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THE OTHER PATH OF CONSTITUTIONALISM

Miguel Schor*

A.V. DICEY, *COMPARATIVE CONSTITUTIONALISM* (J.W.F. Allison, ed., 2013). Pp. 400. Hardcover \$ 119.85.

STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013). Pp. 270. Hardcover \$ 88.12.

INTRODUCTION

Although constitutional experts no longer believe the United States Constitution to be the preeminent constitutional model for new democracies to emulate,¹ the core features of the Constitution such as writtenness, constitutional entrenchment, and judicial review have become universal.² The American revolutionaries articulated a set of grievances that revolved around the British government's failure to respect liberty³ and proposed as a solution that constitutions should be written and difficult to change.⁴ Although judicial review was not hardwired into the text of the Constitution, it has become accepted as a means to effectuate constitutional limits.⁵ In short, a liberal democracy without a written and entrenched constitution policed by judges has become (almost) unthinkable.

There is one highly successful, albeit non-influential, exception to American constitutional hegemony. The British constitution sits athwart the path of global constitutionalism and consequently has long bedeviled comparative constitutional theorists who do not

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1. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

2. See *id.* See also GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1789-1989* (2009).

3. See generally JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

4. GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 171-80* (2011); *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

5. The success of the Supreme Court's attempt to wrest control over the meaning of the Constitution was not guaranteed. The exercise of judicial review faced considerable opposition in the early days of the Republic. See DWIGHT WILEY JESSUP, *REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809-1835* (1987). The dramatic expansion of judicial review during the *Lochner* era also aroused considerable political opposition. See Miguel Schor, *Constitutional Dialogue and Judicial Supremacy*, (Drake Univ. Law Sch. Research Paper No. 12-02, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1730202.

quite know what to make of British exceptionalism.⁶ While the American constitution provides a legible template for how a constitution might preserve liberty, the same cannot be said of the British constitution, which is largely illegible to outsiders as it is found scattered in court cases, statutes, and political understandings called conventions. It is a common law constitution.⁷ There is no single document, as Thomas Paine pointed out in the eighteenth century,⁸ that is called the British constitution. If longevity is the touchstone of a successful constitution, however, the British constitution's lack of global influence is puzzling.⁹

Two recently published works of comparative constitutionalism seek to remedy Britain's constitutional isolation. A.V. Dicey was the Vinerian Professor of English Law at Oxford University in the late nineteenth century when he wrote what became the most important work on the British constitution, *An Introduction to the Study of the Law of the Constitution*.¹⁰ Dicey's comparative work, however, consisted of a series of lectures given primarily between 1895 and 1900 that remained unpublished until 2013. Professor J.W.F. Allison, University of Cambridge Faculty of Law, is to be commended for editing these lectures so that Oxford University Press could publish them as A.V. Dicey's *Comparative Constitutionalism*.¹¹ Stephen Gardbaum, the MacArthur Foundation Professor of International Justice and Human Rights at the University of California Los Angeles School of Law, is a twenty-first century comparative constitutionalist theorist. His work on judicial review in the British Commonwealth—*The New Commonwealth Model of Constitutionalism*¹²—is a seminal work that will undoubtedly influence scholars around the globe. These two monographs illuminate why constitutional theorists should pay attention to British constitutionalism.

BRITAIN'S EXCEPTIONAL CONSTITUTION

Writing a full century after the American Revolution, A.V. Dicey understood that the sun was setting on the global influence of British constitutionalism, as written constitutions were superseding unwritten ones around the globe.¹³ Dicey turned to comparative constitutionalism to explicate Britain's exceptional constitution. He began by criticizing

6. Not all theorists see the British constitution as standing outside the broad stream of Western constitutionalism. See, e.g., Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 POL. SCI. REV. 853 (1962). Ironically, the American revolutionaries whose new constitution effectively buried the British constitution on the global stage thought it provided the best historical exemplar of a constitution that preserved liberty. BAILYN, *supra* note 3, at 66-67. They also believed, quite obviously, that they could improve on the British constitution.

7. See MARTIN LOUGHLIN, *THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION* 6-41 (2013); ERIC BARENDT, *AN INTRODUCTION TO THE LAW OF THE CONSTITUTION* 26-45 (1998).

8. THOMAS PAINE, *RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION* 47 (Prometheus Books 1987) (1791).

9. ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

10. A.V. DICEY, *AN INTRODUCTION INTO THE STUDY OF THE LAW OF THE CONSTITUTION* (1967).

11. A.V. DICEY, *COMPARATIVE CONSTITUTIONALISM* (J.W.F. Allison ed., 2013).

12. STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

13. DICEY, *supra* note 11, at 157.

the term “unwritten constitution,” which is commonly used to refer to the British constitution, as a “lax and popular one.”¹⁴ There is no single document called the British constitution, but many of its key principles can be found written down in statutes and cases. The real difference between the British and American constitutions, he argued, is that while some constitutions are “made,” others have “grown” over time.¹⁵ The British constitution has four distinctive characteristics not readily found “in the constitutions of other countries,” which are antiquity, continuity, spontaneity, and originality.¹⁶

The antiquity and continuity of the British constitution derives from an important conceptual distinction between the American and British constitutions. The American constitution is something separate and apart from the government.¹⁷ The principles of the British constitution, on the other hand, are largely derived from the “best” practices of the British government.¹⁸ There is no clear analytical distinction between the constitution and the government since the constitution is understood in light of what the British government does.¹⁹ A rich literature examines British constitutional history and celebrates how British institutions safeguard liberty or decries their failure to do so.²⁰ The story of the British constitution, in short, is the story of how its ancient and continuous political practices evolved over time.²¹

The most important difference between the British and American constitutions turns on what Dicey termed spontaneity. The British constitution, Dicey argued, is the “undesignated result of spontaneous efforts suggested at different moments”²² and resembles, therefore, an old mansion,

[W]hich instead of being built all at once, after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continuously receiving additions and repairs suited to the taste, fortune, or conveniency of its successive proprietors.²³

The unplanned nature of the British constitution differs markedly from the conceptual underpinnings of the American constitutional project. The American Constitution is the product of the Enlightenment, when faith in reason was virtually unassailable²⁴ and

14. *Id.* at 22. For a searching critique of the use of the term “unwritten” to refer to the British constitution, see ADAM TOMKINS, PUBLIC LAW (2003).

15. DICEY, *supra* note 11, at 172.

16. *Id.* at 174.

17. CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 1-22 (1947).

18. BARENDT, *supra* note 7, at 26-34; LOUGHLIN, *supra* note 7, at 5-39.

19. For a classic statement of this position, see J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979).

20. BARENDT, *supra* note 7, at 26-34; LOUGHLIN, *supra* note 7, at 5-39.

21. In the United States, on the other hand, there is considerable disagreement over the role that evolving political practices should play in construing the constitutional text. Living constitutionalists are more likely to look favorably upon political practices in interpreting the Constitution than are originalists. See, e. g., N.L.R.B. v. Noel Canning, 134 S. Ct. 2550 (2014).

22. DICEY, *supra* note 11, at 183.

23. *Id.* at 182 (internal citation omitted).

24. See AMERICA AND ENLIGHTENMENT CONSTITUTIONALISM (Gary L. McDowell & Jonathan O’Neill eds.,

consequently, people across the Atlantic world began writing down and codifying systems of customary law.²⁵ Hamilton neatly captured this distinction in the very first of the Federalist Papers, when he asked “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”²⁶

Lastly, Dicey argued that the British constitution is “not in any sense a copy of any foreign” constitution.²⁷ The same, he argued provocatively, cannot be said of other constitutions as even “American constitutionalism is primarily and mainly based upon English ideas.”²⁸ The American revolutionaries believed the British constitution to be a fine model worthy of emulation. Their core complaint was not that the British constitution was defective, but that “in their case the principles of the constitution had been violated.”²⁹ In particular, the principle of separation of powers and the “form” of the United States constitution were “borrowed from England.”³⁰ Dicey conceded, though, that a written constitution that is superior to the government is an important departure from British constitutionalism that “worked a far greater change in the nature of the constitution itself than American constitutionalists probably realized.”³¹

Writing in an era when written constitutions were rapidly displacing unwritten ones,³² Dicey unsurprisingly sought to defend the virtues of an historical constitution: “Political arrangements . . . which have been framed to meet an actual want are likely to achieve their immediate object, and having endured have probably met the requirements of the time.”³³ The point Dicey makes is one that Thomas Paine and Edmund Burke famously disagreed on. In the wake of the French Revolution, Burke wrote an impassioned defense of British common law constitutionalism.³⁴ Burke contended that it was a mistake to seek radical constitutional transformation because the past was an important source of stability.³⁵ Thomas Paine wrote *Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution* in response.³⁶ Paine criticized Burke and argued that reason, not tradition, should be the touchstone of constitutionalism.³⁷ Dicey’s defense of Britain’s tra-

2006). The key events that transformed the British constitution—the English revolution and bill of rights—occurred before Enlightenment ideas came into vogue. LOUGHLIN, *supra* note 7, at 14-18.

25. While Americans were busy codifying their public law arrangements in 1787, the French turned to codifying their private law in 1804. JOHN HENRY MERRYMAN, & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 27-31 (2007).

26. THE FEDERALIST NO. 1 (Alexander Hamilton).

27. DICEY, *supra* note 11, at 20.

28. *Id.* at 76.

29. *Id.* at 77.

30. *Id.* at 78-79.

31. *Id.* at 78.

32. Even in the British Commonwealth, written constitutions were becoming the norm. Canada, for example, adopted the British North America Act in 1867 and Australia adopted the Commonwealth of Australia Constitution Act in 1900.

33. DICEY, *supra* note 11, at 187.

34. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (J.G.A. Pocock ed., Hackett Publ’g Co. 1987) (1790).

35. *Id.* at 217.

36. See PAINE, *supra* note 8.

37. *Id.* at 40-41.

ditional constitution is not as famous as Burke's, but it is one that comparative constitutionalists should pay attention to. The long-term success of the British constitution in preserving liberty suggests that it contains lessons that partisans of written constitutions can ill afford to ignore.

JUDICIAL REVIEW AND THE BRITISH CONSTITUTION

Although judicial review first became linked with written constitutions in 1803,³⁸ the practice of writing and entrenching constitutions spread more rapidly around the globe than did judicial review.³⁹ Prior to World War II, many written constitutions were enforced by elected officials, not judges. The logic of *Marbury* has proven irresistible,⁴⁰ however, and contemporary written constitutions are almost invariably associated with judicial review.⁴¹ The British constitution, on the other hand, long resisted the American idea that judges should play an outsize role in protecting liberties. The key principle of British and commonwealth constitutionalism is that Parliament enjoys constitutional and legislative supremacy. It is understandably difficult to accommodate constitutional judicial review, which gives judges the power to authoritatively explicate the constitution, with the principle of parliamentary sovereignty.⁴² In any case, the British generally believed that their existing constitutional arrangements worked tolerably well until the 1960s.⁴³ In 1997, the Labor Party won a landslide victory that enabled it to undertake a number of constitutional reforms.⁴⁴ One of those reforms was the Human Rights Act of 1998 which moved Britain into the modern constitutional world by empowering judges to construe rights.⁴⁵

Stephen Gardbaum's *The New Commonwealth Model of Constitutionalism* examines the distinctive manner in which a handful of commonwealth nations—the United Kingdom, New Zealand, and Canada—adapted judicial review to the strong role historically played by Parliament in protecting rights.⁴⁶ Each of these polities constitutionalized rights and empowered judges to construe bills of rights in the late twentieth century.⁴⁷ Rights protection had long been conceptualized as a bipolar world in which either judges—the American model—or legislators—the British model—had the final constitutional word.⁴⁸ There has been considerable debate over the merits of the two systems.⁴⁹ Professor

38. See *Marbury v. Madison*, 5 U.S. 137 (1803).

39. Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. L. REV. 257, 261-70 (2008).

40. Miguel Schor, *The Strange Cases of Marbury and Lochner in the Comparative Constitutional Imagination*, 87 TEX. L. REV. 1463, 1466 (2009).

41. GARDBAUM, *supra* note 12, at 2-4.

42. An unwritten constitution with a powerful legislature makes it difficult but not impossible for judicial review to take root. The Israeli Supreme Court successfully managed to do so in spite of Israel's lack of a written constitution. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Village, 49(4) PD 221 [1995] (Isr.).

43. VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 3-4 (2009).

44. *Id.* at 42.

45. *Id.* at 59-60.

46. GARDBAUM, *supra* note 12, at 2-4.

47. See DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* (2010).

48. GARDBAUM, *supra* note 12, at 1.

49. Compare, for example, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006), with Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008). Contemporary works on the British constitution disagree on the advisability of adopting constitutional judicial review. Compare LOUGHLIN, *supra* note 7, and TOMKINS, *supra* note 14 (both authors take a

Gardbaum argues that the Commonwealth model of constitutionalism “represents a third approach” to constitutional protection that “occupies the intermediate ground in between the two traditional and previously mutually exclusive options of legislative and judicial supremacy.”⁵⁰

The Commonwealth model of judicial review consists of “two novel techniques for protecting rights”—“mandatory pre-enactment political rights review and weak-form judicial review.”⁵¹ The first requires that legislators deliberate over the constitutionality of proposed legislation.⁵² This differs markedly from the practice in nations with legalized constitutions where ex ante political review tends to be “ad hoc, voluntary and unsystematic.”⁵³ In the United States, for example, a natural division of labor has emerged where Congress focuses on policy issues and generally leaves constitutional issues to the Supreme Court.⁵⁴ The vigorous exercise of judicial review by courts may debilitate elected officials from taking on a function that does not have an electoral pay-off.⁵⁵ In a modern democracy, moreover, elected officials have a number of different issues that occupy their time, ranging from servicing constituents to raising money for re-election. By institutionalizing ex ante political review, the new Commonwealth model squarely places constitutional issues on the agenda of elected officials.⁵⁶

The second aspect of the new Commonwealth model is that it institutionalizes weak-form judicial review.⁵⁷ Courts are empowered to review whether legislation comports with a polity’s bill of rights. This is a departure from the classic British constitutionalism that Dicey analyzed in the late nineteenth century when elected officials authoritatively determined rights. Courts do not have the final word, though, over the meaning of the Constitution as elected officials may override⁵⁸ or ignore judicial decisions.⁵⁹ The new Commonwealth model differs formally from the strong form of judicial review practiced in the

skeptical view towards legalizing the British constitution), with BARENDT, *supra* note 7, and BOGDANOR, *supra* note 43 (both authors argue in favor of legalizing the British constitution).

50. GARDBAUM, *supra* note 12, at 1.

51. *Id.* at 25.

52. *Id.*

53. *Id.* at 25-26.

54. See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 20-22 (2004). Members of Congress are more likely to debate constitutional issues when there is substantial political controversy over legislation or when there is a concrete threat of a judicial veto. *Id.* at 65-66.

55. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

56. GARDBAUM, *supra* note 12, at 26.

57. *Id.*

58. The notwithstanding clause of the Canadian Charter of Rights and Freedoms, for example, allows legislatures to temporarily override constitutional interpretations of many charter rights. See Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). The efficacy of the provision is questionable as elected officials seldom rely on it to overrule the Canadian Supreme Court. Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 OSGOODE HALL L.J. 535, 559-60 (2008).

59. The British Human Rights Act (“HRA”) constitutionalizes the European Convention on Human Rights by making convention rights enforceable in British courts. GARDBAUM, *supra* note 12, at 156-61. Section 4 of the HRA empowers courts to declare that laws are incompatible with convention rights but it is up to Parliament to determine how to proceed. *Id.* at 157-58. The HRA “separates the judicial power to review legislation for compatibility with protected rights from the power to invalidate or disapply legislation deemed incompatible.” *Id.* at 158.

United States. Formally speaking, the Supreme Court has the last word in constitutional interpretation unless its decisions are overruled by constitutional amendment. In practice, though, strong form review shares some of the characteristics of weak form review, as long-term shifts in public opinion mark the outer boundaries of what courts may do.⁶⁰ By affording elected officials the final word over constitutional interpretation, the new Commonwealth model decouples judicial review from judicial supremacy.

Gardbaum persuasively argues that there is a constitutional pay-off to the new Commonwealth model.⁶¹ Pre-enactment review enables politicians to play a constructive role in shaping rights discourse. The language used by courts often gives short shrift to moral and practical issues that elected officials, who are not constrained by formal tests and rules, may be better able to articulate.⁶² In any democracy, however, elected officials may seek to override unpopular rights and are likely to ignore those that are not politically salient.⁶³ Weak form review addresses these issues by empowering courts to effectuate constitutional rights. A bill of rights, coupled with judicial review, moreover, fosters “public recognition” of rights,⁶⁴ which helps obviate the problem that rights inscribed on parchment may be ignored in practice.⁶⁵ Courts, though, suffer from pathologies when effectuating rights. Courts make mistakes, thereby undermining democratic self-governance.⁶⁶ Nor are courts as adept as legislatures in reaching compromises that the citizenry will accept.⁶⁷ Providing elected officials with the final word over constitutional interpretation addresses these problems. The new Commonwealth model, in short, produces a “better, more democratically defensible balance of power between courts and legislatures.”⁶⁸

CONCLUSIONS

Britain is the world’s oldest liberal democracy yet constitutional theorists have largely ignored its peculiar constitutional arrangements. A.V. Dicey’s recently published *Comparative Constitutionalism* and Stephen Gardbaum’s *The New Commonwealth Model of Constitutionalism* make a persuasive case that it is a mistake to ignore British constitutionalism. As Americans find themselves trapped in endless disagreements over whether evolving political practices should be celebrated or reviled in constitutional interpretation, and over whether the Supreme Court or the people is the master of the Constitution, they

60. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy Maker*, 6 J. PUB. L. 279 (1957), reprinted in 50 EMORY L.J. 561 (2001); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

61. GARDBAUM, *supra* note 12, at 47-66, 222-44.

62. Thayer, *supra* note 55, at 138. See also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1381-84 (2006).

63. For two classic descriptions of this problem, see *United States v. Carolene Products*, 304 U.S. 144, 155 n.4 (1938) and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981).

64. GARDBAUM, *supra* note 12, at 55.

65. See Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

66. This problem is typically associated with *Lochner v. New York*, 198 U.S. 45 (1905) and its progeny. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

67. The unceasing political disagreement in the United States over abortion suggests that judicial constitutional supremacy may undermine the ability of political actors to compromise over deeply contested moral issues. See Schor, *supra* note 5, at 11-13.

68. GARDBAUM, *supra* note 12, at 74-75.

could do worse than look at constitutional developments in the polity that the framers, at least, believed provided a fine model of how liberty might be protected.