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The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism

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Brexit, and the recent decision of the UK Supreme Court in *Miller*,¹ has subjected the British constitution to unprecedented public scrutiny, thus resulting in a yearning for greater understanding of the constitution and its key tenets. However, the British constitution, because of its evolutionary nature, is both uncodified and unentrenched, thus making it highly contested. A complete picture of the debate surrounding the meaning of the British constitution cannot be obtained, therefore, without first understanding the competing models of British constitutionalism: the legal, common law and political.

Legal constitutionalism seeks to adopt a codified and entrenched constitution for Britain whereby the doctrine of parliamentary sovereignty is abandoned and the courts are capable of enforcing the constitution, in particular fundamental rights, against the legislature. Common law constitutionalists seek to achieve the same result but via the English common law rather than a written and entrenched constitution. Political constitutionalists, by contrast, seek instead to defend the British constitution against calls for change.

As will be briefly shown, all three models have their conceptual origins in the seventeenth century, but were pioneered chiefly in response to the constitutional changes of the last half-century, in particular British membership of the European Union and the New Labour reform package, which included the Human Rights Act 1998 and devolution to Scotland, Wales and Northern Ireland. It is submitted, however, that Brexit, and the potential of a UK collapse, has given new relevance and meaning to this debate, and a better understanding of it may help us to navigate the constitutional challenges which still lie ahead.

Whilst each model has its advocates and critics, many writers have only engaged with the debate passively whilst examining other constitutional matters. The few direct commentaries on the subject are largely restricted to the study of an individual model only. Critically, each competing model is itself open to dispute, with both proponents and opponents of each model

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¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

offering similar but nevertheless different accounts.² Scholars also popularly characterise the debate “for the very heart and soul of the British constitution”³ as one of law versus politics: should government be controlled by law in the court room (a legal constitution), or by politics within Parliament (a political constitution)? Although this tension is a critical aspect of the debate surrounding the contemporary constitution, the distinction is nevertheless distracting, and fails in particular to draw a precise distinction between the legal and the common law constitution, which are instead often bundled together as one.

The principal purpose of this article, therefore, is to critically analyse the debate surrounding the meaning of the British constitution, with a particular focus on the requirements and claims of each competing model of constitutionalism. The first part of this article will discuss the substantive claims of the three main competing models of British constitutionalism. Whilst the contested nature of each model will be acknowledged, the article will nevertheless identify their common themes and principles, thus bringing greater precision and clarity to the differences between the various competing schools. In particular, it will seek to draw a sharper distinction between the legal and the common law models. The final part will briefly examine the claims of each school collectively and demonstrate that the differences between the models are more nuanced than is often credited. In so doing, it will be shown that none of the competing models provide a complete and accurate picture of the contemporary British constitution. The true nature of the constitution is only apparent once the differences between the competing models are reconciled and we accept a gestalt understanding of the constitution: complementary constitutionalism.

The competing models of British constitutionalism

Legal constitutionalism

Legal constitutionalism developed in opposition to the system of legislative supremacy prevalent in the United Kingdom by the late-eighteenth century, and is frequently viewed as its opposite.⁴ It is also closely related to seventeenth century social contract theory which helped spark the process of global constitution-making during the Age of Enlightenment.

Our modern understanding of social contract theory emerged originally in seventeenth century England as a consequence of the Wars of the Three Kingdoms. Although contractarianism is subject to much theoretical variation, the core idea (as advanced by Thomas Hobbes,⁵ John Locke,⁶ and Jean-Jacques Rousseau⁷) is that the people, in exchange for certain collective benefits, give up some of their power in order to form government and ensure public order.⁸ For Locke, citizens’ obedience to the law was conditional on the state not interfering

² In agreement see M. Elliott and R. Thomas, *Public Law*, 2nd edn (Oxford: Oxford University Press, 2014), p.37.

³ R.B. Taylor, “Foundational and regulatory conventions: exploring the constitutional significance of Britain’s heavy dependency upon conventions” (2015) P.L. 614.

⁴ See especially C.H. McIlwain, “The English Common Law, Barrier Against Absolutism” *The American Historical Review*, Vol. 49, No. 1 (Oct., 1943), 23-31.

⁵ T. Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1992).

⁶ J. Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988).

⁷ J.J. Rousseau, *The Social Contract and Discourses* (London: J.M. Dent & Sons Ltd., Everyman’s Library, 1963).

⁸ R. Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999), p.146.

with three fundamental natural rights: Life, Liberty and Estate. Interference voids the contract, and the people can then revolt.⁹ Although these constraints upon the state envisaged by Locke were largely moral in character, they were translated by Thomas Paine into the language of law.

Basing his hypothesis upon the recently enacted constitution of the US (one of the first to be produced in light of John Locke's liberal theory) and rejecting the descriptive definition of a constitution utilised in late-seventeenth century England, Paine argued that "[i]t is not sufficient that we adopt the word [constitution]; we must fix also a standard significance to it".¹⁰ For Paine, this "standard significance" consisted of a number of criteria for identifying a true constitution.¹¹ Crucially, a "constitution of a country is not the act of its government, but of a people constituting a government".¹² Paine also proposed that a constitution must be prescriptive in nature, and in creating government, also defined and so limited its authority.¹³ It was also implied that the constitution must be contained within a single document.¹⁴ As Paine noted, "[a] constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and whenever it cannot be produced in a visible form, there is none".¹⁵ As a result, the social contract became the written constitution, a high-status contract between the government and the governed,¹⁶ and natural rights became legal civil rights.¹⁷

The constitution is therefore entrenched "higher law" that is "superior to other laws"¹⁸ and incapable of change other than by constitutional amendment. Constitutional rights act as substantive constraints upon legislative and executive powers.¹⁹ Since the Enlightenment, the rights commonly protected by such legal constitutions have steadily evolved and expanded and now overlap with human rights. The protection of human rights is now a widely accepted cornerstone of the legal constitution, as well as of the substantive theory of the Rule of Law.²⁰ Fundamental to both, is not merely the inclusion of human rights as part of the "higher law" of the constitution, but their protection and enforcement by an empowered judiciary.²¹ Although

⁹ See T. Stanton, "Authority and Freedom in the Interpretation of Locke's Political Theory" (2011) 39(1) *Political Theory* 6; J.W. Tate, "Locke, God, and Civil Society: Response to Stanton" (2012) 40(2) *Political Theory* 222.

¹⁰ T. Paine, *Rights of Man, Common Sense and Other Political Writings* (Oxford: Oxford University Press, 1998), p.122. See also M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p.8.

¹¹ See also F.F. Ridley, "There is no British constitution: a dangerous case of the Emperor's clothes" (1988) 41(3) *Parliamentary Affairs* 340, 342-343. Ridley identifies four fundamental characteristics of a constitution that are consistent with those identified by Paine. See also C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947), pp.1-2.

¹² Paine, *Rights of Man, Common Sense and Other Political Writings* (1998), p.122.

¹³ Paine, *Rights of Man, Common Sense and Other Political Writings* (1998), pp.122-123.

¹⁴ McIlwain, *Constitutionalism: Ancient and Modern* (1947), p.2.

¹⁵ Paine, *Rights of Man, Common Sense and Other Political Writings* (1998), p.122.

¹⁶ See A. Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), pp.5-6.

¹⁷ Paine, *Rights of Man, Common Sense and Other Political Writings* (1998), p.119.

¹⁸ Ridley, "There is no British constitution: a dangerous case of the Emperor's clothes" (1988) 41(3) *Parliamentary Affairs* 340, 343.

¹⁹ J.E.K. Murkens, "The quest for constitutionalism in UK public law discourse" (2009) 29(3) *O.J.L.S.* 427, 451.

²⁰ See P.P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework" (1997) *P.L.* 467.

²¹ See Ridley, "There is no British constitution: a dangerous case of the Emperor's clothes" (1988) 41(3) *Parliamentary Affairs* 340, 343, 345, 353. Ridley suggests a strong affinity for the protection of human rights under an entrenched bill of rights, although does not identify it as one of the four named fundamental characteristics.

the US Constitution, an early example of a legal constitution, was silent on the issue of constitutional review (the power of the courts to declare null legislative or executive acts deemed inconsistent with the constitution), it was subsequently claimed by the US Supreme Court in *Marbury v Madison* by way of constitutional interpretation.²² An empowered judiciary has since become one of the most significant mechanisms for the protection of fundamental rights globally,²³ especially after the Second World War.²⁴

Broadly speaking, it is submitted that legal constitutionalism can therefore be seen to advance three claims. First, that the constitution is codified, entrenched “higher law” enacted by the people. It is therefore antecedent to government, and imposes formal and substantive limits upon its power. Secondly, that the substantive constraints upon governmental power should take the form primarily, but not exclusively, of human rights guarantees. Thirdly, that the courts must have the power to review the constitutionality of both executive and legislative acts, normally necessitating a power of judicial strike down.

Legal constitutionalism, although subject to some variation in practice, is the dominant model of constitutionalism globally. Following both the Second World War and the Soviet Union’s collapse, many nations now have a written, codified constitution, often accorded special legal status under the protection of an empowered judiciary. Unlike both common law and political constitutionalism outlined below, legal constitutionalism, in particular the notion of a written antecedent document known as a “constitution”, has little historical basis in Britain, with the tentative exception perhaps of the mid-seventeenth century republic.²⁵ It was, as noted above, developed largely in opposition to Britain’s constitutional arrangements, and is therefore best viewed an external model of constitutionalism. As a result, Britain does not currently possess a legal constitution as defined above. In the British context, therefore, legal constitutionalism, as distinct from common law constitutionalism discussed below, advocates the adoption of a codified and entrenched constitution for Britain.

Despite Britain not possessing a legal constitution *per se*, the cumulative impact of the New Labour reforms to the constitution in the late-twentieth and early-twenty-first centuries has persuaded leading constitutional scholar Vernon Bogdanor to proclaim that the orthodox constitution is now in the process of being replaced by a new, more legal constitution. As Bogdanor notes, “[w]e are now in transition from a system based on parliamentary sovereignty to one based on the sovereignty of a constitution, albeit a constitution that is inchoate, indistinct and still in large part uncoded”.²⁶ Membership of the European Union, the Human Rights Act 1998 and devolution have all empowered the judiciary in a manner more akin to a legal rather than a political constitution, albeit still subject to parliamentary supremacy. The impact of these constitutional changes, however, is subject to ongoing disagreement. Even if the constitution has or is becoming more legal as a result, thus no doubt quelling the demands of

²² 5 U.S. (1 Cranch) 137 (1803).

²³ H.M. Fenwick, *Civil Liberties and Human Rights* (London: Routledge-Cavendish, 2007), p.115.

²⁴ E.M. Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), p.19.

²⁵ Cf. A. Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (Oxford and Portland: Hart Publishing, 2015).

²⁶ V. Bogdanor, *The New British Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2009), pp.xi-xiii. In support, see T.R. Hickman, “In Defence of the Legal Constitution” (2005) 55(4) *University of Toronto Law Journal* 981.

some legal constitutionalists for more far-reaching reform, it is submitted that these changes have not silenced calls for the adoption of a formal legal constitution.

Following the twentieth century rise in legal constitutions globally, British lawyers and lay persons alike increasingly came to view such constitutional arrangements as essential for securing limited government, the very essence of what has become known as constitutionalism: a normative political doctrine that “denotes a type of political regime constructed in accordance with certain principles or ideals, which principles or ideals are judged to be good in themselves and against which a given constitutional regime’s performance can be, and ought to be, judged”.²⁷ Although Dicey asserted that individual liberty was guaranteed under the constitution by virtue of the Rule of Law,²⁸ the dominance of Diceyan thinking throughout the first half of the twentieth century (a supposed “golden age of liberty”²⁹) is now widely seen to have instilled a culture of judicial deference towards executive discretion that was maintained even at the expense of personal liberty.³⁰ The human rights of individuals, therefore, as well as the entire structure of governance, are seen to be at risk from tyrannical governments, which may exercise wide discretionary powers free from legal accountability. As Anthony W. Bradley *et al* therefore note, “[e]ver since the American and French revolutions, it has become clear that a parliamentary majority may not be a bulwark of constitutionalism so much as a challenge to it”.³¹

Academic works on the British constitution have therefore become increasingly critical of its key tenets,³² primarily the doctrine of parliamentary sovereignty and the fusion of powers, on the grounds that such institutional arrangements invite what Lord Hailsham in 1976 described as “elective dictatorship”.³³ As F.F. Ridley, a leading legal constitutionalist, famously declared in his 1988 article, “the term British constitution is near meaningless”,³⁴ because it fails satisfy his four fundamental (and inherently legal) requirements of a constitution.³⁵ According to Ridley, majority government, coupled with the absence of any substantive limits on Parliament’s supremacy, results in an inherently undemocratic constitutional order where fundamental constitutional change can occur unchecked.³⁶

Since Ridley’s article, calls for the adoption of a written and entrenched constitution in Britain have grown, particularly in the wake of both referendums on Scottish independence and EU membership. One notable contemporary advocate is Andrew Blick, who has made a

²⁷ A. King, *The British Constitution* (Oxford: Oxford University Press, 2007), pp.10-11. See also A. Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European Press, 1999), p.9.

²⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* [1915] (8th edn, London: Macmillan and Co., Ltd., 1923), Chapter IV.

²⁹ K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (Oxford: Oxford University Press, 2000), p.v.

³⁰ See Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (2000), generally.

³¹ K.S. Ziegler, D. Baranger and A.W. Bradley (eds), *Constitutionalism and the Role of Parliaments* (Oxford and Portland, Oregon: Hart Publishing, 2007), p.7.

³² See Barendt, *An Introduction to Constitutional Law* (1998), generally

³³ Lord Hailsham expressed this view in a Richard Dimbleby lecture for the BBC on 14th October 1976.

³⁴ Ridley, “There is no British constitution: a dangerous case of the Emperor's clothes” (1988) 41(3) *Parliamentary Affairs* 340, 359.

³⁵ Ridley, “There is no British constitution: a dangerous case of the Emperor's clothes” (1988) 41(3) *Parliamentary Affairs* 340, 342-343.

³⁶ Ridley, “There is no British constitution: a dangerous case of the Emperor's clothes” (1988) 41(3) *Parliamentary Affairs* 340, 360-361.

comprehensive case for the adoption of a written, legally entrenched constitution. Blick sees the adoption of a written constitution as a solution to the turmoil surrounding the contemporary constitution, but one which would necessitate the abolition of parliamentary sovereignty as the doctrine “can threaten values important to the sustenance of a democratic system”.³⁷ He thus argues that “[c]ertain principles, such as human right and the position of the nations of the UK, should not be negotiable.”³⁸ Sovereignty would thus switch from Parliament to the written text of the constitution,³⁹ protected, unsurprisingly, by an empowered judiciary.⁴⁰

Far from seeing the adoption of a legal constitution as a departure from British constitutional history, Blick in fact argues that England has a long tradition of adopting written constitutional documents,⁴¹ predating even the Magna Carta of 1215, thus providing some historical justification for adopting a written constitution today. As he notes, “[c]onfounding popular views, the concept of a written constitution has an important basis in our historic thought and practice. It would not be a foreign imposition”.⁴² In so doing, Blick challenges the orthodox account of British constitutional history as being both free from external influence and continuous in nature, citing in particular 1707 as a break in the constitution’s historic continuity.⁴³

Despite these arguments, the demand for a written constitution remains uncertain. Inspired by the 800th anniversary of Magna Carta, the Political and Constitutional Reform Select Committee published a report setting out three options for codifying the constitution, one being the adoption of a written constitution.⁴⁴ Following a public consultation, broad support for a codified or written constitution was revealed, but the Committee nevertheless stressed that there was no consensus on the issue.⁴⁵

Common law constitutionalism

Conversely, some critics of the orthodox understanding of Britain’s constitution have, via the English common law, sought to reinterpret its key tenets to achieve compliance with the underlying aims of legal constitutionalism. The common law constitution is the modern successor to the “ancient constitution” advanced in the seventeenth century, which viewed the common law as an archive of people’s rights and freedom dating back to time immemorial, thereby providing a basic constitutional framework from which government may legally operate. One of its chief advocates, Sir Edward Coke, even went so far as to say in *Dr Bonham’s case* that the courts would invalidate any Act of Parliament which is “against common right and reason, or repugnant, or impossible to be performed”.⁴⁶

³⁷ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.289.

³⁸ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.291.

³⁹ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.281.

⁴⁰ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.278.

⁴¹ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.23.

⁴² Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.225.

⁴³ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.285.

⁴⁴ House of Commons Political and Constitutional Reform Committee, Second Report, A new Magna Carta? (2014-15), HC Paper No.463.

⁴⁵ House of Commons Political and Constitutional Reform Committee, Seventh Report, Consultation on A new Magna Carta? (2014-15), HC Paper 599, pp.14 and 22.

⁴⁶ *Dr Bonham’s case* (1609) 8 Co Rep 107, at 118a per Coke, CJ.

Although not far removed from its ancient counterpart, the common law constitution nevertheless remains a distinct model which, like the political constitution, has been shaped and informed by recent constitutional changes,⁴⁷ and pioneered by contemporary writers. Despite the great commonality between these various writers as to the underlying assumptions of the common law constitution, however, there is still some disagreement over the model's exact scope. The two most prominent advocates of this uniquely British variant of the legal constitution are Sir John Laws and Trevor Allan,⁴⁸ who offer distinct visions of common law constitutionalism.

The English common law can trace its origins back to the twelfth century and has, despite the rise of parliamentary sovereignty, played a major role in shaping the contemporary constitution ever since. Laws therefore argues that “the unifying principle of our constitution is the common law”.⁴⁹ He views the British constitution as a common law construct, including the doctrine of parliamentary sovereignty,⁵⁰ which is sustained and limited by the common law.

The *de facto* subservience of Parliament to the common law is reflected strongly in Laws' understanding of judicial review of executive action. The basis of review under Laws' common law constitution is deemed to be the common law itself, and not Parliament's will as traditionally conceived under the *ultra vires* model of review.⁵¹ Laws rejects the *ultra vires* model of review as ‘a fiction’ on the grounds that the lawfulness of an executive decision may be determined by free-standing principles of the common law.⁵² According to Laws, common law principles embody predominantly liberal values, which were developed over the centuries, not by Parliament, but by the courts.⁵³ Laws also objects to the *ultra vires* model on the basis that it “implies a power in Parliament to override any restraining principle of civilised government; any fundamental constitutional protection which the common law might evolve for the protection of the people”.⁵⁴ Significantly, this suggests that parliamentary sovereignty, because of its dependency upon the common law, may be subject to common law limits, the attempted breach of which, may enable the courts to override an Act of Parliament.

Crucially, however Laws does not state so explicitly, and refrains from making any serious normative case for the development of the common law in this direction. Instead, Laws states that Coke's *dictum* in *Dr Bonham's case* is “[p]lainly ... far from the modern law”,⁵⁵ and characterises the idea of judicial disobedience of statute as a kind of “absolutism”, suggesting even that a judge, in disobeying a statute, breaks his judicial oath, and so must resign.⁵⁶

The type of common law protections Laws might have in mind, it is submitted, can be seen in *Thoburn*, where Laws stated *obiter* that the common law now recognised a hierarchy of statutes whereby “constitutional” statutes would not, unlike “ordinary” statutes, be subject to

⁴⁷ See M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart: Oxford and Portland, 2015), p.126.

⁴⁸ In agreement see G. Gee and G.C.N. Webber, “What Is a Political Constitution?” (2010) 30(2) O.J.L.S. 1, 4.

⁴⁹ Sir J. Laws, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014), p.3.

⁵⁰ Laws, *The Common Law Constitution* (2014), p.11.

⁵¹ Laws, *The Common Law Constitution* (2014), pp.16-17, 20.

⁵² Laws, *The Common Law Constitution* (2014), p.17.

⁵³ Laws, *The Common Law Constitution* (2014), p.3.

⁵⁴ Laws, *The Common Law Constitution* (2014), p.17.

⁵⁵ Laws, *The Common Law Constitution* (2014), p.11.

⁵⁶ Laws, *The Common Law Constitution* (2014), pp.17-18.

implied repeal.⁵⁷ Only express words could normally be used to repeal a constitutional statute or abrogate constitutional rights.⁵⁸ According to Laws, this development is advantageous because “[i]t gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution”.⁵⁹ Although this partial entrenchment of constitutional statutes is subject to express words, thereby arguably preserving Parliament’s sovereignty as Laws seems to suggest, the common law on this reading has nevertheless succeeded in binding Parliament, something that Laws says Parliament is incapable of doing.⁶⁰ It is the common law, not Parliament, which recognises constitutional statutes.⁶¹ Parliament is therefore *de facto* subservient to the common law, and the doctrine of parliamentary sovereignty is subject, at the very least, to modification by the courts.

It is thus argued that Laws’ vision of the common law constitution is not one defined by the common law courts’ ability to override Parliament on matters of fundamental constitutional importance, but one where such an eventuality is actually avoidable. In Laws’ eyes, all statute and government policy must pass through the common law courts, and in so doing, will be mediated to the people in line with common law rules of interpretation which are “as normative, as full of value, as any substantive legal principle”.⁶² Whilst the practical effect of this constructivist interpretative mechanism is that Parliament’s intention may not always be what is enforced, it is seen by Laws as a means by which a constitutional balance can be struck between Parliament and the courts.⁶³ Mediating statute to the people, he argues, “provides as close a fit as possible between the policy of Parliament and values – reason, fairness and the presumption of liberty – which over time have come to reflect and moderate the temper of the people”.⁶⁴ This avoids, it is submitted, a confrontation between the two, and by extension the necessity for a power of judicial strike down.

Laws’ vision of the common law constitution thus represents a significant departure from the orthodox British constitution, but Allan goes even further. Allan’s vision of the common law constitution, as articulated across several publications, has developed chiefly in opposition to the Diceyan reading of the British constitution, as well as the political constitution outlined below, which he views as an “imperfect representation of what a liberal, democratic regime ought ideally to be”.⁶⁵ Allan’s distrust of the orthodox British constitution arises from its attachment to the doctrine of parliamentary sovereignty which, he claims, risks individuals’ fundamental rights and freedoms.⁶⁶ According to Allan, the courts are better suited to

⁵⁷ *Thoburn v Sunderland City Council* [2003] QB 151 at [62].

⁵⁸ *Thoburn v Sunderland City Council* [2003] QB 151 at [63].

⁵⁹ *Thoburn v Sunderland City Council* [2003] QB 151 at [64].

⁶⁰ *Thoburn v Sunderland City Council* [2003] QB 151 at [59].

⁶¹ *Thoburn v Sunderland City Council* [2003] QB 151 at [69].

⁶² Laws, *The Common Law Constitution* (2014), pp.22. See also p.3.

⁶³ Laws, *The Common Law Constitution* (2014), p.18.

⁶⁴ Laws, *The Common Law Constitution* (2014), p.22.

⁶⁵ T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013), p.88.

⁶⁶ T.R.S. Allan, “Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism” (1986) 44 C.L.J. 111, 116.

upholding the fundamental rights of the constitution,⁶⁷ and should be able to do so even contrary to legislative intention.⁶⁸ Instead of advocating for the adoption of a legal constitution as outlined above, however, Allan seeks to reconcile parliamentary supremacy with the Rule of Law (a doctrine central to Allan's account of the common law constitution) which he claims opens "our existing constitutional tradition ... to a benign or congenial interpretation, capable in principle of inspiring loyalty and allegiance".⁶⁹

Allan views the Rule of Law as a "rule of reason" (a fusion of the principles of due process and equality) which amounts "to a basic requirement of justification, or condition of legitimacy"⁷⁰ to which all decisions and laws should adhere to be considered valid, hence he uses the term interchangeably with the term "legality".⁷¹ Defined broadly as "the sovereignty of the principle of liberty",⁷² he equates the Rule of Law with the ideals of liberal constitutionalism, and the fundamental human rights implicit within, most notably "the basic liberties of thought, speech, conscience, and association".⁷³ Under Allan's account, the Rule of Law transforms the common law into a *de facto* "higher law" constitution for Britain,⁷⁴ thereby providing the basis from which the courts may legitimately enforce fundamental human rights against both the executive and Parliament.

According to Allan, judicial commitment to democracy (in the form of legislation) is not unqualified, and will only extend to legislation which (in conformity with the requirements of the Rule of Law) adheres to "the outcome of a democratic process whose legitimacy is ultimately dependent on it respecting minimum standards of justice".⁷⁵ As with Laws' vision of the common law constitution, Allan advocates a constructivist approach towards statutory interpretation by the courts. "A wise judge", he notes, "will be reluctant to accept at face value legislation which violates important civil right, and will strive to interpret it consistently with traditional (common law) values of individual liberty and autonomy",⁷⁶ thus affirming "both legislative supremacy and constitutional rights".⁷⁷ However, although this should similarly avoid the necessity for judicial strike down, Allan's account of the common law constitution nevertheless goes further than Laws', advancing under exceptional circumstances a *de facto* power of judicial disapplication of statute, thus endorsing Sir Edward Coke's *dictum* in *Dr Bonham's case*.⁷⁸ Such exceptional circumstance would be where the effect of an Act of Parliament would be "the destruction of any recognizable form of democracy".⁷⁹

⁶⁷ T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), p.161.

⁶⁸ T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p.282.

⁶⁹ Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.9.

⁷⁰ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.2

⁷¹ Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.89.

⁷² Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.91.

⁷³ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.2

⁷⁴ Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), p.4.

⁷⁵ Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), p.12.

⁷⁶ Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), p.13. See also Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.91.

⁷⁷ Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.13.

⁷⁸ See Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), pp.267-270; Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), prelude.

⁷⁹ Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), p.282.

Allan's willingness to concede such a power to the courts derives from the importance he attaches to compliance with the Rule of Law. Because state compliance with fundamental rights is deemed paramount, Allan advocates a wide, largely unlimited jurisdiction for the courts. He rejects outright any limits on the courts' power of adjudication.

According to Allan, political questions, as advanced by political constitutionalists, are ones deemed "inherently unsuited to adjudication, either because judicial determination would usurp the proper democratic process, or because judicial qualification or adversarial legal procedures are inadequate or inappropriate to the task".⁸⁰ *Laws* does not tackle political questions under his hypothesis of the common law constitution, and acknowledges only that the power of the courts in interpreting statutes is one "which depends on restraint", applicable mostly where Parliament has delegated powers to Ministers.⁸¹ Although Allan does not dispute the existence of political questions curtailing the scope of judicial review, he nevertheless objects to any principle of judicial deference which precludes legal analysis by the courts. To understand legislative supremacy as requiring "unqualified judicial obedience to statute", would erect "a (genuine) doctrine of political questions, or principle of non-justiciability, that violates the rule of law".⁸² Instead, Allan argues that matters of deference arise as part of the "ordinary process of review".⁸³ Justiciability is not independent of the legal claim, but a necessary part of it.⁸⁴ For Allan, therefore, no legal matter is non-justiciable on principle. Any deference must be determined as part of the court's legal analysis of the case.

This rejection of any barriers to adjudication concerning political questions extends even to constitutional conventions, exposing them as an attempt to "limit the judicial role – excluding 'political questions' from the scope of constitutional adjudications".⁸⁵ Allan argues that conventions should not be excluded from judicial deliberations where relevant to the answering of a legal question,⁸⁶ thus suggesting that they may be judicially enforced.

Because the common law constitution is conceived as a British variant on the legal constitution, it arguably advances the same substantive arguments as that of legal constitutionalism. Whilst some are certainly reflected in Allan's work, and to a lesser degree in *Laws*, it is nevertheless submitted that the common law constitution marks a significant departure from legal constitutionalism, in particular with regards to its form, and can thus be seen to make three related but nevertheless distinct claims of its own. First, that the British constitution is a common law construct developed over centuries. Key principles, such as the doctrine of parliamentary sovereignty, are both sustained and limited by the common law. The common law *is* the constitution. Secondly, the common law embodies substantive values, including fundamental rights, which the courts must uphold. Thirdly, this enforcement of common law rights is achieved principally by the adoption of a constructivist approach by judges towards legislation. Although this should negate any need for judicial disapplication of statute, Allan's model nevertheless endorses it in exceptional circumstances.

⁸⁰ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.161.

⁸¹ *Laws, The Common Law Constitution*, (2014), p.25.

⁸² Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.163.

⁸³ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.163.

⁸⁴ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p.65.

⁸⁵ Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.77.

⁸⁶ Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2013), p.87.

Given the common law constitution's historical roots in the development of the common law itself, it is fair to say that its advocates contend that the UK has always been and remains a common law one. There has certainly been greater judicial recognition recently of fundamental common law rights,⁸⁷ and some judges in *Jackson* even suggested *obiter* that they may invalidate primary legislation under exceptional circumstances.⁸⁸ For writers such as Jeffrey Goldsworthy, Adam Tomkins and Michael Gordon, however, the existence of the common law constitution is entirely fictitious. Goldsworthy disputes the historical accuracy of England's supposed golden age of civil liberty, stating categorically that there "never was such an age".⁸⁹ Tomkins argues that the "ancient" common law constitution of the seventeenth century failed to hold the Stuarts to account despite the many judicial opportunities to do so. Accordingly, Parliament had to intervene to control the King, ultimately developing parliamentary sovereignty.⁹⁰ Gordon demonstrates, through a detailed analysis of nineteenth and twentieth century case law, that it is the supremacy of Parliament, not of the common law, which has prevailed.⁹¹

The decisions of the High Court and UK Supreme Court in *Miller* arguably reinforce this precedent further, with both stating categorically that parliamentary sovereignty was a fundamental constitutional principle.⁹² However, the Supreme Court also acknowledged the "constitutional character" of the European Communities Act 1972 (ECA 1972) as stated *obiter* by Laws in *Thoburn*, but failed to endorse explicitly his distinction between "constitutional" and "ordinary" statutes as the High Court did.⁹³ The High Court's conclusion that the ECA 1972 is a 'constitutional statute' is reached by slightly different means to that of Laws in *Thoburn*. There, as noted above, Laws argues that it is the common law which designates an Act as constitutional in nature, not Parliament. In *Miller*, the High Court suggested that Parliament is deemed to have intended the ECA 1972 to be immune from implied repeal. The partial entrenchment of the Act, therefore, takes the form of a common law presumption as to Parliamentary intention. Because the Act is constitutional in nature, Parliament is presumed to have intended it to be subject to express repeal only. Although arguably only a minor modification of Laws' judgment in *Thoburn*, it crucially does not exclude Parliament in the way that the original judgment does.

It is unclear from the judgment of the Supreme Court whether their passive acknowledgment of the ECA 1972 as constitutional in character represents an endorsement of the High Court's reasoning. If so, it is no longer the case that the common law designates a statute as constitutional and thus immune from implied repeal. Instead, Parliament is presumed under the common law to have intended this outcome, which is arguably more consistent with

⁸⁷ See especially *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

⁸⁸ *R (on the application of Jackson) v Attorney General* [2005] UKHL 56 at [102] (Lord Steyn); [104] (Lord Hope); [159] (Baroness Hale).

⁸⁹ J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999), p.235. See also J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University press, 2010), Chapter 2.

⁹⁰ A. Tomkins, *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2005), Chapter 3.

⁹¹ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), pp.131-137.

⁹² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [43]; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [20].

⁹³ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [88].

Laws' overall claim that the common law mediates the laws of Parliament to the people in line with common law values.

Despite the Court's seemingly strict endorsement of parliamentary supremacy, therefore, it may not spell the end of the common law constitution, but instead its partial acceptance, at least in so far as Laws' distinction between "constitutional" and "ordinary" statutes is concerned.

Political constitutionalism

Both legal and common law constitutionalism find fault with the orthodox understanding of British constitutionalism, particularly its adherence to parliamentary sovereignty at the expense of judicially-enforceable rights. Political constitutionalism recasts these perceived constitutional weaknesses as strengths. The origins of this constitutional model can be traced back to the work of J.A.G. Griffith in the 1970s. Critical of calls for greater constitutional reform, Griffiths launched his renewed defence of the British constitution in the late-1970s when he provided the first real blueprint of what he called the "political constitution".⁹⁴

Griffith famously remarked that "law is not and cannot be a substitute for politics", and that government by law instead of men was unattainable because written constitutions and Bills of Rights did little more than pass political decisions "out of the hands of politicians and into the hands of judges".⁹⁵ Griffith was a moral relativist who argued that people disagree over substantive questions of principle, thus rejecting the idea that some values were more deserving of legal protection and enforcement by the courts.⁹⁶ He thus rejected the notion of universal human rights,⁹⁷ characterising them instead as "political claims".⁹⁸ As a result, Griffith argued that the acceptance or rejection of "political claims" was better left to politicians rather than judges because politicians "are so much more vulnerable than judges and can be dismissed or at least made to suffer in their reputation".⁹⁹ Griffith thus expressed doubt over the effectiveness of judicially-enforced constitutions at curtailing authoritarianism, arguing that "the responsibility and accountability of our rulers should be real and not fictitious".¹⁰⁰

The legacy of Griffith's account of the political constitution remains the subject of academic debate and analysis, in particular its supposed descriptivism. Griffith famously declared that "the constitution is no more and no less than what happens",¹⁰¹ thus suggesting that the political constitution was a mere description of the British constitution in practice, absent both normative principles and prescriptions.¹⁰² Thomas Poole and Graham Gee, however, view this claim as a mischaracterisation of Griffith's account, arguing instead that

⁹⁴ J.A.G. Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1.

⁹⁵ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 16.

⁹⁶ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 19.

⁹⁷ See J. Allan, "Bills of Rights and Judicial Power – A Liberal's Quandary" (1996) 16(2) O.J.L.S. 337, 345; R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), p.16.

⁹⁸ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 17.

⁹⁹ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 18.

¹⁰⁰ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 16.

¹⁰¹ Griffith, "The Political Constitution" (1979) 42(1) M.L.R. 1, 19.

¹⁰² See in particular Tomkins, *Our Republican Constitution* (2005), pp.37-38.

Griffith saw Britain's 'political' constitution as model constitution, underpinned by normative values.¹⁰³

However, despite being conceived in the late 1970s, Griffith's political constitution long lay dormant, and was not revived until after the implementation of the New Labour reform package of 1997. Concerned by the apparent shift from a political constitution to a more legal one, writers such as Tomkins and Richard Bellamy took up Griffith's mantle and sought to defend Britain's political constitution, adopting a more explicit normative account couched in terms of civic republicanism, in particular Phillip Pettit's egalitarian notion of "freedom as non-domination".¹⁰⁴ Fundamental to "freedom as non-domination" is an understanding of democracy where "contestability takes the place of consent"¹⁰⁵ and the people can challenge governmental actions. Although emphasising the importance of democratic mechanisms of accountability,¹⁰⁶ Pettit nevertheless argues that such mechanisms alone are insufficient in securing "freedom as non-domination". They must be accompanied by constitutional constraints in the form of rights-based constitutional review.¹⁰⁷ Both Tomkins and Bellamy frame their normative readings of the political constitution in terms of civic republicanism, but both do so differently, although not incompatibly, and both depart from Pettit's original thesis.

Tomkins believes the contemporary British constitution was forged in the late-seventeenth century around the convention of ministerial responsibility: "that the government is constitutionally responsible to *Parliament*".¹⁰⁸ Unlike Pettit, Tomkins objects to courts holding governments to account on the grounds that it is undemocratic, arguing that participation and access to the courts is limited, and that judges, being unelected and unrepresentative, are not as accountable as democratically-elected parliamentarians.¹⁰⁹

Tomkins seeks to distinguish his account from Griffith's, which he views as wholly descriptive in nature,¹¹⁰ by making his expressly normative. The adoption of a legal constitution in Britain would be unwise, undemocratic, politically undesirable, and unconstitutional.¹¹¹ This is the case, so he claims, because the political constitution is founded upon republican values, in particular Pettit's understanding of "freedom as non-domination".¹¹² Any interference with individual freedom must be by legitimate authority, which he defines as being contestable by those affected by it.¹¹³ For Tomkins, this legitimacy is secured under the British constitution because the government is accountable to Parliament, a forum where the people can contest the government's actions. This has the effect of giving normative force to

¹⁰³ See T. Poole, "Tilting at Windmills? Truth and Illusion in 'The Political Constitution'" (2007) 70(2) M.L.R. 250; G. Gee, 'The political constitutionalism of J.A.G. Griffith' (2008) 28(1) *Legal Studies* 20. See also Gee and Webber, "What Is a Political Constitution?" (2010) 30(2) O.J.L.S. 1.

¹⁰⁴ See generally P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

¹⁰⁵ Pettit, *Republicanism: A Theory of Freedom and Government* (1997), p.ix.

¹⁰⁶ Pettit, *Republicanism: A Theory of Freedom and Government* (1997), pp.183-205.

¹⁰⁷ Pettit, *Republicanism: A Theory of Freedom and Government* (1997), pp.171-183, especially at 181-182.

¹⁰⁸ Tomkins, *Our Republican Constitution* (2005), p.1.

¹⁰⁹ Tomkins, *Our Republican Constitution* (2005), pp.25-27.

¹¹⁰ Tomkins, *Our Republican Constitution* (2005), pp.37-38.

¹¹¹ Tomkins, *Our Republican Constitution* (2005), p.40.

¹¹² Tomkins, *Our Republican Constitution* (2005), pp.46-52.

¹¹³ Tomkins, *Our Republican Constitution* (2005), p.49.

the constitution's system of political accountability, thus making it an "essential component in a constitutional structure designed to secure non-domination".¹¹⁴

Both Griffith's and Tomkins' accounts of the political constitution, therefore, emphasise the prevention of abuse of power through political accountability. Bellamy's account, though not precluding this check on power, instead focuses on the political constitution's ability, through democracy, to harness power to achieve popular goals.¹¹⁵ In this sense, "the democratic process *is* the constitution".¹¹⁶

Bellamy's conception of the political constitution is similarly structured in opposition to what he views as the hallmark of the legal constitution: the entrenchment of human rights within a justiciable "higher law" constitution.¹¹⁷ Echoing Griffith, Bellamy opposes giving legal supremacy to any substantive values whatsoever on the grounds that people disagree on what set of outcomes a society committed to the democratic ideals of equality of concern and respect should achieve.¹¹⁸ Protecting values this way, Bellamy argues, does not guarantee Pettit's republican, egalitarian understanding of "freedom as non-domination", but instead undermines it, because judges are given leave to enforce universally their particular view of rights.¹¹⁹ The public can only ever be regarded as equal, Bellamy argues, when they participate in the democratic process,¹²⁰ as it allows people's disagreements to be acknowledged and resolved without domination. Bellamy notes, "the test of a political process is not so much that it generates outcomes we agree *with* as that it produces outcomes that all can agree *to*, on the grounds they are legitimate".¹²¹

This is achieved, Bellamy argues, in three ways. First, the system of "one person, one vote", because "[i]t allows everyone to be counted equally and to accept the legitimacy of the view that prevails – even if they disagree with it".¹²² Second, because a democratically-elected legislature reflects popular divisions in its membership, thus making unanimous agreement on issues unlikely, Bellamy identifies decisions by majority rule as the fairest method to resolve disputes between equally valid opinions.¹²³ Third, Bellamy contends that legislation can be said to reflect the wishes and concerns of more than just the governing party's supporters because of the "balance of power" principle, whereby rival centres of power, such as political parties in the legislature for example, are forced to recognise one another's concerns and compromise.¹²⁴

¹¹⁴ Tomkins, *Our Republican Constitution* (2005), p.51.

¹¹⁵ Gee and Webber, "What Is a Political Constitution?" (2010) 30(2) O.J.L.S. 1, 12.

¹¹⁶ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.5.

¹¹⁷ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), pp.1 and 15.

¹¹⁸ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), pp.3-4.

¹¹⁹ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), pp.166-167.

¹²⁰ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), pp.4-5.

¹²¹ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.164.

¹²² Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.165.

¹²³ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.38.

¹²⁴ Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.5.

In contrast to legal constitutionalism, therefore, political constitutionalism (as conceived by Griffith, Tomkins, and Bellamy) makes four closely-related claims.¹²⁵ The first claim is that people disagree over what the substantive outcomes of a democratic society should be. As a consequence, political constitutionalists dispute the existence of rights that are necessarily antecedent to democracy and thus deserving of legal entrenchment as part of a “higher law”. Unlike the legal constitution, therefore, the political constitution precludes the constitutional review of legislation. The second claim is that democratic participation legitimises government because it best satisfies the egalitarian requirements of “freedom as non-domination”. The necessary implication of these two claims combined, it is submitted, is the third claim: the doctrine of parliamentary sovereignty. If democratic participation forms the basis of legitimate government, and in the absence of a “higher law” from which the courts may review the constitutionality of legislative decisions, it stands to reason, that the legislature under the political constitution retains the final say on all matters.¹²⁶ The fourth claim is that political accountability is more effective than the courts at preventing authoritarianism because politicians can be removed by the electorate at the ballot box, and because the survival of the government is dependent upon the support of Parliament. The political constitution can be said to have a clear preference for political mechanisms of control over legal ones.

Although Griffith offered a largely descriptive account of the British constitution *as* a political constitution, he did not suggest that Britain had *always* been a political constitution. Tomkins’ work, by contrast, appears to suggest just that. According to Tomkins, the foundations of the contemporary British constitution are found in the Glorious Revolution of the late-seventeenth century. The structural makeup of the constitution therefore predates those adopted by countries a century later,¹²⁷ thus explaining the constitution’s predisposition towards both parliamentary sovereignty and ministerial accountability, as well as the historical marginalisation of the courts in later centuries.¹²⁸ For Tomkins, traditional English public law, between 1870 and 1970, was based on the political constitution,¹²⁹ the height of Diceyan thinking. This claim, however, appears dubious. Although Dicey’s reading of parliamentary sovereignty remains intact under this new political paradigm, his essentially liberal justifications for it have now been replaced with republican ones.¹³⁰ The political constitution, if anything, appears nothing more than a republican reinterpretation of the orthodox constitution.

Although many prominent political constitutionalists remain steadfast in their belief that much of the political constitution remains intact, untouched by recent reforms,¹³¹ Tomkins nevertheless suggests that Britain’s “old” political constitution no longer exists as it once did. After all, political constitutionalism was principally developed in response to a supposed shift

¹²⁵ Cf. the five key features of political constitutionalism identified in R. Bellamy, “Political constitutionalism and the Human Rights Act” (2011) 9(1) *International Journal of Constitutional Law* 86, 89-94.

¹²⁶ In support see Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), Chapter 7.

¹²⁷ Tomkins, *Public Law* (2003), p.45.

¹²⁸ See Tomkins, *Public Law* (2003), pp.47-60.

¹²⁹ Tomkins, *Public Law* (2003), p.21.

¹³⁰ On criticisms of Dicey’s liberal conception of the Rule of Law see Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (2000), pp.7-10.

¹³¹ See particularly K. Ewing, “The Resilience of the Political Constitution” (2013) 14(12) *German Law Review* 2111; A. Tomkins, “What’s Left of the Political Constitution?” (2013) 14(12) *German Law Journal* 2275.

towards legal constitutionalism beginning in the 1970s and accelerating at the dawn of the twenty-first century. Tomkins' account is therefore arguably more normative than descriptive because he seeks to make the case for a change back to the old *status quo*: "the model of the political constitution is one that I seek not to invent but to revive".¹³²

Much like the common law constitution, both Griffith's supposedly descriptive account, and Tomkins' historical account, have arguably anchored the political constitution to the British system of government in such a way as to make the two indistinguishable. However, because of the fact that the political constitution was developed as an alternative to legal constitutionalism broadly understood, and given express normative force by both Tomkins and Bellamy, it could also be viewed as a model of constitutional government which could be adopted by any nation. It is not enough to say that the British constitution *is* a political one, but that it *ought* to be one also.

Building on this, Graham Gee and Grégoire Webber have sought to develop a more comprehensive understanding of the normative claims of political constitutionalism to draw a more effective comparison with legal constitutionalism. They observe that political constitutionalism, unlike its rival, offers "no comparable, definitive prescriptions" and is difficult to distinguish from "day-to-day political activity".¹³³ They thus conclude that although the political constitution is prescriptive in nature, these are minimal, stipulating only that political actors should "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".¹³⁴ Everything else, they claim, is for Parliament to decide.¹³⁵

It is submitted, however, that whilst the political constitution is minimalistic in its prescriptions, these nevertheless go further than Gee and Webber claim. Despite the universal rejection of "higher law" rights enforced by the courts, for instance, both Tomkins and Bellamy are nevertheless keen to stress that human rights themselves are compatible with political constitutionalism.¹³⁶ It also stands to reason, it is submitted, that the political constitution necessitates conformity with the formal reading of the Rule of Law.¹³⁷ In acknowledging the compatibility of human rights, both Tomkins and Bellamy also acknowledge a role for the courts in protecting them, albeit one which is circumscribed.¹³⁸ The problem faced by political constitutionalism, therefore, is how best to accord respect for these values without undermining its three main claims and collapsing into a form of legal constitutionalism.

¹³² Tomkins, *Our Republican Constitution* (2005), p.vii.

¹³³ Gee and Webber, "What Is a Political Constitution?" (2010) 30(2) O.J.L.S. 1, 14.

¹³⁴ Gee and Webber, "What Is a Political Constitution?" (2010) 30(2) O.J.L.S. 1, 15.

¹³⁵ Gee and Webber, "What Is a Political Constitution?" (2010) 30(2) O.J.L.S. 1, 17.

¹³⁶ See Tomkins, "What's Left of the Political Constitution?" (2013) 14(12) *German Law Journal* 2275; Bellamy, "Political constitutionalism and the Human Rights Act" (2011) 9(1) *International Journal of Constitutional Law* 86; R. Bellamy, "Rights, Republicanism and Democracy" in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

¹³⁷ See J. Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195.

¹³⁸ See in particular Tomkins, "What's Left of the Political Constitution?" (2013) 14(12) *German Law Journal* 2275, 2281; A. Tomkins, "The role of the courts in the political constitution" (2010) 60(1) *University of Toronto Law Journal* 1; Bellamy, "Political constitutionalism and the Human Rights Act" (2011) 9(1) *International Journal of Constitutional Law* 86.

Michael Gordon's manner and form theory may provide a solution. Building on Jennings' work,¹³⁹ Gordon argues that Parliament, though incapable of limiting its substantive powers, can nevertheless change the legislative process itself. Parliament could therefore introduce procedural conditions on the passing of valid legislation, he argues, thus binding its successors as to the manner and form of legislation without diminishing its sovereignty.¹⁴⁰ According to Gordon, recent challenges to parliamentary sovereignty, particularly Britain's EU membership, necessitate a reassessment of the doctrine if it is to remain a fundamental characteristic of the British constitution.¹⁴¹ This reassessment includes an embracement of the manner and form theory, which he argues is consistent with parliamentary sovereignty and political constitutionalism, both of which are justifiable on democratic grounds. As he notes, "just as it is democratic to allocate to Parliament the constitutional authority to legislate about any subject-matter, it is also democratic to allocate to Parliament the constitutional authority to legislate about the law-making process."¹⁴² Crucially, Gordon argues that the manner and form theory could be used to develop Laws' distinction between ordinary and constitutional statutes.¹⁴³ Parliament, rather than the courts, would be at the forefront of this distinction, however, thus curtailing the development of common law constitutionalism,¹⁴⁴ and bringing greater "coherence" to Britain's political constitution.¹⁴⁵ Indeed, if Parliament, rather than the courts, spearhead this distinction, granting greater statutory protection to rights for example, the decision would not only be more democratic, but also subject to political forms of accountability, including the electorate.¹⁴⁶

I have offered an alternative solution, however, in the form of constitutional conventions.¹⁴⁷ Conventions are politically-binding rules of conduct incapable of judicial enforcement. They are particularly attractive to political constitutionalism, therefore, because they can, through the threat of political sanctions, achieve limited government without judicial interference. Respect for fundamental human rights and the Rule of Law are constitutional values embodied by what I have previously called latent conventions. Such conventions influence the behaviour of politicians, but have not yet materialised into a recognised convention, and may not do so unless an attempt is made to subvert them. They therefore *de facto* limit Parliament's powers, but in a manner consistent with the political constitution's preference for political over legal mechanisms of accountability.¹⁴⁸

Complementary constitutionalism

¹³⁹ See Sir W.I. Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1960), generally.

¹⁴⁰ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), p.74.

¹⁴¹ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), pp.2-3.

¹⁴² Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), p.322.

¹⁴³ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), p.350.

¹⁴⁴ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), pp.348-349.

¹⁴⁵ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), p.351.

¹⁴⁶ Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015), p.322.

¹⁴⁷ Taylor, "Foundational and regulatory conventions: exploring the constitutional significance of Britain's heavy dependency upon conventions" (2015) P.L. 614.

¹⁴⁸ Taylor, "Foundational and regulatory conventions: exploring the constitutional significance of Britain's heavy dependency upon conventions" (2015) P.L. 614, 626-627.

The debate surrounding the nature of the contemporary constitution has been characterised as one of law versus politics, thus making it bipolar: the legal constitution (including the common law) against the political constitution. The former wants greater legal constraints on government, whilst the latter prefers political ones. No-one is guiltier of this polarisation than the architects and advocates of each school who, in defence of their viewpoint, tend to present “a stark choice between *either* a legal constitution *or* a political constitution – but not both”, thereby presenting the debate on constitutionalism in an “all-encompassing” manner.¹⁴⁹

It is submitted, however, that a view of only one model as the true picture of the British constitution, will always be incomplete. The models proposed, each reflective of wider concerns over the governance of the British state, seek to bring order to the chaos that is the British constitution. However, the sprawling nature of the British constitution, with roots stretching back to time-immemorial spanning several nations, is too much for any single model to capture in its entirety. The true face of the constitution, it is submitted, will only ever come into focus once we accept it as fusion of all three.

There is some recognition by academics that the British constitution is a mixture of both legal and political constitutions. Gee and Webber, for example, have noted that “Britain's constitution today embraces, perhaps in uncertain ways and to an uncertain extent, *both* a political model *and* a legal model”.¹⁵⁰ This recognition extends even to advocates of each competing model of constitutionalism. Trevor Allan and Tom Hickman, for example, have expressed a clear desire to reconcile the differences between the two schools,¹⁵¹ whilst Adam Tomkins and Richard Bellamy have conceded that elements of both the legal and the political schools exist under the same constitution.¹⁵²

Recognition aside, however, few have sought to offer a full account of Britain's “mixed constitution”.¹⁵³ Given that many accounts are normative in nature, and therefore seek, not to offer an account of the constitution as it *is*, but instead of what the constitution *should be*, their reluctance to articulate a full account of the “mixed constitution” is unsurprising. Even where partial accounts are offered, they are, as Gee and Webber note, likely to provide an unreliable picture of Britain's “mixed constitution”, informed by the preferred model of their authors.¹⁵⁴ This is the case even with some explicit reconciliatory models of constitutionalism, in particular Steven Garbaum's new Commonwealth model of constitutionalism,¹⁵⁵ which

¹⁴⁹ Gee and Webber, “What Is a Political Constitution?” (2010) 30(2) O.J.L.S. 1, 20; see also Elliott and Thomas, *Public Law* (2014), p.37 and 79; M. Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford and Portland, Oregon: Hart Publishing, 2000).

¹⁵⁰ Gee and Webber, “What Is a Political Constitution?” (2010) 30(2) O.J.L.S. 1, 20.

¹⁵¹ See T.R.S. Allan, “The constitutional foundations of judicial review: conceptual conundrum or interpretative inquiry?” (2002) 61(1) C.L.J. 87, 96; Hickman, “In Defence of the Legal Constitution” (2005) 55(4) *University of Toronto Law Journal* 981.

¹⁵² See Tomkins, “What's Left of the Political Constitution?” (2013) 14(12) *German Law Journal* 2275, 2276; Tomkins, *Our Republican Constitution* (2005), p.vii; Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007), p.5.

¹⁵³ Tomkins, “What's Left of the Political Constitution?” (2013) 14(12) *German Law Journal* 2275, 2276.

¹⁵⁴ Gee and Webber, “What Is a Political Constitution?” (2010) 30(2) O.J.L.S. 1, 22.

¹⁵⁵ S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013); S. Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 Am. J. Comp. L. 707; S. Gardbaum, “The Case for the New Commonwealth Model of Constitutionalism” (2013) 14(12) *German Law Journal* 2229.

encompass ‘dialogical’ or ‘third wave’ bills of rights like the Human Rights Act 1998,¹⁵⁶ as well as bi-polar sovereignty as developed by Sir Stephen Sedley¹⁵⁷ and Christopher Knight.¹⁵⁸ Although such theories should be praised for seeking to break the traditional dichotomy between law and politics, it is arguable that the former merely preserves political constitutionalism, whilst the latter collapses into common law constitutionalism, thus undermining the reconciliation.

Articulating Britain’s mixed constitution in its entirety is a monumental task which will be explored in greater detail elsewhere. For the purposes of this article, however, a brief account of Britain’s mixed constitution will be made.

Both the common law and the political models of constitutionalism seek to reinterpret the existing constitution, and do so by adopting both principled as well as historical perspectives. The common law constitution, like the legal constitution, is founded upon liberal values, and therefore seeks to read into the common law these values in order to accord them protection in the absence of a codified and entrenched constitution. It looks to the case law of the seventeenth century and the idea of the “ancient constitution” as evidence of the common law’s natural affinity with these liberal values, as well as legislation’s inherent dependency upon interpretation by the common law courts for its primacy within the constitution. The political constitution according to Tomkins and Bellamy, by contrast, is based upon republican ideals. It thus views the British constitution’s traditional orientation around Parliament and political accountability, originating (it claims) from Parliament’s victory over the Crown in the seventeenth century, as the optimal embodiment of these ideals, and empirical evidence of the constitution being an inherently political one. The common law and political constitutions are, in their own ways, *de facto* defences of the pre-existing constitution. Both view the constitution differently in light of their own preferred principles, each looking to history for support.¹⁵⁹ Neither argue for sweeping reform of the constitution, but instead seek only to preserve the *status quo* as they see it. As rival historical reinterpretations, therefore, both are *prima facie* adversarial and polarised in nature. It is submitted, however, that evidence of both models can be found under the contemporary British constitution, and that the differences between the models are more nuanced than is often credited, with disagreement between them being one primarily of degree.

Common law systems operate in much of Britain, and in the sphere of public law at least, the English common law, dating back to the twelfth century, extends to the whole of the UK. It is undisputable that the common law, as developed by judges, is the source of many constitutional rules and principles. It is also true to say that legislation, despite being passed by a sovereign Parliament, is subject to interpretation by judges under the common law. Executive action, including action under the royal prerogative, is also subject to review by the courts according to common law principles, thus suggesting that the *ultra vires* model of review

¹⁵⁶ F. Klug, “The Human Rights Act – a “third way” or “third wave” Bill of Rights” (2001) 4 E.H.R.L.R. 361.

¹⁵⁷ S. Sedley, “Human rights: a twenty-first century agenda” (1995) P.L. 386; Sedley, S. “Judicial Politics”, *London Review of Books*, Vol. 34, No. 4, 23 February 2012.

¹⁵⁸ C.J.S. Knight, “Bi-polar sovereignty restated” (2009) 68(2) C.L.J. 361; C.J.S. Knight, “Striking down legislation under bi-polar sovereignty” (2011) P.L. 90.

¹⁵⁹ For criticism of this historical approach, see M. Loughlin, “Towards a republican revival?” (2006) 26(2) O.J.L.S. 425.

does not adequately explain Britain's system of judicial review. If anything, the *ultra vires* model of review can only partially explain the ability of judges to review executive action. This demonstrates that the common law, to some degree at least, constitutes a restriction on governmental power independent of Parliament.

Recognition of these facts, however, does not necessarily mean that Britain possesses a common law constitution *over* a political one. The *ultra vires* model of review does explain why the courts were able to review governmental action in many cases, thus further demonstrating the centrality of parliamentary sovereignty to the contemporary British constitution, one of the hallmarks of the political constitution. Judicial recognition of this principle, although important to its acceptance, should not be assumed to be at the sole discretion of the courts. As Jeffrey Goldsworthy has noted, "the doctrine of parliamentary sovereignty is constituted by a consensus among the senior officials of all branches of government. It was not ... made by the judges alone".¹⁶⁰ Political reality, shaped by historical and contemporary events, also gives force to the principle, thus compelling judicial recognition of it. The courts have continually recognised parliamentary sovereignty as a fundamental constitutional principle,¹⁶¹ and on several occasions have also said that they will even enforce Parliament's intention to abrogate rights where express words to that effect are used in an Act of Parliament.¹⁶² Parliament itself is equally capable of altering the principle of parliamentary supremacy, and has arguably done so on multiple occasions already, most notably with the ECA 1972. The British constitution also continues to rely heavily on political checks by both Parliament and the electorate, with constitutional conventions remaining a defining characteristic of the constitution.¹⁶³

Similarly, however, adherence to the principle of parliamentary sovereignty and a dependency upon political checks does not necessarily mean that Britain possesses a political constitution *over* a common law one. As shown above, the common law does not preclude parliamentary sovereignty absolutely, nor does the political constitution reject outright the notion of fundamental human rights or the role of the courts in protecting them, even against a sovereign legislature.

It can be seen, therefore, that both models of constitutionalism have shared characteristics, demonstrating common ground between the two. Both models merely give a different emphasis to these shared characteristics, thus resulting in them offering a different answer to the question of what the appropriate balance between law and politics should be. This manifests itself as an answer to the question of who should have the final say in hard cases. The common law model favours the courts under the common law, whilst the political constitution favours politics as embodied by Parliament.

However, in trying to answer the question of where the appropriate line between law and politics should lie, it is submitted that both models offer an incomplete answer. There is

¹⁶⁰ J. Goldsworthy, "Abdicating and limiting Parliament's sovereignty" (2006) 17 *King's College Law Journal* 255, 261.

¹⁶¹ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [43].

¹⁶² See in particular *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131 (Lord Hoffmann).

¹⁶³ See Taylor, "Foundational and regulatory conventions: exploring the constitutional significance of Britain's heavy dependency upon conventions" (2015) P.L. 614.

common ground between the two, and both the common law and political model are the product of Britain's evolved constitution, each focussing on different but equally valid constitutional traits. On this reading, Britain can be seen to possess both a common law and a political constitution. The claims of both models, therefore, cannot be reasonably dismissed outright, irrespective of the normative arguments, and neither model should be seen as being dominant as of right. The common law and political constitutions are two sides of the same coin, where neither is complete without the other. The relationship between the two should therefore be seen as complementary rather than contradictory in nature. Both models should be used in a manner which supports and sustains each other in order to achieve better government accountability than either could alone achieve, thus resulting in a more balanced constitution, what this article calls complementary constitutionalism.¹⁶⁴

It is legitimate for Parliament to expect that its enactments will be enforced by the courts by virtue of its democratic basis. Judicial enforcement, however, is likewise legitimately conditional on Parliament's enactments being in conformity with common law principles. In the same way that the courts should recognise and respect the democratic legitimacy of Parliament, so too should Parliament recognise and respect the rule of law embodied by the common law. Both should perform their functions with the role of the other in mind, and where possible mitigate or avoid potential conflict with the other. Consequently, although Parliament can pass any law whatsoever, it should refrain from undermining the Rule of Law. Similarly, the courts, although capable of interpreting legislation in light of the Rule of Law, should do so in a way which respects Parliament's wishes, and refrain from invalidating an Act wherever possible.

Hard cases may of course arise which bring the models into conflict, with both Parliament and the courts seeking to have the final say. To date, the courts have never invalidated an Act of Parliament. This does not mean, however, that the courts will never invalidate an Act of Parliament, or that they would be acting inappropriately if they did. Hard cases are by definition exceptional and rare, and should not be used as the basis on which to characterise the entire constitutional system. Should the courts one day invalidate an Act of Parliament in circumstances envisaged by Allan above, this should not necessarily signal the end of Parliamentary sovereignty as a key principle of the British constitution, or the subservience of the political constitution to the common law constitution. In every other respect, and in the overwhelming majority of cases, Parliament would still be free to legislate unimpeded. Likewise, should the courts decide not to invalidate, this does not mean that the common law ceases to be important in the interpretation of other statutes. Determining who should win in hard cases is no easy task, and should be dependent upon the circumstances of each case. In some situations, the Rule of Law may need to give way to parliamentary sovereignty, whilst in others the converse may be true. The exact line between law and politics, between the courts and Parliament, is therefore necessarily indeterminate. Any strict rule will ultimately favour one side over the other, thus inevitably resulting in injustice in some cases.

¹⁶⁴ I proposed this reconciliatory theory in Taylor, "Foundational and regulatory conventions: exploring the constitutional significance of Britain's heavy dependency upon conventions" (2015) P.L. 614. For my early hypothesis, see R.B. Taylor, "The Political Constitution No More?" (PhD Thesis, Durham University 2013).

However, when comparing the British constitution to other world constitutions, in particular those with a codified and entrenched constitution, it is clear that the British constitution favours political control over legal ones. That is to say, the British constitution reserves certain matters for politics that a legal constitution would otherwise reserve for law. On this basis, it would be accurate to describe the British constitution as primarily or predominantly political in nature,¹⁶⁵ but this fact does not, and should not, create the impression that it is any less dependent on the common law as outlined above.

Legal constitutionalism, of course, offers something distinct from both the common law and political models. As Blick observes, “written constitution” is a term which “implies an act of conception through language”.¹⁶⁶ Developed in opposition to the British constitution, it offers an alternative which ultimately seeks to displace it. Should Britain eventually adopt a codified, entrenched constitution, everything would potentially be subject to debate, and more than just the balance of power between Parliament and the courts would *have* to be decided. The adoption of a legal constitution, therefore, would represent a new beginning for the British constitution, thus marking a break with its historical continuity. It is submitted, however, that this fact should not exclude the legal constitution from any reconciliation, nor should its adoption be seen to negate any attempt at reconciliation. Whilst the adoption of a fully codified, entrenched constitution would mark a sharp departure from British constitutional history, the same would not be true where it is adopted, not in whole, but in part.

There is great value in the British constitution’s evolutionary common law nature, which should not be easily dismissed in favour of an all-encompassing written constitution.¹⁶⁷ In the same way that legislation has been used to augment the constitution and assist its evolution, so too can codified, entrenched law. Legal constitutionalism can be used sparingly to help supplement Britain’s otherwise evolved constitution for those areas for which both the political and the common law models are unable to provide adequate solutions. Legal constitutionalism is inherently broad in its scope because the process of adopting a constitution necessitates design decisions. All matters contained within the constitution, not just fundamental rights, would have ‘higher law’ status. The creation, composition and powers of institutions of government, for example, are often contained within legal constitutions.

Consequently, although many will look to the protection of fundamental human rights as one area where the British constitution may benefit from greater legal constitutionalism, it is submitted that for a more complementary, and thus balanced use of legal constitutionalism, it should be reserved for matters of broad constitutional design, most notably the Union itself. Minimalist legal constitutionalism, on matters of broad state structure, could help bring greater clarity and legitimacy in the wake of both the EU and Scottish independence referendums. This idea is also not new to Britain, and some have sought to argue that the 1707 Treaty is a *de facto*

¹⁶⁵ See Taylor, “Foundational and regulatory conventions: exploring the constitutional significance of Britain’s heavy dependency upon conventions” (2015) P.L. 614, 622.

¹⁶⁶ Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (2015), p.19.

¹⁶⁷ See Laws, *The Common Law Constitution* (2014), p.7.

constitution.¹⁶⁸ If so, it is a minimalist, partial constitution, supplemented both by the common law and political constitutions.

Although the introduction of legal constitutionalism in the form of codified, entrenched law would necessitate judicial enforcement (thus diminishing parliamentary sovereignty in real terms), this should not be seen as a great departure from Britain's orthodox constitution. Parliament could still legislate on other matters, including fundamental rights. Unlike human rights, which are often wide in their scope and highly contestable, the demarcation of competences between Westminster and the devolved bodies, although complex, is narrower in focus. As a result, judicial interference with political decisions would likely be minimal. Britain could be a "mixed constitution" which is predominantly political in nature, but supplemented by both common law and legal constitutionalism.

It is clear therefore that it is only when all three models of constitutionalism are taken together that a truer image of the constitution appears, and a path towards a more stable constitutional future for Britain emerges. However, if and until we embrace complementary constitutionalism, contestability will remain the defining characteristic of the British constitution. Whether the British constitution can survive such contestability much longer remains to be seen.

¹⁶⁸ See J.M. MacCormick, *The Flag in the Wind: The Story of the National Movement in Scotland*, (London: Victor Gollancz Ltd, 1955), pp.187-196; I. McLean and S. Peterson, "Transitional constitutionalism in the United Kingdom" (2014) 3(14) *Cambridge Journal of International and Comparative Law* 1113.