‘rationalist’ view of public law promotes a language of principles, developing in this way ‘an understanding of the constitution that focuses only on, and in turn exaggerates, certain features of our political and legal arrangements and...provides a false and misleading education in public law.’⁵⁹ There is a call to revive certain aspects of Griffith’s scholarship: the attention to the political culture of the institution and its working arrangements were already placed by Griffith himself against the metaphysics of principles, indeed famously so in his Chorley Lecture. Thus, Gee and Webber urge constitutional scholars to think politically about public law - an activity, they say, that begins ‘with an awareness of...the underlying relationships within legal and political practice.’⁶⁰ This is an invitation to look beyond the formal proceedings in courts and in parliamentary assemblies in order to grasp the key tenets and the functioning reality of the political constitution. The core knowledge of the political constitutionalist therefore ought to be of the varied and daily practices which animate constitutional and political life. The political constitution is at work during parliamentary proceedings, but surely not only there. What is not publicly visible is equally relevant: a nexus of micro- and macro- political and legal processes shape the political constitution and, crucially, this forms the quintessential object of knowledge for public lawyers. Such an approach implies a careful and accurate reconstruction of the complexities of these institutional practices, which should not be limited to parliament but extended to the judiciary and the executive. Otherwise, the unreflective use of principles culminates in a serious pathology:

⁵⁸ Graham Gee and Grègoire Webber, ‘What Is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273; ‘A Grammar of Public Law’ (2013) 14 *German Law Journal* 2137; ‘Rationalism in Public Law’ (2013) 76 *Modern Law Review* 708.

⁵⁹ Gee, Webber, Rationalism, (n 58) 712.

⁶⁰ Gee, Webber, Grammar, (n 58) 2152.

constitutional discourse is trivialised by putting up a ‘placeholder constitution’. The grammar of public law, then, should never lose touch with the realities of power and conflict populating the constitution. A reflexive understanding might resort to a model of the political constitution, as a necessarily incomplete explanatory framework, but always by bearing in mind the relevance of the concrete dynamics behind it. In this way, constitutional studies would become more aware and accurate in taking into account the political dimension of modern constitutionalism.⁶¹

IV. The Political Authority of the Constitution

There is much to learn from the third wave of political constitutionalism and its contribution ought to be welcomed. First, its stance is not hetero-determined by legal constitutionalism, but by an engaging and honest concern with the activity of politics in and of itself. Second, it avoids staging the relation between law and politics in superficially juxtaposed terms, reminding us that the combinations between the logic of the legal order and the logic of political action are many. Third, it liberates constitutional analysis from normative abstractions in the examination of institutions like parliaments and courts, by inviting the introjection into that analysis of other explanatory factors (constitutional analysis, for example, that is based on abstractions such as ‘Parliament’, without any further unpacking of the internal composition of the institution and the political context in which it operates). Yet, it is still possible to push the third wave even further. In fact, we believe that a proper take on the generation of power entails first of all a reflection on the meaning of political action itself. In particular, in order to obtain a fully reflexive conception of the political constitution - that is to say, a conception that valorises political action - we believe that it is necessary to reflect on the properties of ‘the political’ as the place where reflexivity can best be realised.

While other third-wave political constitutionalists have identified as key reference points the work of Michael Oakeshott and Carl Schmitt - both thinkers of the autonomy of the political⁶² - we take our move from another 20th century thinker, Hannah Arendt, whose

⁶¹ It should be added that there is an increasing interest for the study of supranational political constitutions. Two representative examples are: Michael Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76 *Modern Law Review* 191 and Andrew Glencross, ‘The Absence of Political Constitutionalism in the European Union’ (2013) 21 *Journal of European Public Policy* 1163. There is still a lot to be done to develop an analysis of supranational and transnational law from the perspective of political constitutionalism, but this is the topic for another article.

⁶² See contributions to Dyzenhaus & Poole (eds) (n 57). See, for Schmitt, Benjamin Schupmann, *The Constitutional and State Theory of Carl Schmitt* (OUP 2017).

primary interest was to understand political action as a generative force and who cherished the idea of the constitution into which and from which that activity takes place. Arendt's work speaks directly to political constitutionalism – indeed, one might define her as a political constitutionalist *ante litteram*. Her celebration, for example, of politics as an activity valuable in and of itself and essential for human beings' self-realisation finds echoes in Crick's 'defence of politics',⁶³ whilst both Tomkins⁶⁴ and, in particular, Waldron⁶⁵ have drawn inspiration from her work. To be sure, Arendt is not a systematic author and she has changed her mind more than once – and often without showing her working - on topics relating both to law and to politics as well as the relationship between the two. When it comes to law, for example, it is possible to retrieve at least three different understandings which may or may not be mutually compatible.⁶⁶ Despite these differences, however, those views share the same concern: how can the constitutional order generate political power or, at least, avoid its subversion.⁶⁷

This is a fundamental point because, for Arendt, political action springs from the human condition of plurality: from 'the fact that men, not Man, live on earth and inhabit the world.'⁶⁸ In order to develop this thought, Arendt appealed to antiquity in order to mark a dichotomy between political and nonpolitical realms: the familiar, if contested, division between public and private. 'According to Greek thought,' she said, 'the human capacity for political organization is not only different from but stands in direct opposition to that natural association whose center is the home (*oikia*) and the family.'⁶⁹ With the rise of the ancient city-state citizens had found themselves flitting between two sharply distinct orders of existence. The private realm, given form in the household, was the realm of property, a realm of ownership.⁷⁰ The public realm on the other hand was a realm of community, of the communal, of that which is common.⁷¹ Action, because it is 'the only activity that goes on directly between men without the intermediary of things or matter';⁷² action, because it 'corresponds to the human condition

⁶³ Crick himself was an attentive reader of Arendt and we believe that his political thought could still be used meaningfully by third wave political constitutionalists.

⁶⁴ Tomkins (n 43).

⁶⁵ For his most explicit treatment of her work see J Waldron, 'Arendt's Constitutional Politics' in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (CUP 2006).

⁶⁶ For an overview of these conceptions see contributions to the first part of Marco Goldoni, Christopher McCorkindale (eds), *Hannah Arendt and the Law* (Hart 2012).

⁶⁷ For a systematic overview, see Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Hart 2015).

⁶⁸ Hannah Arendt, *The Human Condition* (University of Chicago Press 1958) 7.

⁶⁹ *Ibid* 24.

⁷⁰ *Ibid* 24, 58-67.

⁷¹ *Ibid* 24, 50-58.

⁷² *Ibid* 7.

of plurality' for the way in which it 'establishes,' and indeed depends upon the establishment of, 'relationships and therefore has an inherent tendency to force open all limitations and cut across all boundaries',⁷³ was therefore, in her view, the very lifeblood of *res publica*. It followed that because the public realm was one of the communal, and not one of property, no one citizen, body of citizens, nor even the general will of all, could presume ownership in, or mastery over, the affairs of the *polis*, which demanded a condition of political equality. As Cohen and Arato have said, '[t]he public sphere in Arendt's view presupposes a plurality of individuals unequal by nature who are, however, "constructed" as politically equal. According to her, the meaning of the *polis* as *isonomia* (literally, equality in relation to law) is that of "no rule," in the sense of an absence of differentiation into rulers and ruled within the citizen body.'⁷⁴ To force others in the public realm by violence or by command was, for Arendt, to behave contrary to the political way of life: '[t]o be political,' she said, 'to live in a *polis*, meant that everything was decided through [what for Arendt are the *means* of politics:] words and persuasion.'⁷⁵

In Arendt's account, then, the political is not based on a productivist paradigm ('politics ought to be making and producing outcomes') nor is it based on a moralist interpretation ('politics ought to follow what is morally good'), but on the beauty and value of the often conflictual interaction that takes place amongst *and between* plural human beings. The consequences of this view are stated clearly: plurality is 'the *conditio a quo* and *per quam*' of the political, and its nature is relational by definition, because (and note here the echoes in Griffith's depiction of the human condition) 'we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live.'⁷⁶ In a striking reversal of classic understanding of sovereignty as the exceptional capacity to decide, political power for Arendt instead emerges within and among people, and neither from outside nor from above them. In this way, Arendt avoids an exhaustive identification of the political with any particular institutional form, instead defining political *power* as 'action in concert' within or outside of political *institutions*:⁷⁷ '[t]he *polis* properly speaking,' she said, 'is not the city-state in its physical location; it is the organization of the people [*wherever*] it arises out of acting

⁷³ Ibid 190.

⁷⁴ Jean L Cohen and Andrew Arato *Civil Society and Political Theory* (The MIT Press 1992) 179. At fn 12, Cohen/Arato suggest that such an understanding of 'no rule' is compatible with the Aristotelian idea that citizens take in turns the duties of rulership.

⁷⁵ Arendt (n 68) 26.

⁷⁶ Ibid.

⁷⁷ Hannah Arendt, *What Is Politics?* (Shocken 2002).

and speaking together.⁷⁸ Political institutions, this is to say, might *favour* the creation of political power, but they are not the necessary *condition* for its emergence. Given this premise - that politics implies a multiplicity of perspectives - for its sustainability there must exist a space of appearance into which those perspectives, expressed by Arendt in the language of 'opinions' (and note the plural), can be expressed and shared in the process of persuasion. The task of a robust political constitutionalism therefore should be to cultivate the conditions from which these spaces might emerge and not (as we contend has been the case in the second wave) to assume or to assert that Parliament (or any institution) is *the* site of political action. Indeed, here we see how the third wave might lap back against the first, for Griffith's surest prescription in 'The Political Constitution' was directed precisely in this direction:

I am much more concerned to create situations in which groups of individuals may make their political claims and seek to persuade governments to accept them. I therefore want greater opportunities for discussion, more open government, less restriction on debate, weaker Official Secrets Acts, more access to information, stronger pressure from backbenchers, [and] changes in the law of contempt of court.⁷⁹

Indeed, Griffith continued, 'the best we can do,' in light of the human condition into which we all are born, 'is to enlarge the areas for argument and discussion, to liberate the processes of government, to do nothing to restrict them, to seek to deal with the conflicts which govern our society as they arise.'⁸⁰

Yet, political power is not self-sustaining - it is fragile almost by definition. Its achievement would not last if it were decoupled from other aspects of the human condition. Arendt, across her work, has stressed the importance of authority in many fields (education, for example) and law is one of them. Unlike politics, law is presented by Arendt as an essentially authoritative enterprise which has to 'serve' the generation and the preservation of political power. The task of authority here is to let its subjects grow - or, as it relates to the constitution - to 'augment' or to expand.⁸¹ One can find echoes here of the service conception of authority which, as notoriously illustrated by Joseph Raz, would make the legal system legitimate. Indeed, a useful comparison between these two interpretations of the authority of

⁷⁸ Arendt (n 68) 198 [emphasis added].

⁷⁹ Griffith (n 1) 18.

⁸⁰ Ibid 20.

⁸¹ Hannah Arendt *On Revolution* (The Viking Press 1963) 199-200 and *Between Past and Future* (Penguin 2006) ch 3.

law can shed an important light on the inherently *political* nature of Arendt's approach. As is known, Raz's thesis understands legal authority as a form of expertise capable of providing *exclusionary* reasons: that is, reasons which pre-empt citizens from deliberating about how to act, but which at the same time offer *to* those citizens outcomes that would still have to be applied to them.⁸² The subject, this is to say, acts *according to* the reasons given by the authority,⁸³ but the *calculation of* those reasons is denied to them.

Arendt shares the same core intuition about authority, that is, that authority exists in order to 'guide' its subjects. In this respect, the point of authority can be distinguished from the exercise of pure political *power*. Whereas political power implies interaction among potentially equal subjects, authority instead requires a vertical relation. Nonetheless, her view turns the service conception upside down because she believes that the authority of the constitutional order (and of its institutions) has to be grounded in the capacity of opening up (and not closing down) the space for political action. This, then, is the opposite of the Razian service conception: in Arendt's political constitutionalism, the service provided by the authority is to enable the space for appearance – that forum for the exchange of opinions in the process of persuasion of, by and between equals – to emerge and to flourish. A legal authority shall not pre-empt political action, this is to say, but rather shall ensure that the conditions in which political action takes place are maintained. In this respect, the pages that Arendt devoted to some of the classic tenets of modern constitutionalism are quite telling. The separation of powers and federalism,⁸⁴ more than fundamental rights,⁸⁵ are identified as being the constitutional structures most capable of generating of political power. The inspiration here comes from that Copernican discovery made by Montesquieu: when power is divided and distributed, it does not disappear (as it is sometimes postulated by the supporters of a unitary and monolithic conception of sovereignty), but instead proliferates. Political constitutionalists should take note of this point as they tend to downplay or to underestimate its importance. In fact, Arendt's interpretation of these classic instruments of modern constitutions is not the usual standard liberal justification which identifies in these two pillars shields of protection for

⁸² The classic formulation is Joseph Raz, *The Morality of Freedom* (OUP 1986). For a recent restatement see *From Authority to Interpretation* (OUP 2009) ch 5.

⁸³ Waldron has tried to give a version of this conception of authority in terms of normative positivism: 'Can there be a Democratic Jurisprudence?' (2009) 58 *Emory Law Journal* 675.

⁸⁴ Douglas Klusmeyer, 'Hannah Arendt's Case for Federalism' (2010) 40 *Publius* 31.

⁸⁵ Arendt is mildly sympathetic to judicial review, but she does not understand it in terms of constitutional protection of fundamental rights. Rather, she interprets judicial review as another form of protection of the main conditions for political action. Hence, judicial review should be more concerned with constitutional structures.

minorities and checks over dominant political power. Against a conception of sovereignty which occupies the space of politics in an exclusive manner, Arendt identifies in the separation of powers and federalism potential frameworks for the creation of political power because they *multiply* chances of political participation, and for the expression of opinions.⁸⁶

V. The Subversion of the Political

As Arendt understood it, opinions - which 'never belong to groups but exclusively to individuals'⁸⁷ - could be formed *only* in a process of ongoing deliberation *between* those individual citizens in whose possession the faculty rests.⁸⁸ In this sense, opinions - for Arendt, as for Griffith - are specifically *public* things. Indeed, at the heart of the liberal illusion that he set out to dismantle in 'The Political Constitution' was the assumption that opinion was never the property of the individual but rather of the undifferentiated mass. It was, he said, the 'first, last, and necessary refuge of the natural lawyers [to assume] that there is a body of opinion, a mass of activity, of a generalised sort which can be appealed to as the inarticulate majority.'⁸⁹ Rather, opinions could only meaningfully be formed, according to Arendt, where individuals confront one another with their various interests, and are prepared to modify and enlarge their perspective to incorporate those of others.⁹⁰ Drawing on Kant's notion of 'reflective judgment', according to which a 'public sense' can be achieved only by 'putting ourselves in the position of everyone else',⁹¹ for Arendt the exchange of opinions was the means by which individuals could (using Kant's terminology) enlarge their mentality beyond their private interests and towards a concern for the (public) world:

The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid will be my final conclusions, my opinion.⁹²

⁸⁶ The classic reference is chapter 6 of *On Revolution* (n 81).

⁸⁷ Arendt, *On Revolution*, (n 81) 227.

⁸⁸ *Ibid* 268.

⁸⁹ Griffith (n 1) 19.

⁹⁰ Arendt, *On Revolution*, (n 81) 268.

⁹¹ Immanuel Kant *Critique of Judgment* (1790) 151.

⁹² Arendt, BPF, (n 81) 241.

As Griffith put it in his lecture, to live in a community with others is to condition oneself to disagreement about the controversial issues of the day. 'I know what my own view is about racial minorities, immigration, the power of trade unions, official secrets, abortion and so on and so on,' and, 'I will...seek to persuade those in authority to act as I feel they should.'⁹³ It was, then, the political moment *par excellence* when one was able, by the strength of argument, 'to woo', as Arendt put it, 'the consent of [another] in the hope of coming to an agreement with him eventually.'⁹⁴ As such, opinions depend upon at least two external (that is, external to the critical, rational individual) factors. First, they depend upon the existence or the emergence of a public space within which this confrontation can take place. Second, they depend upon the exchange of uncorrupted information, through which exchange opinions can form, evolve and take shape.

In her first analysis it was the U.S. Senate – an institution that, she said, rivalled the Supreme Court in its constitutional 'novelty and uniqueness'⁹⁵ – which Arendt held out as the political institution *par excellence*. Whilst it was true, as she saw it, that opinions are always the preserve of the individual, it was equally the case that in order to have meaning in, and influence upon, government (and so to avoid a reduction to deliberation purely for deliberation's sake) the 'endless variety' of opinions would need to be purified and filtered in some way, through some institution, fit for the task. No individual, she said, was up to the task of representing *all* opinions; no man, 'neither the wise man of the philosophers nor the divinely informed reason, common to all men, of the Enlightenment,' was capable of sifting through opinions, and coming to find in them a common, or at least public, reason.⁹⁶ Thus, in the Senate - urged by Madison to proceed 'with more coolness, with more system, and with more wisdom, than the popular branch [of government]'⁹⁷ - it was thought that the appointment of Senators for six year terms, as opposed to two years in the House of Representatives, as well as the more heterogeneous constituencies served by the 'one state, two Senator' arrangement, as opposed to the smaller constituencies represented in the House, would free the Senators to do just that, and so to take a broader view of the public interest than might be possible in the lower-house.⁹⁸

⁹³ Griffith (n 1) 12.

⁹⁴ Arendt, BPF, (n 81) 222.

⁹⁵ Arendt, *On Revolution*, (n 81) 228.

⁹⁶ Ibid 227.

⁹⁷ Madison, quoted in James Madison, Alexander Hamilton and John Jay *The Federalist Papers* (Isaac Kramnick (ed), Penguin Books 1987) 43.

⁹⁸ See, however, Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart Publishing 2009) 44) who observes that the actual rates of re-election in both Houses in fact blur the distinctions between the two.

Indeed, echoing Madison's call, Arendt described the Senate and its members as being those selected specifically for the purpose of sifting through the multitude of opinions for the discovery of genuinely public views:

[T]hese men [the Senators], taken by themselves, are not wise, and yet their common purpose is wisdom – wisdom under the conditions of the fallibility and frailty of the human mind.⁹⁹

However, if the genius of the Founding Fathers was to create an institution for the formation of public views within the very fabric of government,¹⁰⁰ the fabric itself was quickly stained by the relative ease with which the two-party system – equated, pejoratively so, by Alexander Hamilton and James Madison in the *Federalist Papers* with faction and division - took hold of public life, the Senate included.

Whilst it was not the case that the emergence of the two-party system led, as the celebrated revolutionary Patrick Henry believed it must (by virtue of that faction and division), to the destruction of the Union,¹⁰¹ nor, as John Jay warned, did the 'more sober part of the people' yearn for a (re)turn towards monarchy,¹⁰² Arendt nevertheless found in the two party system cause both for celebration, and for lament. On the one hand, she said, the two party system – as experienced in Great Britain and the United States – had managed to secure a tense equilibrium between the party of government and the party of opposition:

Since the rule of each party is limited in time, the opposition party exerts a control whose efficiency is strengthened by the certainty that it is the ruler of tomorrow.¹⁰³

For this reason, she said, 'lofty' questions of 'Power' and 'State' are taken down from the clouds and placed 'within the grasp of the citizens organized in the party,' who know that if they are not the rulers of today, they will nevertheless find their turn tomorrow.¹⁰⁴ By *On Revolution*, however, Arendt's faith in the two party system had chilled. Whilst she recognized

⁹⁹ Arendt, *On Revolution*, (n 81) 27.

¹⁰⁰ Ibid ch 6.

¹⁰¹ Daniel Sisson *The American Revolution of 1800* (1874) 45.

¹⁰² John Jay, in a letter to Thomas Jefferson, October 27th, 1786, reproduced in Henry P Johnston (ed) *The Correspondence and Public Papers of John Jay, in four volumes* (GP Putnams & Sons 1890-1893), vol 3 at 212-213.

¹⁰³ Hannah Arendt, *The Origins of Totalitarianism* (Schocken 1951) 323-324. On the place of the party of opposition in the political constitution see G Webber, 'The Loyal Opposition and the Political Constitution' (2017) 37(2) OJLS 357.

¹⁰⁴ Ibid 324.

its ‘viability and...its capacity to guarantee constitutional liberties’, which, she said, set the two-party system aside from multi-party and one party systems,¹⁰⁵ Arendt went on to say that the ‘best [the system] has achieved’ is a ‘certain control of the rulers by the ruled.’ What it categorically had not achieved – and here we return to the mis-step of the second wave – was the meaningful *participation* of the governed in public affairs. The best that the citizen could hope for was that her views be *represented* in the legislature.¹⁰⁶ The crucial move comes next, however, when Arendt says that what is at stake, if this is true, is that the expression of opinions - which, under these conditions are the sole preserve of those few representatives with whom the opportunity to participate in government rests – will wither away in a condition of apathy.¹⁰⁷ A representative institution, such as Parliament, might enable the exchange of opinions in the process of ‘open discussion and public debate’ held within its four walls; without a public space *outside*, however, in which citizens can meet, discuss and debate, more still, without a space within which *these* opinions can impact upon the deliberations within Parliament, the constitution is reduced to oligarchy: where ‘public happiness and public freedom [to participate in the affairs of government] are once again the privilege of the few.’¹⁰⁸

Arendt, then, held out little hope for a constitution which surrendered public for private happiness, political freedom for civil liberty, but she was just as pessimistic for a constitution in which that political freedom – the freedom to participate in the affairs of government – was left to the peoples’ representatives. She well knew that the ‘room[s of congress or parliament] will not hold all,’¹⁰⁹ that sheer numbers prevented all of the people deciding all political questions all of the time. Yet, she was weary all the same of replacing the participation of the people with the participation of a political elite. Arendt’s reading of the American revolution was one in which a constitution was made from the ground up, from a multitude of small, localized, public spaces – the townships and the wards – within which the people of those communities could gather in the shared experience of political liberty. Within these ‘schools of public life’, as Timothy Dwight described them,¹¹⁰ on the one hand partial injustices could be made known, such that the legitimacy of impositions by the British Parliament could be debated and (then) resisted, whilst on the other hand – in the midst of revolution – the people themselves could negotiate, compromise and co-operate in establishing the form of government

¹⁰⁵ Arendt, *On Revolution*, (n 81) 268.

¹⁰⁶ Ibid 268.

¹⁰⁷ Ibid 268-269.

¹⁰⁸ Ibid 269.

¹⁰⁹ Arendt, *On Revolution*, (n 81) 236.

¹¹⁰ Timothy Dwight *Travels In New England and New York* (1821) 86.

that would replace British sovereignty. The tragedy of the American revolution however was that *at that moment* the revolutionaries ‘forgot’ both the spirit of resistance which brought the new constitution into being, and the institution (the town meetings) through which that spirit was productively channelled as a working reality engaged in a constituent act. ‘The failure,’ as Arendt put it, ‘of post-revolutionary thought to remember the revolutionary spirit and to understand it conceptually was preceded by the failure of the revolution to provide it with a lasting institution.’¹¹¹ That ‘failure’, however, was quite intentional: the men of the revolution were well aware that nothing threatened the stability of their achievement more than the tumultuous spirit which had in the first place inspired it. By creating a constitution in which the peoples’ political freedom was exercisable only on election day, it was the peoples’ representatives only ‘in parliament and in congress, where he moves amongst his peers,’ who retained the privileges of political freedom: of debate, speech and persuasion – of the means, in other words, of political action.¹¹² Arendt saw in this arrangement an inherent conservatism: if political freedom exists only *within* institutions, then those who exercise that freedom are unlikely strongly to contest and to question the principles that underpin that freedom. Left outside of those institutions looking in, Arendt could see only two options for the people themselves: either ‘they must sink into lethargy,’ and thus precipitate the ‘death of public liberty,’ or they must ‘preserve the spirit of resistance to whatever government they have elected, since the only power they retain is the reserve power of revolution.’¹¹³

By turning inwards, then, by reflecting on the conditions of political action, we can therefore more productively look *outwards* to the many, varied and unpredictable spaces for political action that – as political constitutionalists – we ought to *register*, ought to understand, explicitly in constitutional terms. If the second wave took from Griffith and his antecedents the inspiration that Parliament is the pre-eminent space of appearance then we must recall that Griffith’s own faith in Parliament – so forcefully put in ‘The Political Constitution’ - was itself both qualified (by the need to enlarge the spaces for discussion and debate) *and conditional* upon its capacity, in the juxtaposition of Labour and Conservatives, to recreate and to channel the conflict between private rights and public interests that defines the human condition. So it was that – just a decade before – Griffith’s own faith had been shaken by, and that reserve power of revolution was his suggested remedy to, the failure of the political constitution to institutionalise that conflict and therefore to engender apathy. ‘Today,’ he said, ‘[our] system

¹¹¹ Arendt, *On Revolution*, (n 81) 232.

¹¹² *Ibid* 276.

¹¹³ *Ibid* 237-238.

of government is one hundred years old and looks its age. We are left with a device for replacing one set of political leaders with another set who are barely distinguishable' with the result that 'the life has gone out of the struggle except for those who directly participate in it.'¹¹⁴ As with Arendt on the 'failure' of the American revolution, for Griffith this was no accident: '[p]olitics,' he said, 'is not a game; it's a harsh business because it is about power and money. And you don't find people who like power and money relinquishing their control over these commodities.'¹¹⁵ Thus to allow a single institution, Parliament, to monopolise the space of and the opportunities for political action – and in so doing, to engender apathy outside - was to close off the spaces for discussion and disagreement and therefore to 'prevent radical change the purpose of which is to reduce [their] authority.' Radical change that, after all, 'must come at their expense' because it 'it must reduce their power.'¹¹⁶

VII. Conclusion

It is time to take stock and to evaluate the consequences of the reflexivity of politics for constitutional studies. In light of what we have said, we are firmly convinced that a reflexive understanding of the political constitution entails a new research agenda for political constitutionalists. This agenda should go well beyond a debilitating focus on the functioning of courts vis-à-vis parliaments and should confront political constitutionalists with an internal examination: to discover, and not to evade or to take for granted, what is political about the political constitution.

Vertically, if the reflexivity of politics is to be taken seriously, it is necessary to re-introduce the study of the forms and practices of constituent power. However, and precisely because a reflexive political constitutionalism does not require a command conception of sovereignty as the expression of the ultimate supreme will, that power should not be understood in terms of an exceptional sovereign decision. Rather, constituent power ought to be conceived of as a form of democratic politics expressed through the means of autonomous political action.¹¹⁷ Horizontally, political constitutionalists ought to expand the scope of their inquiry and explore other important sites and/or institutions where politics plays out in relevant and

¹¹⁴ JAG Griffith, 'Why We Need a Revolution' (1969) 40(4) *Political Quarterly* 383 at 386.

¹¹⁵ *Ibid* 389.

¹¹⁶ *Ibid* 391.

¹¹⁷ See Antonio Negri, *Insurgencies* (University of Minnesota Press 2002); Emiliios Christodoulidis, 'Against Substitution: On the Constitutional Thinking of Dissensus', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007).

meaningful ways. Indeed, Arendt's work, as inspiring as it is, can be pushed further toward a reflexive direction. At times, she seems to imply that certain elements of the legal order ought to be left outside of politics, as they constitute necessary *pre-conditions* for political action. In general, this is the case with the idea that political equality is artificially granted by law and, as such, to be seen as being somehow pre-political.¹¹⁸ Here, however, there is a potential contradiction on the one hand between a conception of political action that emerges autonomously and unpredictably and, on the other hand, an interpretation that posits constitutional *order* as the pre-condition for action.¹¹⁹ A more specific example should illustrate the problem. Private property is conceived of by Arendt as a form of privacy, conceptually different from wealth, whose importance is intimately linked to the constitution of the public sphere.¹²⁰ In short, there cannot be space for politics if there is no private property understood as the realm of privacy. The problem with this reconstruction is that it pre-empts the politicisation of what counts as private property, precisely because the latter is formalised as the precondition for political action. Arendt does not push the reflexivity of politics to its logical consequence that the very definition of the boundaries of private property must also be left open to disagreement.¹²¹ For example, it is very difficult to ignore the constitutional relevance of monetary policy and the related role played by the Bank of England. Questions of political accountability concerning monetary policies are as important as other forms of executive accountability because (1) the impact of monetary policy upon citizens' lives is remarkable and (2) monetary policies can pre-empt political action by reducing the political options on the table.¹²² Yet, political constitutionalists have been largely oblivious to developments in this and other areas of the regulatory State, often reducing the question of the spaces for and of politics to a confrontation between the legislature and the courts. If politics is indeed about power and about money then the stakes involved in adopting such a reflexive and, from there, such a radical and expansive approach could barely be higher.

¹¹⁸ For a penetrating critique of Arendt's constitutional thought along these lines see Jacques Rancière, *Disagreement* (University of Minnesota Press 1999).

¹¹⁹ See Emiliios Christodoulidis, Andy Schaap, 'Arendt's Constitutional Question', in Goldoni, McCorkindale (eds) (n 60) 112. For an alternative interpretation which makes the right to have rights politicisable, see Charles Barbour, 'Between Politics and Law: Hannah Arendt and the Subject of Law', in Goldoni, McCorkindale (eds), *Hannah Arendt and the Law*, ch. 16.

¹²⁰ Arendt (n 68) 59-60.

¹²¹ We believe that this approach to the potential of political action is actually truer in spirit to Griffith's work.

¹²² This has been the case, for example, with the adoption of austerity policies; cf Mark Blyth, *Austerity* (OUP 2012); Wolfgang Streeck, *Buying Time* (Verso 2014).