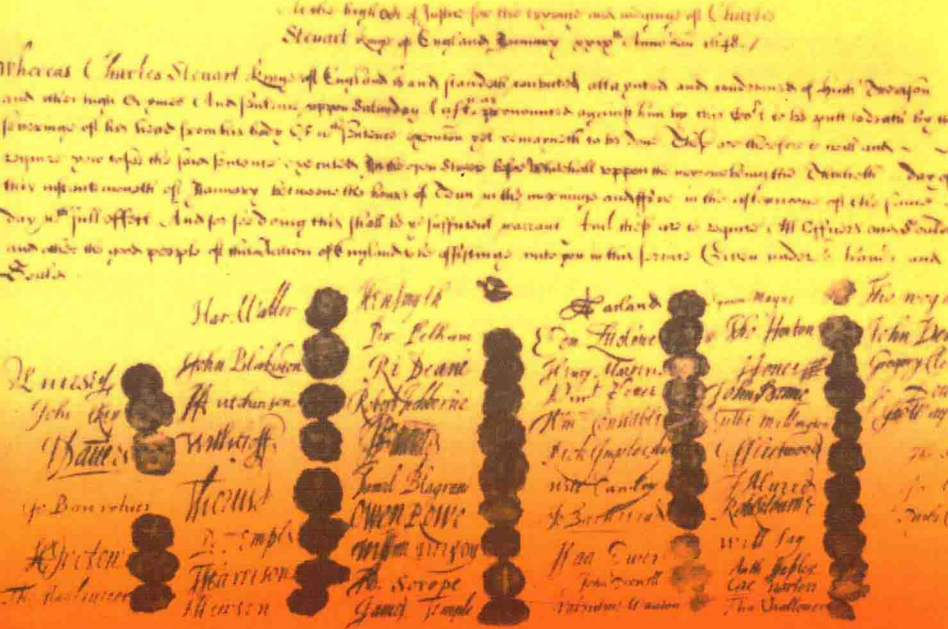

OUR REPUBLICAN CONSTITUTION

Adam Tomkins

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OUR REPUBLICAN CONSTITUTION

This new book by Adam Tomkins sets out a radical vision of the British constitution. It argues that despite its outwardly monarchic form the constitution is profoundly informed, and indeed shaped, by values and practices of republicanism. The republican reading of the constitution presented in this book places political accountability at the core of the constitutional order. As such, *Our Republican Constitution* offers a powerful rejoinder to the current trend in legal scholarship that sees the common law and the courts, rather than Parliament, as the central players in holding government to account. The book further contends that while the constitution should be understood as having republican foundations, current constitutional practice is, in a number of respects, insufficiently republican in character. The book closes by outlining a programme of republican constitutional reform that is designed to secure genuinely responsible government.

This is an original and provocative reinterpretation of the central themes of the British constitution, drawing on constitutional history (especially of the seventeenth century), political theory and public law.

For Lauren, of course

Preface

This book presents a republican reading of the British constitution. It offers an interpretation of contemporary constitutional practice, of aspects of constitutional history and of the state of constitutional reform that is, in each respect, radically critical of orthodoxy.

The book opens with an exposition of what I perceive to be the currently dominant view of the British constitution as it is discussed, analysed and taught by lawyers. I call this view 'legal constitutionalism'. Chapter one sets out the various tenets of legal constitutionalism and offers a detailed and critical analysis. For all its popularity among public lawyers (both academic and judicial), the model of legal constitutionalism is, it seems to me, dangerously misguided. It is the purpose of chapter one to demonstrate why this is so.

It is one thing to criticise orthodoxy; it is another to seek to replace it. Chapters two, three and four set out an understanding of constitutionalism that I argue can and ought to be adopted in Britain instead of the model of legal constitutionalism. The alternative advocated in this book returns to an older, political, approach to the constitution, an approach which I contend should be seen as resting on republican foundations. It is not a novel argument to suggest that the British constitution is primarily political rather than legal in character—the model of the political constitution is one that I seek not to invent but to revive. What is new in this book is the attempt to ground the political constitution on values and practices of republicanism.

This, the core argument of the book, proceeds in three stages. First I explain what is meant (and, just as importantly perhaps, what is not meant) by republicanism. Chapter two surveys previous constitutional writings to have considered this issue and constructs a conception of republicanism that borrows extensively from recent and ground-breaking scholarship in political philosophy and in the history of political thought. The second stage of the argument moves from the domain of ideas to that of constitutional practice. I argue that British constitutional practice has, at key moments in its history and especially in the seventeenth century, been profoundly influenced by republican ideas. Indeed, the argument in chapter three suggests that the constitution is, at least in part, founded upon republican ideals. The final stage of the argument moves back to the present and addresses the (some would maintain, rather sizeable) gap between contemporary constitutional reality and the republican ideal presented in chapter two. The book closes with a series of suggestions as to reform with a view to establishing an agenda for change that would help to close the gap.

The republican approach to constitutionalism presented in this book is not an import, constructed out of ideas borrowed and transplanted from elsewhere, but is one that derives from an analysis of the values inherent within the British constitutional order. At first glance this may strike us as a rather bizarre claim to make. After all, is Britain not one of the world's longest-lasting and most stable monarchies? Is our state not the United *Kingdom*, rather than the United *Republic*, of Great Britain and Northern Ireland? Furthermore, is it not the case that, in the last thirty years, the single most potent *threat* to the United Kingdom government has come from a certain species of republicanism, in the form of the terrorism of the IRA, the Irish Republican Army? Given this, how could it be said that republicanism is an approach to politics that is in harmony, rather than in conflict, with British constitutional traditions?

As with all political 'isms', republicanism is a term that can be used in a variety of ways. Just as liberalism is a term broad enough to accommodate a bewildering range of positions, from the neo-Conservative libertarianism of a Ross Perot or a Pat Buchanan to the social welfarism of a Gordon Brown, and just as socialism covers a wide spectrum from the romantic democratic trade unionism of Tony Benn to the totalitarianism of Stalin, so too with republicanism. That the IRA and George W Bush (for example) both use the word republican as a label to describe themselves does not mean that they share the same policies, any more than Pat Buchanan shares those of Gordon Brown or Tony Benn those of Stalin. Political labels can be extremely misleading. Mrs Thatcher was one of the late twentieth century's most important Conservative politicians, but her brand of market liberalism was far from conservative of the economic structure that was in place when she arrived at Downing Street. Similarly with republicanism: the republican constitutionalism advocated in this book has nothing to do with Northern Irish republicanism. Neither is it an endorsement of anything associated with the current leadership and direction of the Republican party in the United States. Indeed, as we shall come to see, the republicanism defended here is in many instances the direct opposite of much of what the Republicans stand for on the right wing of contemporary American politics.

The argument here will be that, notwithstanding the monarchic nature of the British state, values and practices of republicanism can nonetheless be found within it. This is not an entirely new claim. Montesquieu wrote as long ago as 1748 of 'a nation where the republic hides under the form of monarchy'.[1] A century later Walter Bagehot echoed the remark and applied

[1] Montesquieu, *The Spirit of the Laws* [1748] (ed and trans A Cohler, B Miller and H Stone, Cambridge, Cambridge University Press, 1989), at 70.

it specifically to Britain where, he stated, 'a republic has insinuated itself beneath the folds of a monarchy'.[2] The meaning of these famous but somewhat cryptic remarks will be uncovered and explored as this book proceeds.

This book grew out of the inaugural lecture I delivered on 17 March 2004 as John Millar Professor of Public Law in the University of Glasgow. I am grateful to the Dean of my faculty, Noreen Burrows, for chairing the lecture and to the School of Law for hosting the reception that followed it. The arguments presented here are the product of research I was able to undertake only with the support of a large number of colleagues and institutions. I am especially grateful to the Research School of Social Sciences and the Humanities Research Centre at the Australian National University for awarding me a research fellowship for three months in 2000 and to the Faculty of Law at the University of New South Wales for awarding me a visiting research fellowship for two months in 2003. Both the time away from home and the exposure to so much outstanding Australian scholarship were invaluable. My ideas on republican constitutionalism were shaped in numerous ways through the feedback my presentation of them provoked from audiences in several universities in Britain, Australia, New Zealand and the United States. I am very grateful to all those who gave me opportunities to present my work at faculty seminars at Kent Law School, the University of Aberdeen, Newcastle Law School, the University of Manchester, the University of Oxford, the Australian National University, Griffith University, the Queensland University of Technology, the University of New South Wales, the University of Auckland, Texas Law School and Cardozo Law School.

Finally, I would like to record my thanks to the friends and colleagues who have given generously of their time and energy to help me with this book. I have benefited from numerous conversations with Joshua Getzler, Mark Godfrey and Victor Tadros. Nick Barber, Lionel Bently, Brian Bix and Emilios Christodoulidis each read several chapters in draft and offered helpful advice. Scott Veitch read the entire book, some of it more than once. He saved me from numerous errors and sustained me throughout the writing process with encouragement, sound advice and some fine whisky. Above all, my wife Lauren Apfel, whose insights, expertise and tireless editorial efforts have once again been invaluable, was a constant source of both support and inspiration. It is to her, of course, that this book is dedicated.

[2] W Bagehot, *The English Constitution* [1867] (ed P Smith, Cambridge, Cambridge University Press, 2001), at 44. For discussion, see A Tomkins, 'The Republican Monarchy Revisited' (2002) 19 *Constitutional Commentary* 737.

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On the Political Constitution

"There are only two things that ever stop the government from doing anything: money or politics."[1]

I THE IDEAL OF POLITICAL ACCOUNTABILITY

Political Accountability and the British Constitution

THE BRITISH CONSTITUTION is a remarkable creation. It is no exaggeration to say that there is nothing quite like it anywhere else in the world. Both in its famously 'unwritten' form and in aspects of its content it is extraordinary. At its core lies a simple—and beautiful—rule. It is a rule that has formed the foundation of the constitution since the seventeenth century. It is that the government of the day may continue in office for only as long as it continues to enjoy the majority support of the House of Commons. The moment such support is withdrawn is the very moment that the government is required to resign. By this one rule is democracy in Britain secured;[2] by this one rule are 'we the British people' able, through our elected representatives in Parliament, to 'throw the scoundrels out'.[3] The rule is known as the convention of ministerial responsibility or as the doctrine of responsible government. For now, the most important thing to note about the rule is that it stipulates that the government is constitutionally responsible *to Parliament.*

The extreme step of forcibly removing the government from office is not, of course, an everyday occurrence. This is not to say that it never happens.

[1] Words spoken by the character Josh Lyman, Deputy White House Chief of Staff, in *The West Wing*, written by Aaron Sorkin. (The episode is 'Noel', from season two.)

[2] Although this was not its original function, as we shall see. The rule that the government is accountable to the House of Commons dates from the 1640s, a time well before the emergence of British democracy.

[3] Compare JHH Weiler, 'To be a European Citizen: Eros and Civilization', in his *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999), at 329.

The Labour government led by prime minister James Callaghan fell in 1979 because it lost a vote of confidence in the House of Commons. Callaghan's successor as prime minister, Margaret Thatcher, reluctantly resigned from office eleven years later when it was explained to her by her Cabinet colleagues that they felt she had lost the support of the majority of backbench Conservative MPs.[4] It is not only prime ministers who are responsible to Parliament: all government ministers are constitutionally responsible to Parliament.

Votes of no confidence and prime ministerial resignations are relatively rare but, in addition to providing the occasional drama of high political theatre, there is a second aspect to our rule. It is less spectacular, perhaps, but it is no less important. The government is required to secure the support of a majority in Parliament not only when ministerial careers are on the line, but every single day. It is a routine obligation on the part of the government that it must ensure that its policies, decisions and actions enjoy parliamentary backing. Parliament is the institution through which the government must legislate;[5] Parliament is the institution that controls the government's purse strings; and Parliament is the institution that will continuously inquire into the 'expenditure, administration and policy' of every government department.[6] It follows that in order for it to realise its legislative ambitions, the government will have to persuade a majority in Parliament that its policies are the right ones; that in order for the government to enjoy financial freedom, it will have to persuade a majority in Parliament that its spending plans are the right ones; and that in order for government departments to achieve success they will have to ensure that their expenditure, administration and policy are sustainable.

The beauty of our rule lies in its recognition of what may be called the 'reality of government'. Government is not (or at least is not always) an especially attractive occupation: it can be cynical, even dirty. One way of expressing the 'reality of government' is to say that those in political office are liable to try to do whatever they can politically get away with.[7] What is special about the British constitution is that it recognises this reality and acts on it. It does this by building it into the very heart of what the constitution tries to do. The purpose of all constitutions is to find ways of insisting that the government is

[4] See G Marshall, 'The End of Prime Ministerial Government?' [1991] *Public Law* 1 and R Brazier, 'The Downfall of Margaret Thatcher' (1991) 54 *Modern Law Review* 471.

[5] There are exceptions: these are considered in ch 4, below.

[6] These words are taken from the Standing Order of the House of Commons that governs the powers of Departmental Select Committees (Standing Order No 152). On select committees, see G Drewry (ed), *The New Select Committees* (Oxford, Clarendon Press, 1989, 2nd ed).

[7] See n 1, above.

held to account for its actions. What is unusual about the British constitution is the way it sets about accomplishing this task.

Most modern constitutions in the western world are not founded on an ideal of making government responsible to a political institution such as a Parliament. Most Western constitutions may *recognise* what I am calling the reality of government but they do not *act* on it in the way that the British constitution does. Rather than building constitutional structures of political accountability around this realisation, the bulk of Western constitutional practice has in modern times tended to focus instead on legal controls. Ideals of the 'rule of law' or of respect for 'fundamental' or 'human' rights form the backbone of today's constitutionalism in both continental Europe and North America. Ideals such as these are generally enforceable in courts of law rather than in political institutions such as Parliament. Accordingly it is to the judges, rather than to parliamentarians, that these constitutions look to provide the lead role in securing checks on government.

Instead of incorporating the fact that governments are liable to try whatever they think they can politically get away with into the fabric of constitutional accountability, such constitutions turn their backs on politics. It is as if they regard politics as part of the problem—as something that requires to be checked—rather than as part of the solution. What is beautiful about the British constitution is that it does not do this. It uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished. This is beautiful for at least two reasons: first, because it is democratic; and secondly, because it can actually work. Politics really can stop governments from abusing their authority.

Turning instead to the courts to provide ways of holding the government to account endangers both democracy and effectiveness. No matter how democracy is defined, judges can never hope to match the democratic legitimacy of elected politicians. Whether you conceive of democracy in terms of the representativeness of the personnel or in terms of the openness and accessibility of the institution, Parliaments will always enjoy greater democratic legitimacy than courts. As for effectiveness, we shall come to examine this in more detail later in this chapter, and when we do we shall see both how and why it is that courts—or at least British courts—are unable to secure the same results in terms of government accountability as Parliament can.

Before we come to consider this issue, it is important to add some further remarks on just how unusual the British prioritisation of political over judicial accountability is. It is easy to take one's routines for granted, but central constitutional traditions such as prime minister's question time are no mere habits. The weekly half-hour that the prime minister must endure at the despatch box in the House of Commons is one of the most important

reminders of the constitution's core rule: that the prime minister and his government are accountable to Parliament and require its ongoing support if they are to continue in office. The prime minister may appear to be the most powerful politician in the country, but his power is not his to keep. He is but its temporary custodian. His power is held on trust. At election time it is the electorate itself that may, indirectly,[8] remove it from him. But general elections normally occur only once every four or five years, and between elections it is Parliament, not the people themselves, to whom the prime minister must report if he is to be permitted to continue in office.

Traditions such as prime minister's question time and the doctrine of ministerial responsibility are so familiar to us in Britain and form such a central component of our political experience and expectations that we are in danger of assuming that they are shared everywhere. However, such an assumption would be sorely misplaced. There is simply no direct equivalent to the British system of political accountability in the United States, for example, in the traditions of many of our continental European neighbours or in the constitutional order of the European Union.

The US has in recent years suffered more than most from the absence of an effective mechanism of political accountability. Think, for example, of the protracted and hugely expensive procedures involved in the unsuccessful attempt to impeach President Clinton in the late 1990s. Bruce Ackerman, one of America's most astute constitutional commentators, has observed that:

> Bill Clinton would not have lasted a month as a prime minister in a parliamentary system. His backbenchers would have revolted, or his coalition partners would have ushered him out the door in a desperate effort to move into the next election with a new face at the head of the old government. In contrast, Americans had to waste a year on the politics of Clinton's personality.... [G]iven the American separation of powers, Bill Clinton's failings did not provide a constitutionally adequate basis for Congress to override the judgment rendered by the voters in 1996. But compared with the way a parliamentary system would have handled the affair, [the US Constitution] did a spectacularly bad job in dealing with this minor scandal.[9]

Under the terms of the US Constitution it is Congress, not a court of law, that is empowered to impeach the President. But short of this extreme step

[8] 'Indirectly' because under the British system the prime minister and his government ministers are not elected to office. They must all be members of one of the two Houses of Parliament (Commons and Lords). Those who are peers in the Lords are appointed rather than elected. Those who are MPs in the Commons are elected as MPs but not as ministers. The only part of the electorate that may directly remove the prime minister from office is that part of it which happens to reside in the prime minister's constituency.

[9] B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, at 659.

congressional powers to subject the executive branch to account are severely limited. Professor Ackerman's argument in the article just quoted from is that what he calls a 'constrained' form of parliamentarianism would make for a more suitable and more effective (as well as a more democratic) system of constitutional accountability than American presidentialism is capable of. We shall have cause to return to the United States at several points later in this book, but for now let us turn our attention briefly away from America and towards Europe.

It has been suggested that the English word 'accountability' does not even have an exact translation in some other European languages, such as French and German.[10] But it is not just the word that is difficult to translate: British practices of political accountability have few parallels elsewhere in Europe.[11] In France, for example, the current constitution (the Constitution of the Fifth Republic, dating from 1958) was expressly designed to limit the extent to which the National Assembly could subject the government to account. The Constitution provides that the prime minister is to be appointed by the President of the Republic, not by the National Assembly,[12] and stipulates that the government is accountable to the National Assembly only in strictly limited ways. Thus, while a government must resign if its general programme is defeated in a parliamentary vote, it is under no obligation to present such a programme to the National Assembly in the first place.[13] Further, the availability of censure motions is strictly curtailed, such that they may be passed only by an absolute majority of all members of the National Assembly.[14]

British policy-makers and constitutional practitioners have been painfully slow to realise just how special our expectations of political accountability are. Particularly in the context of developing a constitution for the European Union, Britain could have done much more to export its notions of political accountability, so that they could have been built into the political framework of the EU. Other leading European nations have been far keener to export their constitutional ways—whether it be German concepts of proportionality, French ideas of institutional design or Scandinavian traditions of transparency and open government—than Britain has. This is a great pity,

[10] See R Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555 and C Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002), at 14–15.

[11] 'Few', but not 'none'. Ireland, the Netherlands and Denmark are all examples of European countries that do share something of the British notion of political accountability.

[12] Constitution of 1958, Art 8.

[13] *Ibid*, Art 49. See J Bell, *French Constitutional Law* (Oxford, Clarendon Press, 1992), at 17.

[14] As John Bell has noted (*ibid*), when British prime minister James Callaghan lost a vote of no confidence in 1979 he lost it by 311 votes to 310. The absolute majority at that time would have been 315.

as it would have been significantly to the benefit of the EU's citizens had its constitution more enthusiastically embraced British ideas and practices of political accountability.[15]

Political Accountability under Challenge

The British reluctance to export its most cherished constitutional ideas on the European stage is, regrettably, a somewhat typical symptom of a broader malaise. We just do not seem to like our constitution very much any more.[16] In Charles Dickens' *Our Mutual Friend*, written in 1864-65, the character Mr Podsnap proclaims that:

> We Englishmen are Very Proud of our Constitution, Sir. It Was Bestowed Upon Us By Providence. No Other Country is so Favoured as This Country.[17]

Mr Podsnap is, of course, a preposterous figure—pompous, shallow and insular. But it is as if we have now made a sort of association in our minds that all those who seek to praise the British constitution do so in the manner of a Mr Podsnap, or that admiring it is somehow to condone the imperial values of the Victorian age. That greatest of British Victorian constitutionalists, Walter Bagehot, had no doubt that the British constitution was 'a model and an exemplar for liberals everywhere'.[18] As Vernon Bogdanor has suggested, 'most educated Englishmen of his day would almost certainly have agreed'.[19] Even into the 1950s, it was commonplace on both the political left and right for the British constitution to be described as 'nearly as perfect as any human institution could be'.[20] At the beginning of the twenty-first century, views such as these have become more than unfashionable. They have become anathema. No doubt it is appropriate for both the ignorant bluster of Podsnappery and the smug self-satisfaction of the 1950s to have been consigned to the dustbin. But it is not only such hyperbolic views of the British constitution that have fallen by the wayside: even moderate support for it is now relatively difficult to find.

[15] I have argued this point more fully elsewhere: see A Tomkins, 'Responsibility and Resignation in the European Commission' (1999) 62 *Modern Law Review* 744 and 'The Draft Constitution of the European Union' [2003] *Public Law* 571.

[16] For a stimulating account, see C Harlow, 'Export, Import. The Ebb and Flow of English Public Law' [2000] *Public Law* 240.

[17] C Dickens, *Our Mutual Friend*, ch 11.

[18] V Bogdanor, 'Introduction', in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford, Oxford University Press, 2003), at 1.

[19] *Ibid.*

[20] See V Bogdanor, 'Conclusion', in *ibid*, at 689.

Indeed, in the past thirty years the British constitution has taken a real beating, coming under sustained and unprecedented criticism. Argument has spanned the political spectrum, from the left-leaning liberal reformism of Charter 88[21] to the right-wing critiques of frustrated politicians and journalists alike.[22] Remarkably, among the most persistent advocates for constitutional change have been the judges. For a quarter of a century their pet project was to cajole Britain's political parties into accepting the merits of incorporating the European Convention on Human Rights into domestic law so that Britain could have a Bill of Rights,[23] a policy that was finally implemented when the Human Rights Act 1998 came into force in October 2000, and one which has vastly increased the constitutional power of the judiciary.[24]

Away from the London-based 'juristocracy'[25] the British constitution also came under sustained attack from the Scots, who felt particularly disenfranchised during the Thatcher era when the government allowed the problems of the Scottish economy to be neglected while simultaneously imposing one of its most controversial policies (the poll tax) on Scotland before it was made to apply south of the border. The British constitution, it was felt, had allowed a distant and authoritarian executive to centralise power in Whitehall. The solution, it was urged, was for both legislative and executive power to be devolved to new institutions in Edinburgh. Scotland needed not only an executive but also a Parliament of its own.[26] When the Blair government came into office in 1997 it did so promising a package of devolution measures

[21] See, eg, A Barnett, C Ellis and P Hirst (eds), *Debating the Constitution: New Perspectives on Constitutional Reform* (Cambridge, Polity Press, 1993) and A Barnett, *This Time: Our Constitutional Revolution* (London, Vintage, 1997).

[22] See, eg, L Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London, Collins, 1978) and F Mount, *The British Constitution Now: Recovery or Decline?* (London, Heinemann, 1992).

[23] See, among many, many examples, L Scarman, *English Law—The New Dimension* (London, Stevens, 1974); L Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397; T Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 *Law Quarterly Review* 390.

[24] As Lord Hope put it in one of the first Human Rights Act cases to reach the House of Lords: 'the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary'. See *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, at 374–75.

[25] I have borrowed this word from Keith Ewing: see KD Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?', in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (London, Mansell, 1994), ch 7. See also now R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Harvard University Press, 2004).

[26] See, eg, the influential paper formulated by a body known as the Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (Edinburgh, Scottish Constitutional Convention, 1995).