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## *What Is a Political Constitution?*

GRAHAM GEE\* AND GRÉGOIRE C. N. WEBBER\*\*

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**Abstract**—The question—what is a political constitution?—might seem, at first blush, fairly innocuous. At one level, the idea of a political constitution seems fairly well settled, at least insofar as most political constitutionalists subscribe to a similar set of commitments, arguments and assumptions. At a second, more reflective level, however, there remains some doubt whether a political constitution purports to be a descriptive or normative account of a real world constitution, such as Britain's. By exploring the idea of a political constitution as differently articulated by J.A.G. Griffith, Adam Tomkins and Richard Bellamy, this essay explores why the normativity of a political constitution may be indistinct and ill-defined, and how compelling reasons for this indistinctness and ill-definition are to be found in the very idea of a political constitution itself. A political constitution is here conceived as a 'model' which supplies an explanatory framework within which to make sense of our constitutional self-understandings. The discipline of thinking in terms of a model opens up a critical space wherein there need not be some stark, all-encompassing choice between constitutional models, which, in turn, allows for more subtle understandings of Britain's constitution as neither exclusively 'political' nor 'legal'.

### 1. *Introduction*

To inquire 'what is a political constitution?' is to pose a beguilingly simple question. It is true, of course, that the idea of a *political constitution*—one that is associated with holding those who exercise political power to account, for the most part, through political processes and in political institutions—has long since melted into the landscape of constitutional thought, at least in Britain. It is commonplace, after all, for textbooks and articles to juxtapose the idea of a political constitution with that of a *legal constitution*, the latter being associated with holding those exercising political power to account, to a substantial and increasing extent, through judicial review. It is also commonplace to suggest that Britain's constitution is slowly evolving away from a political constitution towards something more akin to a legal constitution. Yet, at the same time, our

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question—what is a political constitution?<sup>2</sup>—is not so easily answered. For the question itself seems incomplete. As H.L.A. Hart remarked in 1953, ‘what is ...’ questions ‘have great ambiguity’ insofar as ‘the same form of words may be used to demand a definition or the cause or the purpose or the justification or the origin of a legal or political institution’.<sup>1</sup> Without more, the question is not situated in time, place, or perspective. To leave such matters unspecified neglects the potential for the political constitution to lend, explicitly or otherwise, something important to the constitutional self-understandings of a great variety of different people, in different places, at different times, and in different ways across the history of constitutional thought. Or, differently put: it is possible to pursue our question in any number of directions.

Our answer to the question—what is a political constitution?—will seek to explain why the political constitution continues to bring something important to the constitutional self-understandings of public lawyers in Britain at the very time when the British constitution is said to be evolving towards a legal constitution. This more focused question could be taken to invite an inquiry into the commitments, arguments and assumptions shared by most proponents of a political constitution; assumptions, for example, about the nature, content and workings of a real world constitution, such as Britain’s, or the proper role of political and judicial institutions therein. But this question could also invite a more reflective inquiry into what the idea of a political constitution purports to be; for example, does it purport to describe Britain’s constitution or to make normative sense of it? In this essay, we address our question in these more reflective terms, and for the following reasons. Today, the commitments, arguments and assumptions—in short, the claims—shared by most proponents of a political constitution seem fairly settled. In the 30 years since J.A.G. Griffith’s lecture on ‘The Political Constitution’,<sup>2</sup> and from which point it seems reasonable to trace the modern development of political constitutionalist thought,<sup>3</sup> the articulation of the claims that inform and underpin a political constitution has achieved a certain completeness—and amongst its proponents at least, a certain acceptability. The same is not true, however, of efforts to make sense of the political constitution at a more reflective level. In truth, there has been little reflection on what students of the British constitution imagine

<sup>1</sup> HLA Hart, ‘Definition and Theory in Jurisprudence’ [1953] in his *Essays in Jurisprudence and Philosophy* (OUP, New York 1983) 21.

<sup>2</sup> JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1–21.

<sup>3</sup> For a brief discussion of the development of something akin to the idea of a political constitution in the work of Harold Laski and Ivor Jennings, and the subsequent and explicit development of this idea by Griffith, see Michael Foley, *The Politics of the British Constitution* (Manchester UP, Manchester 1999) 30–7. For some, the classic work on the idea of a political constitution is Walter Bagehot, *The English Constitution* [1867] (Collins, London 1963). See generally Martin Loughlin, *Swords & Scales: An Examination of the Relationship of Law & Politics* (Hart, Oxford 2000) 4; and Adam Tomkins, ‘The Republican Monarchy Revisited’ (2002) 19 *Constitutional Commentary* 737–60.

themselves as doing (or for that matter what they succeed in doing) when they appeal to, and talk in terms of, a political constitution.<sup>4</sup>

More particularly, there remains some doubt whether proponents of a political constitution imagine themselves as engaged in a largely descriptive or normative enterprise, or perhaps an uncertain mix of the two. It is notable, for instance, that while Griffith spoke of Britain's political constitution in largely descriptive terms, Adam Tomkins and Richard Bellamy have each more recently envisaged the idea of a political constitution in explicitly, self-consciously normative terms.<sup>5</sup> Whereas Griffith seemed to deny normative content to the idea of a political constitution or, indeed, to deny the status of a political constitution as an idea at all, envisaging it instead as a reading of prevailing practices in the British political system, Tomkins and Bellamy have each argued that the idea of a political constitution can be conceived separately from any real world constitution as one that is informed and underpinned by republican norms. In this essay, we explore why some seem to envisage the idea of a political constitution in largely descriptive terms, yet others do so in plainly normative terms. In doing so, we consider whether there is something inherent in the very idea of a political constitution which invites, and possibly even demands, ambiguity about its precise normative content. In short, ours is an attempt to grapple with the indistinct and ill-defined normativity of a political constitution.

In doing so, we seek to respond to the challenge which, in our view, nowadays confronts proponents of a political constitution in Britain. If, on the one hand, a political constitution is no more than a predominantly descriptive account of constitutional practices, there is an argument that it no longer accurately describes—if it ever did—the nature, content and workings of the British constitution. If, on the other hand, a political constitution is a predominantly normative idea, there is an argument that it no longer supplies—if it ever did—an attractive account upon which to organize the British constitution. In this essay, we explore why responses to this challenge must begin by recognizing that the normativity of a political constitution is indistinct and ill-defined, but that compelling reasons for this indistinctness and ill-definition can be found within the political constitution itself. In our view, only by grappling with its indistinct and ill-defined normativity will we be able to grasp what the idea of a political constitution purports to be and, in turn, to understand its continued relevance to what many take to be Britain's changing constitution. In doing so, we develop below the claim that a political

<sup>4</sup> Often appeals are made to 'the political constitution' and 'a political constitution', testifying to some ambiguity as to the ambition of those who talk and think in these terms. For now, we will generally employ the phrase, 'the idea of a political constitution' as a precursor to our claim, developed below, that a political constitution is best conceived as a model of the constitution.

<sup>5</sup> See Adam Tomkins, *Our Republican Constitution* (Hart, Oxford 2005); and Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, Cambridge 2007).

constitution is best conceived as a constitutional model which oscillates between the descriptive and the normative.

We approach our study of the political constitution in a more or less unorthodox fashion. For one of the distinguishing features of much political constitutionalist scholarship is the extent to which its proponents engage with legal constitutionalists, such as Ronald Dworkin, T.R.S. Allan and Sir John Laws, but not with each other.<sup>6</sup> Indeed, it can sometimes seem as if, for many of its proponents, a political constitution is defined by the array of contrasts that can be drawn with a legal constitution, with much effort being made to rebut the challenges that appear to be posed to a political constitution by its legal counterpart. More emphasis tends to be placed on making sense of a political constitution obliquely, in terms of what it differs from, rather than in terms of its own possibilities. There may be good reasons for seeking to explain a political constitution (or any complex idea) in this way. It might even be difficult to make sense of the political constitution without, to some degree, bringing into perspective the idea of a legal constitution. In this essay, however, we engage more directly with the idea of a political constitution itself. Consequently, we devote comparatively little attention to the nature, content and workings of a legal constitution.<sup>7</sup> Instead, our focus is on the idea of a political constitution as it has been differently articulated over the last 30 years or so by Griffith, Tomkins and Bellamy. We begin by considering Professor Griffith's lecture on 'The Political Constitution'. This lecture expressed, albeit in ways that are exaggerated in places, the claims today shared by most proponents of a political constitution in Britain. More importantly for our purposes, Griffith's lecture is interesting insofar as it seemed to envisage the political constitution in terms which were largely, if not at times exclusively, descriptive of prevailing constitutional arrangements.

## 2. *The Descriptivism of Griffith's Political Constitution*

Professor Griffith chose as the title for the Chorley Lecture of 1978, 'The Political Constitution',<sup>8</sup> but in neither the lecture itself nor his writings more

<sup>6</sup> While many proponents of a legal constitution draw on, or at least seem to be inspired by, the writings of Ronald Dworkin, the leading proponents in Britain of the model of a legal constitution are TRS Allan and John Laws: see TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon, Oxford 1993); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2001); John Laws, 'Law and Democracy' [1995] PL 72–93; and John Laws, 'The Constitution, Morals and Rights' [1996] PL 622–35.

<sup>7</sup> For critiques of the legal constitutionalist approach, and particularly the work of TRS Allan, see Thomas Poole, 'Dogmatic Liberalism? T.R.S. Allan and the Common Law Constitution?' (2002) 65 MLR 463–75; Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435–54; and Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 LS 142–63.

<sup>8</sup> For three recent re-interpretations of this lecture, see Carol Harlow, 'The Political Constitution Reworked' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington 2006) 189; Thomas Poole, 'Tilting at Windmills? Truth and Illusion in the Political Constitution' (2007) 70 MLR 250–77; and Graham Gee, 'The Political Constitutionalism of J.A.G. Griffith' (2008) 28 LS 20–45.

generally did Griffith purport to grapple with the question ‘what is a political constitution?’, perhaps because he never conceived of it as anything distinct or separate from the British constitution itself. Rather, Griffith’s contribution was to offer what was, in 1978, a novel account of Britain’s constitutional arrangements and, for some, a faintly disturbing account of what he took to be the distinctively political character of the constitution. Through this, Griffith laid the foundations for the emergence of the idea of a political constitution as a fresh and provocative way of thinking and talking about the British constitution. To be clear, the novelty of his lecture lay less in making claims not found in his previous scholarship or in describing the British constitution as distinctively political; rather, the novelty was in bringing claims (and aphorisms) present in his earlier scholarship together into a reading of the British constitution that was political inasmuch as it was characterized by conflict, disagreement, messiness and chaos—a reading that was fresh, provocative, even unsettling for some.

Griffith’s lecture set out the sort of relentless critique of a bill of rights which is today distinctive of much political constitutionalist scholarship. More particularly, Griffith’s lecture was a critique of bills of rights of the sort that generate judicially enforceable limits on the legislature.<sup>9</sup> This critique relied on two broad categories of objection, which he labelled the ‘philosophical’ and ‘political’.<sup>10</sup> The *philosophical objection* reflected Griffith’s rejection of any approach to constitutional matters that was focused on, and formulated in terms of, ‘rights’. For Griffith, there was no such thing as ‘rights’, but rather ‘political claims by individuals and groups’.<sup>11</sup> There is, Griffith suggested, ‘a continuous struggle between the rulers and the ruled about the size and shape of these claims’, and that ‘struggle is political throughout’.<sup>12</sup> This led Griffith to stress the importance of cultivating ‘situations in which groups of individuals may make their political claims and thus seek to persuade governments to accept them’.<sup>13</sup> Griffith’s *political objection* reflected his belief that law is neither separate from nor superior to politics, but is itself a form of political discourse. ‘Law’, Griffith wrote, ‘is not and cannot be a substitute for politics’.<sup>14</sup> Therefore, insofar as politics is ‘what happens in the continuance or resolution of conflicts’, law is no more than ‘one means, one process, by which those conflicts are continued or may be temporarily resolved’.<sup>15</sup> Or, as Griffith put it in a later article, ‘law is politics carried on by other means’.<sup>16</sup>

<sup>9</sup> Griffith presented the lecture as a response to three books published in the 1970s: Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, London 1978); Lord Scarman, *English Law—The New Dimensions* (Stevens, London 1974); and Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 1977).

<sup>10</sup> Griffith (n 2) 12.

<sup>11</sup> *Ibid.* 17.

<sup>12</sup> *Ibid.* 17–8.

<sup>13</sup> *Ibid.* 18.

<sup>14</sup> *Ibid.* 16.

<sup>15</sup> *Ibid.* 20.

<sup>16</sup> JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 LQR 42–67, 64.

Together, these two objections led Griffith to argue that bills of rights should be avoided. For Griffith, rights, and the principles that are said to find expression in them, cannot be guidelines for legislative or administrative activity since rights and principles, in their application to specific situations, are ‘the very questions which divide not unify opinion’.<sup>17</sup> The fact that the framers of bills of rights are ingenious in crafting abstract formulations under the rubric of rights should not conceal what are in truth political claims. It followed, for Griffith, that judicial adjudication of political claims passes ‘political decisions out of the hands of politicians and into the hands of judges’.<sup>18</sup> Thus, bills of rights do not resolve political claims, but shift them into disputes about the meaning of the legal language of the bill of rights, with these disputes ultimately falling to be decided by judges. This, in turn, offended Griffith’s conviction that ‘political decisions should be taken by politicians’.<sup>19</sup> From Griffith’s viewpoint, political decisions should be taken by politicians not because politicians are more likely to arrive at some uniquely correct answer, but because they are removable every few years at the ballot box and are accountable to Parliament in the meantime. This led Griffith to contend that ‘the responsibility and accountability of our rulers should be real and not fictitious’.<sup>20</sup> While Griffith acknowledged that mechanisms of political accountability such as ministerial responsibility did not always operate as effectively as might be hoped, he maintained that ‘the remedies are political’,<sup>21</sup> by which he meant that proposals for reform should focus not on a bill of rights which would limit Parliament’s ability to legislate, but on measures which would enhance Parliament’s ability to hold ministers, and others who exercise political power, to account.<sup>22</sup>

In crafting this critique of bills of rights, and in linking this critique to Britain’s reliance on mechanisms of political accountability, Griffith outlined his reading of Britain’s constitutional arrangements as they are and should be. While he did not offer anything akin to a definition or summary of his use of the expression ‘political constitution’ and did not explicitly refer to the rubric of ‘a political constitution’ in the text of his lecture itself, it seems to us that there are four claims which combined to delineate Griffith’s reading of a political constitution; claims which today, more than 30 years on, tend to be repeated, albeit often with a greater degree of theoretical sophistication, by most political constitutionalists in Britain. First, there is no sharp distinction

<sup>17</sup> Griffith (n 2) 20. For an argument how bills of rights can be read to acknowledge this, see Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP, Cambridge 2009).

<sup>18</sup> Griffith (n 2) 16.

<sup>19</sup> *Ibid* 3, 16.

<sup>20</sup> *Ibid* 16.

<sup>21</sup> *Ibid* 16.

<sup>22</sup> See generally JAG Griffith, *Parliamentary Scrutiny of Government Bills* (Allen & Unwin, London 1974).

between law and politics.<sup>23</sup> Second, law and politics each respond to and are conditioned by ‘the conflict [which] is at the heart of modern society’.<sup>24</sup> Law and politics are to be understood by reference to what Jeremy Waldron has termed ‘the circumstances of politics’, being ‘a felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be’.<sup>25</sup> Third, because of the circumstances of politics, reasoning under the rubric of ‘rights’ should be employed with caution, since there will likely be disagreement about which so-called ‘rights’ to recognize, how ‘rights’ apply to concrete cases, how best to realize such ‘rights’ and so forth. More pointedly put: arguments about what are contestable, political claims should be recognized and labelled as such rather than paraded about as ‘rights’. Fourth, this account of the relation between law and politics, together with a profound scepticism about rights-based reasoning, ‘cannot encourage those who would embark on formal or written statements’ such as a bill of rights to limit the political process, but suggests instead that ‘the best [that] we can do is enlarge the areas for argument and discussion’<sup>26</sup> in the political process, including about the nature and content of the constitution itself. Together, these four claims combined to map Griffith’s reading of Britain’s constitution as one which treats the constitution not as a framework of fundamental laws, but as a contingent response to the circumstances of politics that is itself the subject of political debate, as well as liable to the possibility of change, even radical change, through the ordinary, day-to-day political process.

Griffith’s reading of Britain’s constitutional arrangements as political through-and-through has found a sympathetic audience with modern-day proponents of the political constitution. It seems that for some, however, this sympathy has been tested by the *descriptivism* (or, as we put it below, the *apparent descriptivism*) of Griffith’s political constitution.<sup>27</sup> Despite Griffith’s not infrequent appeal to the vocabulary of ‘ought’ (e.g. ‘political decisions should be taken by politicians’, ‘the responsibility and accountability of our rulers should be real and not fictitious’), some take his reading of Britain’s constitution in 1978 to deny that there are norms underpinning a political

<sup>23</sup> On the important contribution made by Griffith in claiming, albeit in stark terms, that law is politics by some other means, see Thérèse Murphy and Noel Whitty, ‘A Question of Definition: Feminist Legal Scholarship: Socio-Legal Studies and Debate about Law and Politics’ (2006) 57 NILQ 539–56, 539–40. For evidence that political constitutionalists have today moved beyond the starkness of Griffith’s claim to recognize that law and politics likely ‘collide and combine in a dazzling variety of (not always compatible) ways’: see, eg Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157–75, 169.

<sup>24</sup> Griffith (n 2) 2.

<sup>25</sup> Jeremy Waldron, *Law and Disagreement* (OUP, Oxford 1999) 102.

<sup>26</sup> Griffith (n 2) 20.

<sup>27</sup> For brief discussion of the ‘descriptivism’ of Griffith’s model of a political constitution, see Dawn Oliver, *Constitutional Reform in the UK* (OUP, Oxford 2003) 21 (characterizing Griffith’s idea of a political constitution as ‘lacking normative content’); and JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP, Cambridge 2007) 34 (characterizing Griffith’s political constitution as ‘entirely descriptive—neither legally prescriptive nor morally normative’).



constitution, and that there are, as a consequence, no prescriptions deriving from it to guide the behaviour of ministers, members of Parliament, civil servants, law officers, judges and so forth.<sup>28</sup> This apparent descriptivism is encapsulated in a passage in which Griffith wrote that Britain's constitution 'lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.'<sup>29</sup> On one reading, this passage implies that there can be no norms underpinning a political constitution inasmuch as a political constitution always remains subject to the possibility of change—significantly, *any* change—through the ordinary political process. On this reading, in which there are no legal limits on the political process and no bill of rights to cabin day-to-day politics, everything and anything that happens is constitutional.

On a second (and, in our view, truer) reading, matters are rather more ambiguous. We concede that Griffith *appeared* to deny normative content to a political constitution; indeed, that he can be taken to deny that the political constitution can be conceived of as an 'idea' separable from Britain's constitution. We also concede that one possible consequence of Griffith's failure to emphasize any normative content to the political constitution is that Britain's seeming shift towards the idea of a legal constitution could 'be presented as jeopardizing nothing that is normatively valuable'.<sup>30</sup> At the same time, however, it is difficult to escape the conclusion that, for Griffith, Britain's political constitution exemplified a 'good' constitution and to which normative weight ought to be attached. As Carol Harlow observes, Griffith's political constitution stands 'as a benchmark for those who see representative and parliamentary government as important constitutional desiderata'.<sup>31</sup> Indeed, perhaps above all, Griffith's lecture stands as a benchmark for those who recognize a critical, normatively significant link between the constitution and political activity, and where the constitution always remains subject to the possibility of change through the sort of day-to-day politics which is associated with representative and parliamentary government. It may be, then, that Griffith's quip that Britain's constitution is no more and no less than what happens was merely a reminder, in aphoristic form, that a constitution should always be subject to political debate in, and the possibility of change through,

<sup>28</sup> It would follow that, for Griffith, something like ministerial responsibility, which is a key component of most understandings of a political constitution, is not a constitutional requirement, but simply a prevailing practice in Britain's political constitution. If ministers refused to inform and explain their actions to Parliament, it would not be apt, on this reading of Griffith's lecture, to talk of 'unconstitutionality', but rather to conclude that Britain's political constitution, which can of course be changed through the ordinary political process, would have simply 'changed again': JAG Griffith, 'Comment' [1963] PL 401–3, 402. According to this reading, it is not possible to argue that something in Britain's political constitution is 'unconstitutional', only that it is 'politically unwise or undesirable': JAG Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159–76, 175.

<sup>29</sup> Griffith (n 2) 19.

<sup>30</sup> Tomkins (n 5) 40.

<sup>31</sup> Harlow (n 8) 190.

the ordinary political process. If Griffith can be taken as sketching his vision of a ‘good’ constitution—or in terms that might be truer to his approach: as presenting the British constitution in a way that brings out its best components—and if his suggestion that a constitution is no more and no less than what happens is taken as a statement about the close relationship between a political constitution and day-to-day politics, Griffith can be said to have downplayed, but not denied, the normativity within—indeed, the separable idea of—the political constitution.<sup>32</sup> We return to this below. For now, we suggest that if this reading is correct, the challenge for political constitutionalists would seem to be twofold: first, to render explicit the normative content of a political constitution; and second, to account for why this normative content remained indistinct and ill-defined within Griffith’s lecture. The first of these challenges is, it now seems, being met: for in an attempt to move beyond the apparent descriptivism associated with Griffith’s political constitution, and in order to render explicit what would be lost with any shift towards a legal constitution, recent scholarship on the idea of a political constitution has taken an explicitly ‘normative turn’.

### 3. *A Normative Turn*

The turn evident in recent political constitutionalist scholarship renders explicit the normative qualities of day-to-day politics in real world constitutions, such as Britain’s, with long traditions of democracy and the rule of law. This ‘turn’—spearheaded by public lawyer Adam Tomkins and political theorist Richard Bellamy—supplies a corrective to the vision of day-to-day politics commonly associated with legal constitutionalists, who often seek to cabin politics for fear of its destructive potential. Legal constitutionalists sometimes present the vagaries of ordinary, everyday political life as potentially destructive of the rule of law and individual rights and which, therefore, must be constrained by judicially enforceable constitutional prescriptions. Instead, the normative turn in political constitutionalist writing offers an account of how politics serves as the ‘vehicle’<sup>33</sup> through which to realize these same (and other) ends. More particularly, the very aspects of day-to-day political life that ‘many legal and political theorists are apt to denigrate—its adversarial and competitive qualities, its use of compromise and majority rule to generate agreement, the role of political parties—are those’ that political constitutionalists like Bellamy

<sup>32</sup> Griffith (n 2) 15 (Griffith referred to reform proposals which ‘would change the constitution at its very heart. This heart is that the Governments of the United Kingdom may take any action necessary for the proper government of the United Kingdom, as they see it, subject to two limitations. The first limitation is that they may not infringe the legal rights of others unless expressly authorized to do so under statute or the prerogative. The second limitation is that if they wish to change the law, whether by adding to their existing legal powers or otherwise, they must obtain the assent of Parliament’).

<sup>33</sup> Tomkins (n 5) 3.

and Tomkins ‘seek to praise’.<sup>34</sup> In doing so, the focus of this turn is not on an idealized form of political life, but rather—much like Griffith—on the actual day-to-day political life found in real world constitutions, with all of its imperfections and foibles. In what follows, we offer a sketch of the broad contours of this recent scholarship in order to show how political constitutionalists have sought both to move beyond the descriptivism associated with Griffith’s reading of a political constitution and to elaborate on the link which Griffith alluded to between the constitution and day-to-day politics.

Sympathetic to the tenor of Griffith’s commitment to political accountability, but critical of his descriptive account, Tomkins has sought ‘not to invent but to revive’ the idea of a political constitution by grounding it on basic norms of republican theory.<sup>35</sup> Drawing on the scholarship of Quentin Skinner and Philip Pettit, Tomkins has identified non-domination, popular sovereignty, equality, open government and civic virtue as the basic norms that inform and underpin the idea of a political constitution.<sup>36</sup> Extrapolating from these basic norms to consider how republicanism might be instantiated in a real world constitution, Tomkins has suggested that ‘the centrepiece of a republican constitutional structure is accountability: those in positions of political power must be accountable to those over whom (and in whose name) such power is exercised’.<sup>37</sup> This, in turn, has prompted Tomkins to argue that a political constitution, with its emphasis on political accountability, embraces elements of a republican ideal. By pointing to ministerial responsibility as the ‘simple—and beautiful—rule’<sup>38</sup> that resides at the heart of Britain’s constitutional arrangements, Tomkins has constructed a republican-inspired reading of what is, for him, Britain’s political constitution. For the most part, Tomkins—in a manner that recalls Griffith’s approach—draws out the primarily political character of the British constitution by interpreting contemporary constitutional practices in ways that illuminate the continued relevance of ministerial responsibility. In the face of the widespread belief that Parliament is seldom effective in holding ministers to account, Tomkins re-appraises the parliamentary record, arguing that although ministerial responsibility is not always as effective as might be hoped, ‘the system of political accountability is actually stronger now than it has been for some years’.<sup>39</sup>

<sup>34</sup> Bellamy (n 5) 210.

<sup>35</sup> Tomkins (n 5) vii.

<sup>36</sup> See generally Quentin Skinner, *Liberty before Liberalism* (CUP, Cambridge 1998); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, Oxford 1997); and Philip Pettit, ‘Keeping Republican Freedom Simple: On a Difference with Quentin Skinner’ (2002) 30 *Political Theory* 339.

<sup>37</sup> Tomkins (n 5) 64–5.

<sup>38</sup> *Ibid.* 1.

<sup>39</sup> Adam Tomkins, *Public Law* (Clarendon, Oxford 2003) 134. By stressing the continued relevance of ministerial responsibility, he suggests that the constitution, in the absence of fundamental laws that are enforceable in the courts, is premised upon political accountability, and upon a political class which takes seriously its responsibility for holding ministers to account. See further, Adam Tomkins, *The Constitution after Scott: Government Unwrapped* (Clarendon, Oxford 1998) 266–75.

This republican-inspired account has attracted considerable comment, albeit much of it critical.<sup>40</sup> For our purposes, however, what is significant about Tomkins' scholarship is that it bespeaks a concern to move beyond Griffith's descriptivism in order to construct a normatively attractive vision of a political constitution that explains how day-to-day political activity, and the exercise of ministerial responsibility in particular, helps to realize the basic norms of republicanism.

Like Tomkins, Richard Bellamy has drawn upon republican theory to develop an explicitly normative account of the idea of a political constitution.<sup>41</sup> Yet, unlike Tomkins, for whom ministerial responsibility to Parliament is the core of a political constitution, the legislature's law-making function is the thread that runs throughout Bellamy's designation of the *political* constitution as the *democratic* constitution. This emphasizes not only the politics of prevailing constitutional arrangements—the constitution as the contingent, contested result of reasonable disagreement operating under the circumstances of politics, where constitutional change is effected for the most part through the prevailing political majority—but also the grounding of the constitution in the democratic. For Bellamy, 'the democratic process *is* the constitution'.<sup>42</sup> On this account, the constitution never escapes democracy, insofar as it is never beyond question or amendment by the principal political institutions, acting through ordinary political (and, for the most part, legislative) processes. The constitution is sustained (not undermined) by the day-to-day activity of democratic politics—and, in this, is forever subject to modification and amendment through such political activity. The constitution is forever within the legislature's grasp and forever subject to challenge, revision, amendment and—conceivably—rejection.

For Bellamy, no political matter may be decided other than *by* the people, lest that matter (no matter how obvious or true or right) become a source of

<sup>40</sup> For the criticism that Tomkins is selective in his use of historic materials to draw out what he takes to be the distinctive republican streak in Britain, see Martin Loughlin, 'Towards a Republican Revival' (2006) 26 OJLS 425–37, 430–3. For the criticism that Tomkins neglects important facets of Philip Pettit's republican ideal, including Pettit's caution about the limitations of a 'parliamentarian mentality', see TRS Allan, 'Book Review' [2006] PL 172–5, 174. For criticism directed as much towards the very idea of a political constitution as towards Tomkins' republican-inspired vision of a political constitution, see Ian Loveland, 'Book Review' (2006) 122 LQR 340–4. For a more favourable review acknowledging that Tomkins attempted no more than a tentative and preliminary republican reading of the British constitution, see Danny Nicol, 'Book Review' (2006) 69 MLR 280–4.

<sup>41</sup> See, eg Bellamy (n 5). For critical reviews of Bellamy's monograph, see TRS Allan, 'Book Review' (2008) 67 CLJ 423–6; Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591–7; and Alec Walen, 'Judicial Review in Review: A Four-Part Defence of Legal Constitutionalism—A Review Essay on Political Constitutionalism, by Richard Bellamy' (2009) 7 I-CON 329–54. Themes consolidated in Bellamy's monograph can be found in: Richard Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy' (1996) XLIV Pol Studies 436–56; Richard Bellamy and Dario Castiglione, 'Constitutionalism and Democracy—Political Theory and the American Constitution' (1997) 27 B J Pol Sci 595–618; Richard Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP, Oxford 2001); and Richard Bellamy, 'Republicanism and Constitutionalism' in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell, Oxford 2008).

<sup>42</sup> Bellamy (n 5) 5 (emphasis in original).

domination *over* the people. This confronts the view of legal constitutionalists, according to which certain matters are not—or, once positioned at the constitutional level, are no longer—political. For some legal constitutionalists, certain ‘constitutionalized’ matters are beyond recall or question by political institutions through the normal political processes; they exist within a non-political world. But this stratagem is nothing other than politics cloaked in false neutrality, Bellamy suggests, for nothing can be taken ‘outside of politics’, lest constraints be arbitrarily set upon the political system. It seems that from Bellamy’s standpoint, there is no non-political world, no matter that should be taken from the people and determined by some authority other than their own. The republican norm of non-domination requires that only the people rule themselves.

Like Tomkins’, Bellamy’s account of a political constitution evinces the critical relationship between the constitution and ordinary day-to-day politics, even if they develop the political constitutionalist’s claims differently. These differences are explainable, in part, by the ‘purpose’ of a constitution attributed by each, and the role of Parliament within it. Tomkins talks of a constitution as being ‘to check government’.<sup>43</sup> If this aptly captures his vision of a constitution, there is little surprise that he should underline the central importance of ministerial responsibility to Parliament and, in turn, that his concern should be with the influence of party whips and the need for more free votes in Parliament.<sup>44</sup> Indeed, Tomkins has gone further in articulating his vision of a political constitution, arguing that ‘we should abandon the notion that Parliament is principally a legislator’; rather, today, Parliament is first and foremost a ‘scrutinier’ or ‘regulator’ of government.<sup>45</sup> Meanwhile, Bellamy’s understanding of a constitution seems implicitly to emphasize not just a ‘negative’ red-light constitutionalism, in which the prime concern is to check government, but also a ‘positive’ constitutionalism in which political institutions and processes, and the legislative process more particularly, help to realize constitutional goods, including political equality. Bellamy’s idea of a political constitution is one which recognizes that a legislature premised upon majority rule, periodic elections and party competition will ‘institutionalize mechanisms of political balance and political accountability that provide incentives for politicians to attend to the judgments and interests of those they govern’.<sup>46</sup>

<sup>43</sup> Tomkins (n 5) 3.

<sup>44</sup> Ibid 136–9. For an illuminating exchange on the place of party whips in the British constitution, see Danny Nicol, ‘Professor Tomkins’s House of Mavericks’ [2006] PL 467–75; and Adam Tomkins, ‘Professor Tomkins’s House of Mavericks: A Reply’ [2007] PL 33–9.

<sup>45</sup> Adam Tomkins, ‘What is Parliament for?’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford 2003) 53, 54.

<sup>46</sup> Bellamy (n 5) viii.

The thrust of Bellamy's argument is that competition between political parties 'reinforces [a system of political equality] by promoting the responsiveness of political agents to their citizen principals'.<sup>47</sup>

While Tomkins and Bellamy have, for the most part, carried the normative turn in political constitutionalist scholarship, a survey of this turn would be incomplete if it omitted reference to Martin Loughlin.<sup>48</sup> For although Loughlin has not identified himself as a participant in the political constitutionalist debate and, indeed, has expressly disassociated himself from the rubric of a political constitution,<sup>49</sup> political constitutionalists have found much to support their thinking in Loughlin's scholarship on the relationship between public law and politics. The disagreement that animates citizens, the contestability of political decisions, and the idea of law being a distinctive form of political discourse all animate Loughlin's scholarship as they do political constitutionalist thought. Yet, when Loughlin turns directly to the idea of a political constitution, he conceives of it as 'concerned with drawing a polarized opposition' with the idea of a legal constitution.<sup>50</sup> While he is correct to identify polarizing opposition between many political and legal constitutionalists, there remains an important explanatory force within the ideas of the political and legal constitution, as we will explore in the sections below. Nevertheless, while not participating directly in the normative turn described in this section, Loughlin has undoubtedly shaped the normative bases upon which this turn relies.<sup>51</sup>

The normative turn within political constitutionalist scholarship has answered the first of two challenges that arise as a result Griffith's downplaying of (but not denying the) normative content within a political constitution. While many might take issue with the normative qualities attributed to various aspects of day-to-day politics, Bellamy and Tomkins succeed in rendering explicit the normativity of a political constitution. But a second, related challenge remains: to account for why this normative content remained for Griffith and, we suggest, remains for Tomkins and Bellamy, indistinct and ill-defined. In other words, what is it about a political constitution that invites, and possibly even demands, ambiguity about its precise normative content? That is the task to which we now turn.

<sup>47</sup> Ibid 259.

<sup>48</sup> See, in particular, Loughlin (n 3); and Martin Loughlin, *The Idea of Public Law* (OUP, Oxford 2003).

<sup>49</sup> Martin Loughlin, 'Reflections on the Idea of Public Law' in Emiliios Christodoulidis and Stephen Tierney (eds), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, Aldershot 2008) 52.

<sup>50</sup> Ibid.

<sup>51</sup> For example, Loughlin's critical review of Rawls' political liberalism will readily resonate with political constitutionalists: see Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 OJLS 183–202, 187–91.

#### 4. *Prescriptive Without Prescribing*

In our view, both a political constitution and a legal constitution are prescriptive, but not only do they make different demands of different political and judicial actors, they do so in more and less exacting ways. The prescriptions of a legal constitution are the more extensive and exacting, and thereby also the easier to detect. Typically, the idea of a legal constitution is associated with a constitutional text and a set of unwritten (judicially expounded) constitutional principles. The constitution is higher law, in the sense that 'ordinary' law conflicting with it is liable to be held invalid in the judicial process. What bears emphasis is that a legal constitution provides detailed and strong prescriptions as to the basic character, content and workings of the constitution, including, for example, prescriptions on which rights to include in a written bill of rights and on which grounds to exercise judicial review. Formalized legal instruments, such as a written constitution and a bill of rights, occupy much of the terrain populated by political actors, serving to bound political activity, including by prescribing procedures limiting the ability of political actors to change the constitution through the regular legislative process. Transgressions of the prescriptions laid down by a legal constitution are (said to be) easily identified, with judges pronouncing definitively on the requirements of formalized constitutional arrangements.

In contrast, a political constitution offers no comparable, definitive prescriptions: no formalized legal instruments, no immutable statement of rights or architectural arrangements, no procedures entrenching the constitution, and no fixed constitutional boundaries to be policed. As a result, the idea of a political constitution continues to give rise to some ambiguity as to how it can be prescriptive in the absence of similarly overt prescriptions. The normative content of a political constitution is, in other words, difficult to discern. It is notable that just as the normative content of a political constitution is difficult to discern, so too are the very workings of a political constitution. Indeed, it occurs to us that a contributing factor to why the normativity of a political constitution remains obscured is because the workings of the political constitution are themselves less visible than a legal constitution. Because a political constitution 'lives on changing from day to day' (as Griffith noted), and because, in a very real sense, 'the democratic process *is* the constitution' (as Bellamy noted), a political constitution is, in the final analysis, difficult to identify as a phenomenon distinct from day-to-day political activity. There is no appeal to a reified constitutional text, to a bill of rights or to grand judicial pronouncements. Rather, a political constitution works primarily, and often imperceptibly, inside Parliament and the executive and, where visible, its workings will often appear less dignified and more haphazard than court proceedings, as members of Parliament argue amongst

each other, harangue the Prime Minister and then, for the most part, rally behind their party whips. In our view, this (in)visibility offers a partial explanation for why support for the idea of a political constitution seems to be dwindling: much of the workings of a political constitution are not visible, and where they are, they often take the form of the rough and tumble of day-to-day politics that ‘offend most of our rational and all of our artistic sensibilities’.<sup>52</sup>

While it is true that the prescriptions of a legal constitution are more extensive and exacting than those of a political constitution—which explains, in part, why the normativity of a legal constitution is the easier to detect—it would be wrong to conclude from this alone that the normativity of a legal constitution is more compelling than that of its political counterpart. In the same way that it would be wrong to evaluate the quality of reasoning within a legislative forum against the standards of reasoning within a judicial forum, so too we should not expect a political constitution to exhibit the same species of normativity discernible within a legal constitution. Indeed, if we are willing to envisage the normativity of a constitution otherwise than a legal constitution—alist would, we might come to appreciate that there is something inherent in the idea of a political constitution that invites some necessary (and welcome) ambiguity about the extent to which a political constitution—which is always subject to the possibility of change through the political process—is prescriptive.

The idea of a political constitution is prescriptive, but it does not purport to prescribe the nature and content of the constitution in great detail. By design, a political constitution leaves it to political actors, operating through the ordinary political process, to prescribe the nature and content of the constitution. At its simplest, it directs political actors to design an electoral process based on some notion of equal votes and to ensure that the political process is based on some notion of holding those in power to account. In this, the idea of a political constitution prescribes no more than the bare minimal conditions for political equality and accountability and non-domination. Beyond these broad parameters, there are ‘no views of democratic procedures that all can agree best protect majority rule, guarantee free discussion or protect minorities’.<sup>53</sup> And because of this, no more prescriptions—in number or detail—should be undertaken by anyone other than political actors. A political constitution does not prescribe in any great detail because one of its basic features is its constant liability to the possibility of change effected through the ordinary political process. It would not be coherent for the idea of a political constitution to prescribe that the nature and content of the constitution must always remain

<sup>52</sup> Michael Oakshott, *The Politics of Faith and the Politics of Scepticism* (Yale UP, New Haven 1996) 19.

<sup>53</sup> Bellamy (n 5) 134.



liable to change through the ordinary political process and yet also, at the same time, to prescribe that very nature and content.

The significance of this becomes apparent if we contrast the role of political actors within the legal constitution and political constitution, respectively. The idea of a legal constitution presents the constitution as a fixed, end-point for political actors. Now, it is true that a legal constitution is not necessarily fixed in the sense that it is unchanging, at least insofar as it is subject to 'growth' under the guise of 'living tree' interpretation in the judicial forum or the evolution of 'unwritten principles' at common law. However, a legal constitution is, in effect, a fixed end-point for political actors insofar as constraints are imposed upon (and, for the most part, are not amendable by) those actors. In contrast, the idea of a political constitution conceives of a constitution as more contingent, dynamic and political activity. It is appropriate to recall Griffith's characterization of a political constitution as one in which '[e]verything that happens is constitutional', and where 'if nothing happened that would be constitutional also'. As we read this famous passage, Griffith's implication is that a political constitution is a direct expression of day-to-day political activity. Absent a set of fundamental laws, justiciable and enforceable in the courts, that impose restraints on political institutions and the political process more generally, a political constitution is conceived as a direct expression of ordinary political activity operating within and across political institutions. Critically, a political constitution is conceived in a way that makes explicit the possibility of adaptation, and even radical adaptation, through such ordinary, day-to-day political activity.

In a sentence that aptly captures this less exacting, but nonetheless normative orientation, Bellamy writes that the constitution 'must be left open so we may *rebuild the ship at sea*—employing, as we must, the prevailing procedures to renew and reform those self-same procedures'.<sup>54</sup> For Bellamy, and for political constitutionalists more generally, the ship of state is rebuilt according to the ordinary political process that is—so to speak—already at sea. In other words, the constitution and the political process which gives it shape are both already constituted. We, political actors and citizens, are not in the scholar's 'original position' charged with designing a first constitution from naught. Rather, we are already at sea; a constitution is already before us, the political process already in use, and the process of rebuilding is, simply put, continual. For a political constitution, there is thus no single, identifiable moment of constitution-making and, for the political constitutionalist, it is right that this should be so. Because disagreement will never cease and because changing circumstances will likely affect people's reasoned opinions,

<sup>54</sup> Ibid 174 (emphasis added).

constitution-making should be seen as ‘an ongoing political process’ in the circumstances of politics.<sup>55</sup> In this way, the idea of a political constitution encourages us to see (and to design) a constitution as created, sustained and amended through the ordinary political process that is the focus of day-to-day politics. It is thus that we might say that the idea of a political constitution is one that is prescriptive without really prescribing. Or rather: the idea of a political constitution prescribes that it is for us all, for the most part acting through representatives in political institutions, to do the prescribing.

Keeping all this in mind, we can see that the ambiguity that has so troubled interpretations of Griffith’s political constitution as normatively empty may be the inevitable ambiguity of any account of a constitution which purports to be prescriptive without prescribing much. The normativity of a political constitution is necessarily ambiguous because its ought-propositions are minimal; it directs, in effect, little more than that it is for all of us, acting principally through our elected representatives in Parliament, to do the prescribing. Of course, there is a deeper concern here, for some at least. Some will worry that a constitution that prescribes so little allows political actors too much latitude; too much room to ride roughshod over the rights of minorities or to disregard important boundaries of constitutional government. There is, in other words, a real concern that a constitution should not be one where everything that happens, no matter the nature or content, is constitutional.

To this political constitutionalists might respond: ‘*whilst everything that happens is constitutional, not just anything can happen*’.<sup>56</sup> There are two claims wrapped within this response: empirical and normative. By laying stress on ‘real democracy’, ‘real politics’ and ‘actually existing political practices’, political constitutionalists have rightly insisted on the empirical claim that a political institution that can do anything, in the sense of there being no legal limits on its powers, seldom actually does everything within its grasp. Rather, as political constitutionalists are keen to demonstrate, politics, unconstrained by judicially enforceable legal limits, has been used as the means to realize good ends. As we saw in the previous section, for Tomkins, this involves placing stress on the exercise of ministerial responsibility to Parliament as a way of checking the power of government; for Bellamy, this involves placing stress on how, far from endangering the rule of law and individual rights, Parliament’s law-making function supplies much of their rationale and best defence.

Building on this empirical claim, political constitutionalists also make a normative claim. By specifying that not just anything *can* happen, political constitutionalists can be taken to claim that not just anything *should* happen.

<sup>55</sup> Ibid 106.

<sup>56</sup> Gee (n 8) 42 (emphasis in original).

Or, more strongly put: certain things, albeit minimal, should happen. As just reviewed, the idea of a political constitution provides political actors with the directive: design a constitution that provides for the equal participation of all citizens, but, at the same time, ensures that this design is itself subject to the possibility of re-design. Fail in this task and the result will be a distancing from the republican ideal and a concomitant source of domination and political inequality. The result will not, however, be ‘invalid’ or contrary to fundamental law, as legal constitutionalists would maintain in relation to their more exacting prescriptions. The political constitution’s directive is prescriptive but not binding in the way of a legal constitution.

Our claim, then, is that both a political constitution and a legal constitution share the normativity of an account that makes claims of political and judicial actors, even if they make different claims of each. However, where the species of normativity diverge is in the degree to which they prescribe. Legal constitutionalists prefer to set the stage before the actors step in and to determine their script to the greatest detail. In contrast, by self-consciously directing political actors to conceive of themselves as engaging in constitutional activity at the same time as they are engaged in ordinary, day-to-day political activity, political constitutionalists prescribe very little beyond the basic command to leave to political actors the responsibility to prescribe (and re-prescribe) the content and character of *their* constitution. The species of normativity inhabiting a political constitution thus escapes reification but, at times, also escapes obvious identification and classification. Yet, despite the relative indistinctness and ill-definition of its prescriptions, whenever one talks in terms of a political constitution, one must not lose sight of the fact that one appeals to a normative model of the constitution. Now, it is of course true that this model envisages a constitution that is contingent, contested, and even often times messy—but what recognizing a political constitution as a normative model helps us to grasp is that a political constitution is *none the worse for it*. For, at its best, a political constitution reflects the maturity, seriousness and responsibility of our political actors. And even at their worst, which is to say, for some political actors at least, much of the time, a political constitution still supplies a normatively attractive account of how we ought to govern ourselves.

### 5. *The Model of a Political Constitution*

We are now in a position to venture an answer to the question posed—what is a political constitution? In our view, a political constitution, conceived in reflective terms, is a *normative model*. We have, thus far, concentrated on making sense of the normativity of this model; that is to say, we have sought to show that what is distinctive about the normativity of a political constitution is that it is prescriptive without prescribing much. In this section, our attention shifts to what it means to talk of a political constitution as a model. While some

political constitutionalists talk in terms of models,<sup>57</sup> none has sought to explain the significance of this designation. This is unfortunate. To answer the question—what is a political constitution?—we seek not only to offer an account of the normativity of a political constitution, but also to explain what it means to talk in terms of constitutional models.

A model supplies an explanatory framework within which to make sense of a real world constitution. Because real world constitutions tend to be complex and contingent, and because our grasp of their intricacies is so fragile, we employ models, more or less explicitly, to help us ‘describe events, ascribe causality between events, impute motive or intention, discern meaning, and apply norms as standards of evaluation’.<sup>58</sup> That is to say, we employ models to help make sense of real world constitutions. The explanatory framework supplied by a constitutional model involves an appeal to some idea or group of ideas; in the case of the model of a political constitution, as conceived by Tomkins and Bellamy, this appeal is largely to a republican ideal. The significance of such an appeal, whether to a republican or some other ideal, is that it enables us to adopt a critical stance with respect to the subject matter of analysis—here, the practices and institutions of a real world constitution. We are then equipped to understand and evaluate this subject matter from the perspective supplied by the model. But note that a constitutional model should never be wholly abstracted from that which it seeks to explain. After all, constitutional theory, properly conceived, ‘does not involve an inquiry into ideal forms’ but rather ‘must aim to identify the character of actually existing constitutional arrangements’.<sup>59</sup> This ambition ought to resonate especially with those, like Griffith, who have sought to explicate existing constitutional practices. But of course, it is this very concern to ground the idea of a political constitution in ‘actually existing constitutional arrangements’ that has led others to deride these same scholars as offering no more than an account of what happens.

Doubtless, the explanatory framework supplied by a model will be idealized and stylized, but the discipline of thinking and talking in terms of a model is key because it opens up a critical space wherein there need not be some stark, all-encompassing choice in any given real world constitution between two (or more) models. For if we keep in mind that a model necessarily assumes some distance between the instance and the ideal, we are better placed to appreciate that any given example (a real world constitution) will not resonate in all respects with a given exemplar (a political or legal or some other model). In turn, this allows us to grasp the possibility that there might be more than one

<sup>57</sup> While the rubric of ‘models’ does not feature in Bellamy’s *Political Constitutionalism*, it is prominent in Tomkins’ *Our Republican Constitution*.

<sup>58</sup> Loughlin (n 3) 52. Loughlin does not talk in terms of constitutional models; that said, similar concerns underlie his interpretive approach and our account of the model of a political constitution.

<sup>59</sup> *Ibid* 186.

model informing a given real world constitution. Indeed, this is the key insight to result from talking and thinking in terms of constitutional models. For this insight can help us to appreciate that Britain's constitution is no longer—and likely never was—premised on any one constitutional model, whether this be a political or a legal or some other model. Rather, we are now better placed to recognize that Britain's constitution today embraces, perhaps in uncertain ways and to an uncertain extent, *both* a political model *and* a legal model.

Perhaps because neither a political constitution nor a legal constitution have been examined explicitly as constitutional models, what is often absent from most accounts of a real world constitution given by legal and political constitutionalists alike is an exploration (or, for that matter, even an acknowledgment) of how it can be true *both* that a real world constitution will embrace both models *and* that a political model and a legal model are, at least in some significant respects, at odds. Because political constitutionalists have, for the most part, proceeded to defend the model of a political constitution by way of a 'challenge' to the 'common view' of a legal constitution and the 'unexamined and erroneous assumptions about the workings of democracy on which it rests',<sup>60</sup> they have tended to focus on the opposition between the two models, rather than on how they can both be incompletely realized within a real world constitution. For example, while Bellamy acknowledges that 'there are elements of both legal and political constitutionalism in most constitutions',<sup>61</sup> he offers an account which makes—or at least seems to make—an all-encompassing claim about the choice facing real world constitutions. For, on our reading, Bellamy does not regard it as normatively desirable that elements drawn from a legal model may in fact subsist within a real world constitution alongside elements drawn from a political model. Indeed, insofar as Bellamy presents his model of a political constitution as the original and true source of the republican norms of non-domination and political equality, it would appear that a constitution ought to remain unburdened by elements drawn from a legal model. In this, his treatment of the model of a political constitution makes it difficult to conceive of how it could subsist alongside the model of a legal constitution within a given real world constitution. It would seem, then, that on this reading of Bellamy, no real world constitution can embrace elements of both a political and a legal constitution, for what the one seeks to promote, the other distorts; what the one protects, the other undermines. In other words, it would seem that for Bellamy at least, there is a stark choice between *either* a legal constitution *or* a political constitution—but not both.

Something similar might be said of Tomkins. Although he acknowledges that Britain's constitution can be said to be 'primarily' (and by implication not

<sup>60</sup> Bellamy (n 5) 5.

<sup>61</sup> *Ibid.*

exclusively) political rather than legal in character, and although alive to the dangers involved in any shift away from a political towards a legal model, Tomkins does not explain what it means to suggest that Britain's constitution today embraces elements drawn from each model.<sup>62</sup> This should not be taken to suggest that the presentation of stark alternatives is only active within political constitutionalist scholarship; legal constitutionalists appear as guilty of this indictment as their 'antagonists'. Irrespective of where the fault lies, it is by rejecting the view that the stark alternatives painted by certain political and legal constitutionalists must also play out in a real world constitution that one can, in turn, see how it can be true *both* that a political model and a legal model are, at least in some significant respects, at odds *and* yet can be embraced by a real world constitution.

The seeming contradiction between these two truths can be answered by recognizing the difference between the ideal and the instance that underpins and informs the notion of a constitutional model. To develop a more rounded sense of any real world constitution (such as Britain's) almost inevitably involves an appeal to, amongst other things, both a political model and a legal model. With this in mind, it will come as little surprise to learn that a subsisting real world constitution, whether in Britain or elsewhere, will tend to embrace a political or legal or any model for that matter, in some, perhaps many, but likely never all respects. An all-encompassing claim that a real world constitution is 'legal' or 'political' can, on this view, be read as an exaggerated claim which agitates for the evolution of a real world constitution in one direction, rather than another. In most cases, and most obviously at a time of seemingly rapid constitutional change in Britain, these exaggerated, all-encompassing claims will not be accurate evaluations of a given real world constitution. This is not to say that it is never appropriate to employ an all-encompassing claim. Inasmuch as articulating unfashionable claims in encompassing terms can be an effective way of illuminating the shortcomings of conventional thought, there will likely always be some place for such claims. Yet, as Loughlin notes, where, as today, there is 'renewed interest in investigating constitutional fundamentals, constitutional scholarship should not be converted into some adversarial contest'.<sup>63</sup> In this light, it is perhaps truer to maintain that a real world constitution tends—albeit in different, challenging and at times contradictory ways—to embrace both of the models of a political and a legal constitution and that each model seeks to render explicit different facets of our constitutional self-understandings.

<sup>62</sup> Tomkins (n 5) vii; Adam Tomkins, 'Constitutionalism' in Mathew Flinders and others (eds), *The Oxford Handbook of British Politics* (OUP, Oxford 2009) 242. In his most recent work, Tomkins has sought to sketch the role of and limits on judicial review in a political constitution: Adam Tomkins, 'The Role of Courts in the Political Constitution' (2010) 60 UTLJ 1–22. For a critique of Tomkins' thinking on judicial review, see Paul P Craig, 'Political Constitutionalism and Judicial Review' in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP, Oxford, 2010).

<sup>63</sup> Loughlin (n 40) 435.

## 6. *Embracing the Political and the Legal*

While there is a noticeable tendency for political and legal constitutionalists to engage in all-encompassing claims about the nature and content of Britain's constitution, there are also, it must be said, a number of writers who acknowledge the constitution's dual embrace of elements drawn from the model of a political constitution and its legal counterpart. Recently, some have begun to offer accounts of this dual embrace which seek to chart the ways in and degree to which the constitution draws on each of the two models. This is welcome. But whenever such an account is given, three propositions should be kept in mind. First, people will offer different understandings of what it means to talk of a specific real world constitution's dual embrace of the legal and political models, with at least some of the differences between these understandings explicable by whether one is more inclined towards a political or legal (or some other) model in the first place. Proponents of a political model—such as Bellamy and Tomkins—will likely offer understandings which differ in important respects from those favoured by proponents of a legal model—for example, Allan, Laws or Tom Hickman. For that matter, proponents of the different models will even differently envisage what is involved in offering an account of Britain's dual embrace of the political and legal. Legal constitutionalists may envisage accounts of 'politics under the constraints of legal order'.<sup>64</sup> In turn, political constitutionalists may envisage law as politics by some other means. That differences may exist between how political and legal constitutionalists make sense of a real world constitution's dual embrace of the political and the legal, and that one of these two models will tend to supply a dominant frame within which to accommodate elements drawn from the other, is scarcely surprising. For when trying to make sense of a real world constitution's dual embrace of both the political and the legal models, political and legal constitutionalists alike will tend to supply an account of the constitution that is itself shaped, more or less explicitly, in the image of their favoured model.

Second, because people tend to perceive a real world constitution's dual embrace of the political and the legal in ways shaped by their commitment to some model of the constitution, it will often prove difficult to offer an account which is thoroughly faithful to the basic claims of—or possibly even the animating spirit of—both constitutional models. Take Hickman's essay in which he purports to offer an account of 'the legal constitution *plus* political constitution, rather than the legal constitution *versus* political constitution'.<sup>65</sup> Hickman's objective, as disclosed by the title of his article, 'In Defence of the Legal Constitution', is to defend the model of a legal constitution. Ultimately,

<sup>64</sup> David Dyzenhaus, 'The Difference that Law Makes' (1997) 60 MLR 866–73, 870.

<sup>65</sup> Tom R Hickman, 'In Defence of the Legal Constitution' (2005) 55 UTLJ 981–1025, 1016.

for Hickman, the British constitution ought to be ‘understood as founded upon law that is enforceable in the courts’,<sup>66</sup> and is thus essentially, or predominantly at least, understood by reference to the model of a legal constitution. He seeks, however, to mount a defence of (what he takes to be) Britain’s predominantly legal constitution that is sensitive to the fact that law ‘cannot provide answers to every question’, and that acknowledges that the courts ‘must always show due deference to the decisions and activities of the political institutions’.<sup>67</sup> He is concerned, in particular, to demonstrate that Britain’s predominantly legal constitution encompasses the mechanisms of political accountability closely associated with the model of a political constitution. It is thus that Hickman points to a set of cases that, in his opinion, reveal the tendency of Britain’s legal constitution ‘to reinforce political methods of accountability’.<sup>68</sup> By conceiving of the constitution ‘in terms of a harmonious and mutually reinforcing matrix of interacting, and frequently overlapping, remedial channels that together facilitate and control governance of the state’,<sup>69</sup> Hickman offers a predominantly legal account of the British constitution which at the same time purports to take the model of a political constitution seriously. In this, Hickman attempts to plot a path between those legal constitutionalists who would suggest that ‘law should be always pushed forward, ever more intrusively into the fiery fields of party politics and popular morality as it goes’,<sup>70</sup> as well as those political constitutionalists who would ‘insist on attacking the idea of the [legal] constitution itself’.<sup>71</sup>

While we welcome Hickman’s recognition of the need to explore ‘the interface between the modern political and legal constitutions’,<sup>72</sup> and while we find his suggestion that ‘the legal and political constitutions [should be conceived] not as competitors, but as partners’,<sup>73</sup> an intriguing one, it is not clear to us that he succeeds in depicting Britain’s constitution as an essentially legal constitution which, at the same time, takes the model of a political constitution seriously. For a start, Hickman’s account is premised on a narrow understanding of the model of a political constitution as one that helps to make sense of ‘a complex and vitally important set of structures of political accountability (such as the various ombudsmen, inspectorates, complaints procedures, auditors, and channels of ministerial responsibility, as well as many

<sup>66</sup> *Ibid* 987.

<sup>67</sup> *Ibid* 1016–7.

<sup>68</sup> *Ibid* 1018. Hickman’s account appeals to the ‘conversational nature of constitutional arrangements’ promoted by a dialogue between court and legislature that purports to be informed by both the legal and the political models of the constitution (at 1020). For Hickman’s assessment of the dialogue metaphor, see generally Tom R Hickman, ‘Constitutional Dialogue: Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306–35. For a further, critical exploration of the metaphor, see Grégoire CN Webber, ‘The Unfulfilled Potential of the Court and Legislature Dialogue’ (2009) 42 *Can J Pol Sc* 443–65.

<sup>69</sup> Hickman (n 65) 1016.

<sup>70</sup> *Ibid* 1018.

<sup>71</sup> *Ibid* 1016.

<sup>72</sup> *Ibid* 990.

<sup>73</sup> *Ibid* 1016.



more)<sup>74</sup>. In this, he explicitly rejects the possibility that the model of a political constitution might serve as an important explanatory model in clarifying either the theoretical foundations of Britain's constitution or the character of its prevailing institutions—and, in this, Hickman's account comes close to making the sort of all-encompassing claims that he purports to eschew. Indeed, given his narrow conception of a political constitution, it is unsurprising that at the same time as Hickman acknowledges that 'in terms of the day-to-day operation and regulation of government', the model of a political constitution 'is more important than its legal kin, and it should undoubtedly be at the forefront of constitutional scholarship',<sup>75</sup> he also suggests that, 'more often than might be expected', it is the legal model, rather than its political counterpart, 'that hold[s] the solutions to matters of contemporary dispute'.<sup>76</sup>

More importantly, perhaps, Hickman does not always seem to engage with the full force of the basic claims that underpin a political constitution. For example, he purports to address 'the provisional nature of constitutional arrangements', suggesting that 'this feature of the constitution is perfectly consistent with liberal legalism, insofar as a liberal and legal constitution allows for the evolving nature of moral values and insists that legal norms are sufficiently open to accommodate and, indeed, inculcate shifts in moral consensus'.<sup>77</sup> However, for a political constitutionalist, the claim is not merely that the constitution should be viewed as provisional, in the sense of being subject to the possibility of change. There is a second, critical aspect to this claim: such constitutional change should occur through the ordinary political process that can best realize the republican norms of non-domination and political equality. It is not clear that Hickman's 'legal constitution plus political constitution' attaches sufficient weight (or provides an adequate response) to this half of the political constitutionalist's claim. Consequently, it seems that, at most, Hickman's constitution is a legal constitution plus a pale imitation of a political constitution.

The second proposition relevant to how a real world constitution embraces both the political and the legal thus suggests that it will often prove difficult to develop an account of a real world constitution's dual embrace of the political and legal models that remains faithful to the basic claims and animating spirit of a political constitution and a legal constitution. Now, this difficulty doubtless draws on the reality that, even while there might be elements of each model within a real world constitution and even while many of those elements may be more or less compatible with each other, a political constitution and a legal constitution are incompatible—*qua* models—in important respects. For each model makes claims about the nature, content and workings of the constitution

<sup>74</sup> Ibid 987.

<sup>75</sup> Ibid 987.

<sup>76</sup> Ibid 990.

<sup>77</sup> Ibid 998.

which cannot be fully reconciled with each other. It seems inevitable that whenever attempt is made to explain the dual embrace of the political and the legal models within a real world constitution, the resulting account will be one that does not, and in all likelihood never could, internalize the full extent of the conflict between the two models. To take a crude example, if a legal constitutionalist sought to temper judicial review of legislation with an account of deference to Parliament, proponents of a political model might still have concerns that decisions taken by elected politicians were liable to being overturned by unelected judges.

The third proposition relevant to the ways in which a real world constitution embraces both a legal model and a political model draws on the contingency of this dual embrace. Because both a legal and a political constitution can each be imagined in different ways, and because at times they prescribe conflicting arrangements even if they can be compatible in many other respects, their relationship within a real world constitution will itself always be contingent. This can be taken to be one (but not the only) reason why any assessment of the relationship between the model of a political constitution and the model of a legal constitution ought not to be starkly presented as either in tension or in harmony. It seems an over-simplification to suggest, as Hickman does, that '[w]hat we require if we are to move forward is an account that presents the legal and political constitutions not as competitors but as partners'.<sup>78</sup> Rather, it may be that the interface of a legal constitution and a political constitution is in fact messy, uncertain and contested—and perhaps for the same or similar reasons that animate a political constitution itself, this may be a good thing. For in contingency lies the potential to imagine things otherwise. Even though each of us will view a real world constitution in ways shaped by our favoured model, and even though it may prove difficult to offer an account faithful to the basic claims of other models, this ought not to stop us from offering accounts which identify new and interesting ways in which our favoured model makes sense of existing constitutional practices. Or differently put: the mere fact that we recognize that a real world constitution will embrace any one model of the constitution in some, but not all respects ought not to preclude us from searching out previously overlooked ways in which our favoured model casts light on the nature and content of some facet of that real world constitution.<sup>79</sup>

This third proposition thus suggests, perhaps paradoxically, that recognizing that there is an 'unreality'<sup>80</sup> in categorizing a real world constitution as either

<sup>78</sup> Ibid 1016.

<sup>79</sup> For an attempt to explain why the model of a political constitution is relevant to explaining how judicial independence obtains in Britain, as well as to draw out its relevance for those keen to make sense of the reforms instituted by the Constitutional Reform Act 2005, reforms which tend to be taken as evidence of Britain's further shift away from a political constitution towards a legal constitution, see Graham Gee, 'Defending Judicial Independence in the British Constitution' in Adam Dodek and Lorne Sossin (eds), *The Future of Judicial Independence* (Irwin Law, Toronto forthcoming).

<sup>80</sup> Ian Leigh, 'Secrets of the Political Constitution' (1999) 62 MLR 298–309, 309.

entirely political or entirely legal ought to breathe new life into the political and legal models by encouraging the proponents of each to venture into unfamiliar territory and to uncover the relevance of their favoured model in elucidating some facet of constitutional arrangements and practice. This is significant. For there is, we suspect, scepticism amongst some of those who are aligned to neither the legal nor political models about whether either model can add much to our understanding of the modern British constitution. Tired of the seemingly stark choice between either a political constitution or a legal constitution, and weary of the all-encompassing claims which too often seem to underlie such a choice, some may quite reasonably question whether either model adds much to our understanding of a constitution which, today, seems to be neither distinctively legal nor distinctively political. However, it seems to us that both models are, in some respects, more critical than ever to making sense of the British constitution. By drawing both on the model of a political constitution and on that of a legal constitution, while of course recognizing that each is ultimately a highly stylized reading of the constitution which will only be embraced in some but not all respects, it ought to be possible to uncover new and more interesting ways of speaking about Britain's constitution today. There is, after all, a real sense in which some of the more pressing questions about the nature and content of the constitution are laid bare by the tensions that seem to exist between the two models. To be effective tools for understanding a constitution, however, the models and the contingent relationship between them must remain subject to constant re-imagining.

## 7. Conclusion

We return to the question with which we began: what is a political constitution? In articulating our answer 'a political constitution is ...', we have sought to reflect on what a political constitution purports to be. By moving beyond the descriptivism associated with Griffith's political reading of Britain's constitution, and by tracing the contours of a decisive normative turn evident in the scholarship of Tomkins and Bellamy, we have sought to present a political constitution as a normative constitutional model, even if its normativity is in important and inescapable ways indistinct and ill-defined. It is by conceiving of a political constitution in these terms that we come to appreciate the renewed relevance of the contingent, contested, and often messy model of a political constitution even as Britain's constitution is said to be slowly evolving away from a political model towards something more akin to a legal model of the constitution.

The renewed relevance of the political constitution is grounded in the understanding that, *qua* model, it continues to speak to some, even if not all, aspects of the constitution. Much constitutional scholarship in Britain is focused on trying to cast light on the nature of constitutional arrangements.

Yet, clearly, there is (and perhaps has long been) disagreement about how best to capture these arrangements. By thinking and speaking in terms of normative constitutional models, a political constitution and its legal counterpart present themselves as essential facets of our constitutional self-understandings, even as it becomes more difficult to claim that either model alone accounts for all aspects of Britain's constitution. Indeed, it is precisely because there is such widespread and whole-hearted disagreement about the nature, content and workings of the constitution as a whole, and precisely because that disagreement runs so deep, that these two models—the legal and the political—can serve as such effective expressions of our constitutional self-understandings. The key is to remember that they remain models and that they can do no more than render explicit self-understandings that are, in an important and perhaps inevitable sense, incomplete.

While we have focused on the political constitution in this essay, we recognize that both the legal and the political models are at their most effective in rendering explicit our self-understandings when taken alongside one another. For when our attention is so focused, we are called on to defend existing commitments or articulate the merits of proposed reforms as we seek, at the same time, to grapple with the presence of the other model within existing constitutional arrangements. By understanding the promise of thinking and talking about both models together, our answer to the question—what is a political constitution?—can be taken to sketch an answer to another question not explicitly posed in this essay, but nevertheless present throughout: 'what is a legal constitution?'