

What's Left of the Political Constitution?

By Adam Tomkins*

Abstract

This paper argues that we should move on from what has become a rather outdated contrast between the political constitution and the legal constitution. Taking as its focus the constitution of the United Kingdom, the paper analyzes the contemporary constitutional order as a mixed system of politics and law combined. It argues that such a mix may be a more compelling and attractive system than either the model of the political constitution or that of the legal constitution.

A. Introduction¹

The model of the political constitution has frequently been contrasted with that of the legal constitution. In drawing this contrast, the relationship between the political constitution and the legal constitution has typically been presented as one of rivalry.² On this view, these are competing models, generally at odds with one another, doing battle not just for primacy but, it seems, for exclusivity. As such, the constitution of the United Kingdom is seen *either* as a political constitution *or* as a legal constitution; we may depict the British constitution from either the perspective of a political constitutionalist, or from that of a legal constitutionalist. More recently, several commentators have argued that this distinction is a false choice and that we can, and indeed in the UK do, have elements of both.³ On this revised view, the British constitution is neither exclusively political nor

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¹ This is an essay on the constitution and public law of the United Kingdom; it is not an exercise in transcendental constitutionalism or in global constitutional theory. The British debate between political and legal constitutionalists is primarily concerned with how—and by whom—executive powers are best held to account. Its main focus is not on arguments about the extent to which primary legislation should be subject to judicial review.

² See ADAM TOMKINS, PUBLIC LAW 1–24 (2003); ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 1–25 (2005).

³ See Tom R. Hickman, *In Defence of the Legal Constitution*, 55 U. TORONTO L.J. 981 (2005); Graham Gee & Grégoire C.N. Webber, *What Is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273 (2010).

exclusively legal. The revised view is correct. The British constitution is indeed now a “mixed constitution.”⁴

Several things follow. The first is that, if we are to understand the contemporary British constitution, we must understand both its political and its legal dimensions. Any account of the constitution that presented only one of these aspects would necessarily fail. Any British constitutional lawyer who thinks that case law is the only primary source worthy of consideration does not understand the constitution and can give nothing but a misleading account of it. (Of course, any British constitutional commentator who overlooks case law in her account of the constitution must also fail.) Parliamentary sources remain essential. I do not mean only legislation, but also parliamentary debates and the proceedings and reports of select committees. Executive sources, from the *Ministerial Code* to the *Cabinet Manual* (both of which include *de facto* codifications of constitutional convention, among other things) are likewise indispensable.

But there is much more at stake here than a squabble over appropriate sources. To say that the British—or, for that matter, any other—constitution is a mixed constitution, that brings together and relies on elements of both politics and of law, does not take us very far. As Sedley L.J. said in another context, to say that something is *sui generis* does not tell us anything about the content or the nature of the genus we have identified.⁵ It matters less that the constitution is mixed than what the balance of the mix is, and should be. Are we talking about a largely political constitution with a smaller legal element, or is it the other way round? Or, are the two more or less equal partners? Are they partners at all? Are we talking about a happy mix with a nice balance, a good mix, a coherent mix; or a riot, a mess, a muddle, a dysfunctional, conflicted, fragile, uncertain, mixed-up constitution? Does the mix combine to make the constitution stronger than the sum of its parts? Or do we have a combustible mix that is inherently unstable? Finally, do we have a mix that is a hopelessly unprincipled compromise, or are there such things as principles of mixed constitutionalism that can be distilled from a normative analysis of British constitutional practice?

I was more worried a few years ago about these matters than I am now. I was concerned that we had so under-valued Parliament as an institution in which the Government of the day could be held effectively to constitutional account that there were many who had given up on it.⁶ I was likewise concerned that the only institution showing much

⁴ The “mixed constitution” is an old phrase, and I do not mean to use it in the way in which it was understood in the eighteenth century. For example, I am not referring to that ancient mix of monarchy, aristocracy, and democracy that Blackstone, *par excellence*, identified as animating the Anglo-British constitution. I am referring to the contemporary mix of politics and law.

⁵ See Sec’y of State for the Home Dep’t v. Pankina, [2010] EWCA (Civ) 719, [2011] Q.B. 376 (Eng.).

⁶ See Adam Tomkins, *What is Parliament For?*, in PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 53 (Nicholas Bamforth & Peter Leyland eds., 2003).

constitutional initiative was the judiciary: that the judges were on the march, that the constitution was up for grabs, and that it was the judges who were grabbing it.⁷ Recent years have witnessed, however, something of a parliamentary comeback and, more clearly, a halting of the judicial advance. Indeed, some interventions have even suggested that it would be appropriate now to see something of a judicial retreat.⁸ These developments merit closer examination.

In relation to Parliament, while the public and media perception of parliamentary values took a deserved hit over the so-called expenses scandal of 2009–10 (more accurately, an allowances scandal), the public seems to have put the scandal behind it and moved on. Aside from the allowances scandal, Parliament's increased self-assertiveness has manifested—and has been noticed—in numerous respects. Philip Cowley's widely cited and influential research on the unruliness of “backbenchers,” in their unprecedented willingness to defy the party whips, shows that Governments find it increasingly difficult to push aspects of their legislative agenda through the House of Commons.⁹ In the House of Lords, the quality of debates on a wide range of matters of public policy has long been respected. The 2010–12 session, for example, saw prolonged, expert, and highly effective debate in the Lords on the health service, Scotland, constitutional reform, welfare reform, legal aid provision, and on many other components of the Government's policy. Such debates were not ends in themselves, but led to numerous—even serial—amendments to, and revisions of, Government bills, as is the task of a revising chamber. The Terrorist Asset-Freezing etc. Act 2010,¹⁰ the Public Bodies Act 2011,¹¹ and the Health and Social Care Act 2012,¹² among others, were each markedly improved as a direct result of Lords' amendments. The Welfare Reform Act 2012¹³ and the Legal Aid, Sentencing and Punishment of Offenders Act 2012¹⁴ would also have been improved had the Commons not insisted on rejecting various Lords' amendments.

Select committees of both Houses produce an ever-increasing volume of very high-quality work, which informs and enriches debates both within and beyond Parliament. Both

⁷ See Adam Tomkins, *The Rule of Law in Blair's Britain*, 26 U. QUEENSLAND L.J. 255 (2007).

⁸ See Jonathan Sumption Q.C., F.A. Mann Lecture, *Judicial and Political Decision-Making: The Uncertain Boundary* (2011). Mr. Sumption (as he was when he delivered this lecture) is now a Justice of the U.K. Supreme Court.

⁹ See generally PHILIP COWLEY, *THE REBELS: HOW BLAIR MISLAID HIS MAJORITY* (2005).

¹⁰ Terrorist Asset-Freezing etc. Act, 2010, c. 38 (U.K.).

¹¹ Public Bodies Act, 2011, c. 24 (U.K.).

¹² Health and Social Care Act, 2012, c. 7 (U.K.).

¹³ Welfare Reform Act, 2012, c. 5 (U.K.).

¹⁴ Legal Aid, Sentencing and Punishment of Offenders Act, 2012, c. 10 (U.K.).

Houses have demonstrated that they can debate rights seriously. The debate in the Commons on prisoners' right to vote was a genuinely impressive affair.¹⁵ The Lords take great care over, for example, counter-terrorism measures to ensure, as best they are able, that the appropriate balance is struck between the interests of security and those of individual liberty and due process.¹⁶ Both Houses of Parliament routinely show that they take the constitution seriously and that they take their onerous constitutional responsibilities seriously. Whether it be the Welsh Affairs Committee alerting an Anglo-centric Westminster to the stark consequences for Wales of the Government's program of constitutional change;¹⁷ the European Scrutiny Committee assembling a penetrating, expert commentary on the constitutional consequences of the so-called "sovereignty clause" of the European Union Bill;¹⁸ the Joint Committee on Human Rights showing the over-reach of several of the Government's proposals in its Justice and Security Green Paper;¹⁹ or countless other examples, the routine, everyday, and frequently superb work of our Parliament shows that the political element of the constitution is alive and well. Indeed, it is thriving as it rarely has before.

The judges, meanwhile, seem to have settled down somewhat from the heady over-excitement of Sir John Laws' "higher-order law"²⁰ and from the zest in *Jackson* with which certain of their Lordships seemed to bang nails into the imaginary coffin of parliamentary sovereignty.²¹ Legislation is accorded respect, even when it entails the making of difficult choices on questions affecting fundamental rights.²² The legislation of even devolved, or subordinate, legislatures is ruled not to be amenable to judicial review on grounds of reasonableness, again because of the constitutionally appropriate respect courts show to

¹⁵ See 10 February 2011, 523 PARL. DEB., H.C. (6th ser.) (2011) 493–586 (U.K.).

¹⁶ See, e.g., the following debates in the House of Lords on the Justice and Security Bill: 19 June 2012, PARL. DEB., H.L. (5th ser.) (2012) 1659–95 (U.K.); 11 July 2012, PARL. DEB., H.L. (5th ser.) (2012) 1162–83 (U.K.); 17 July 2012, PARL. DEB., H.L. (5th ser.) (2012) 120–44 (U.K.); 21 Nov. 2012, PARL. DEB., H.L. (5th ser.) (2012) 1811–47 (U.K.).

¹⁷ See HOUSE OF COMMONS WELSH AFFAIRS COMMITTEE, THE IMPLICATIONS FOR WALES OF THE GOVERNMENT'S PROPOSALS ON CONSTITUTIONAL REFORM, 2010–12, H.C. 495 (U.K.).

¹⁸ See HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, THE EU BILL AND PARLIAMENTARY SOVEREIGNTY, 2010–12, H.C. 633 (U.K.).

¹⁹ See JOINT COMMITTEE ON HUMAN RIGHTS, THE JUSTICE AND SECURITY GREEN PAPER, 2010–12, H.L. 286, H.C. 1777 (U.K.). The Justice and Security Act 2013 is considerably more restrained than were the Government's original proposals.

²⁰ Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72.

²¹ R (*Jackson*) v. AG, [2005] UKHL 56, [2006] 1 A.C. 262.

²² See, e.g., R (*Animal Defenders Int'l*) v. Sec'y of State for Culture, Media & Sport, [2008] UKHL 15, [2008] A.C. 1312 (H.L.) [81] ("Parliament in the context of the overall scheme of the 2003 Act for control of the content and nature of political broadcasting, acted within the ambit of the discretionary judgment available to it in introducing and maintaining the prohibition on political advertising ...").

the superior judgment of “elected members,” who are “best placed to judge what is in the country’s best interests as a whole.”²³ Potentially dangerous and destabilizing dicta from 2002 about “constitutional statutes”²⁴ having a different status in our legal system have been clarified and narrowed.²⁵ Few declarations of incompatibility with Convention rights²⁶ have been granted by the appeal courts in recent years, and the courts’ powers to re-interpret legislation so as to stretch its meaning to conform to their constructions of Convention rights²⁷ have not been aggressively or widely used. In that most contested arena of national security and counter-terrorism law the UK’s appeal courts, far from insisting that the Government does more to safeguard individual rights, have tended to be too timid rather than too bold, as repeated recent reversals in Strasbourg testify.²⁸ The major counter-terrorism cases lost by the Government in the UK Supreme Court are cases in which the judges have sought to bolster the political constitution, not to undermine it. Thus, in *Ahmed v. HM Treasury* the court ruled that ministers could not rely on order-making powers to authorize the freezing of terrorist assets, but required clear parliamentary authority.²⁹ In *Al Rawi v. Security Service* the court ruled that there was no inherent power in the courts to order that a civil action for damages—or part of such an action—be conducted under a “closed material procedure.”³⁰ If such a development were deemed necessary, it would have to be for Parliament to legislate it.³¹

²³ AXA Gen. Ins. v. Lord Advocate, [2011] UKSC 46, [2012] 1 A.C. 868 [49]. Such deference will apply to questions of legislative reasonableness, but subordinate Parliaments must of course act strictly within the limits of their legal powers, which is quite rightly a question of law, not a question of political judgment. See *Imperial Tobacco v. Lord Advocate*, [2012] UKSC 61, 2013 S.C. (UKSC) 153.

²⁴ *Robinson v. Sec’y of State for N. Ir.*, [2002] UKHL 32.

²⁵ See *Imperial Tobacco v. Lord Advocate*, [2012] UKSC 61, 2013 S.C. (UKSC) 153.

²⁶ Human Rights Act, 1998, c. 42, § 4 (U.K.). In this essay, the term “Convention rights” means those rights of the European Convention on Human Rights given domestic legal force in the UK by the Human Rights Act 1998.

²⁷ *Id.* at § 3.

²⁸ Compare *RB (Algeria) v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [2010] 2 A.C. 110, with *Othman (Abu Qatada) v. United Kingdom*, ECHR App. No. 8139/09, 55 Eur. Ct. H.R. 1 (2012). Compare *R (Al-Jedda) v. Sec’y of State for Defence*, [2007] UKHL 58, [2008] A.C. 332, with *Al-Jedda v. United Kingdom*, ECHR App. Nos. 26766/05 & 22228/06 53 Eur. Ct. H.R. 23 (2011). Compare *R (Al-Skeini) v. Sec’y of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. 153, with *Al-Skeini v. United Kingdom*, ECHR App. No. 55721/07, 53 Eur. Ct. H.R. 18 (2011). Compare *R (Gillan) v. Comm’r of Police of the Metropolis*, [2006] UKHL 12, [2006] 2 A.C. 307, with *Gillan v. United Kingdom*, ECHR App. No. 4158/05, 50 Eur. Ct. H.R. 45 (2010).

²⁹ *HM Treasury v. Ahmed*, [2010] UKSC 2, [2010] 2 A.C. 534. See *Terrorist Asset-Freezing etc. Act, 2010*, c. 38 (U.K.) (establishing provisions for imposing financial restrictions on “certain persons believed or suspected to be . . . involved in terrorist activities”).

³⁰ *Al Rawi v. Sec. Serv.*, [2011] UKSC 34, [2012] 1 A.C. 531.

³¹ See *Justice and Security Act, 2013*, c. 18 (U.K.).

This is not a manifesto for complacency. It is no part of my argument to suggest that Parliament is perfect and in no need of reform or improvement. Nor is it any part of my argument to contend that the courts have put themselves firmly back in their place and will never again seek to over-reach. We must always be alert to the twin constitutional dangers of parliamentary under-performance and judicial power-grabbing. There is, and can be, no guarantee that Parliament will not slip back into neglect or that the courts will not rediscover the urge to impose, or at least to threaten to impose, upon the people, governance by judges.

B. The Constitutional Role of the Courts

It is a well-known feature of the literature that political constitutionalists have been quicker to criticize the courts for over-reach—and, at the same time, to criticize them for insufficiently protecting civil liberties—than they have been to explain what, positively, they think the courts should be doing in constitutional law. Likewise, legal constitutionalists have written much more about what they think courts should do than where they think the proper limits of judicial power should lie. Many legal constitutionalists have written about constitutional law and practice without analyzing Parliament's role at all. In an essay published in the 2010 *University of Toronto Law Journal*, I attempted a first, tentative sketch of what I called “the role of the courts in the political constitution.”³² On the basis that the courts should do what they are good at—and what they are designed for—while leaving to Parliament and others what political institutions are good at—and designed for—I made the following main claims:

- (i) The courts should ensure that the government acts within the scope of, and not beyond, its legal powers;³³
- (ii) The courts should ensure that the government's decision-making is procedurally fair;³⁴
- (iii) The protection of civil liberties should be privileged, so that the courts should ensure that government interference with civil liberties may occur only when justified as being necessary on the basis of evidence;³⁵

³² Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. TORONTO L.J. 1 (2010).

³³ I cited the decisions of the House of Lords in the following cases as examples of when I think the courts should have gone further in this regard: *RB (Algeria) v. Sec'y of State for the Home Dep't*, [2009] UKHL 10, [2010] 2 A.C. 110; *Austin v. Comm'r of Police of the Metropolis*, [2009] UKHL 9, [2009] 1 A.C. 564; *R (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2009] A.C. 453; *R (Corner House) v. Dir. of the Serious Fraud Office*, [2008] UKHL 60, [2009] 1 A.C. 756; *R (Al-Jedda) v. Sec'y of State for Defence*, [2007] UKHL 58, [2008] A.C. 332; *R (Gillan) v. Comm'r of Police of the Metropolis*, [2006] UKHL 12, [2006] 2 A.C. 307. In three of these cases the verdict of the House of Lords has now been overturned in Strasbourg: *Gillan, Al Jedda, and RB (Algeria)*. As indicated above, I welcome the more recent decisions of the UK Supreme Court in *Ahmed* [2010] UKSC 2 and *Al Rawi* [2011] UKSC 34, as applications of the principle that I was seeking to outline.

³⁴ Tomkins, *supra* note 32, at 6.

- (iv) Some protections of civil liberties are so important that they may be articulated in the form of absolute rights—such as the rule that no-one may be subjected to torture; such rights should be rigorously enforced by the courts;³⁶ and
- (v) The courts should have a role in nourishing and supporting the political constitution; when the government acts in a manner that undercuts or circumvents effective parliamentary scrutiny, the court should refer the matter back to Parliament for reconsideration of the matter.³⁷

I also argued (vi) that where the protection of civil liberties was qualified rather than absolute, the task of balancing the needs of the public interest against the civil liberty in question was appropriately seen as a political question for Parliament rather than as a legal question for the courts. As a result, I was critical of the view that the sort of proportionality analysis we see in disputes over privacy, freedom of religion, freedom of expression, freedom of peaceful assembly, and so forth, should necessarily be a matter for the courts.³⁸

The role of the courts sketched out in this essay has been the subject of sustained critique from Paul Craig.³⁹ Professor Craig marshaled a long series of arguments against me, including: that I had not admitted to the full consequences of my position; that what I have summarized in bullet point (i) above was radically under-determined; and that my position was, in a variety of ways, both inconsistent and incoherent. There is a lot to be said about

³⁵ I examined the decision of the House of Lords in *R (Gillan) v. Comm'r of Police of the Metropolis*, [2006] UKHL 12, [2006] 2 A.C. 307 as a leading example of the courts' failure to undertake this task responsibly. That decision was subsequently overturned in Strasbourg, albeit on different grounds. The result is that Parliament changed the law. See the provisions of the Protection of Freedoms Act 2012, repealing and replacing with fresh—and more narrowly defined—powers the stop-and-search provisions of the Terrorism Act 2000: Protection of Freedoms Act, 2012, c. 9 (U.K). It is to be noted that the political constitution got to the right result here both more quickly and more convincingly than the courts ever did—Strasbourg included.

³⁶ Tomkins, *supra* note 32, at 7.

³⁷ I cited *R (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2009] A.C. 453 as an example of where the courts failed to do this—as Lord Mance argued in his compelling dissent in that case. Again, *HM Treasury v. Ahmed*, [2010] UKSC 2, [2010] 2 A.C. 534 and *Al Rawi v. Sec. Serv.*, [2011] UKSC 34, [2012] 1 A.C. 531 are more recent examples of where the Supreme Court performed this task well.

³⁸ I cited *R (Begum) v. Denbigh High Sch.*, [2006] UKHL 15, [2007] A.C. 100, *Belfast City Council v. Miss Behavin' Ltd.*, [2007] UKHL 19, [2007] 1 W.L.R. 1420, and *R (Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport*, [2008] UKHL 15, [2008] A.C. 1312. I made clear that my gripe was not that the House of Lords got the proportionality assessment wrong in these cases, but that the proportionality assessment was deemed to be a task suitable for judicial assessment at all. Tomkins, *supra* note 32, at 7.

³⁹ Paul Craig, *Political Constitutionalism and the Role of the Courts: A Response*, 9 INT'L J. CONST. L. 112 (2011). Professor Craig's response draws on and develops his earlier critique of my work. Paul Craig, *Political Constitutionalism and Judicial Review*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 19–42 (Christopher Forsyth et al. eds., 2010).

each of these arguments, but I shall resist the temptation to launch into a point-by-point response to Professor Craig, save to say the following. Professor Craig thinks that it is the necessary consequence of my argument that the UK should repeal the Human Rights Act 1998⁴⁰ (HRA) and withdraw from the European Convention on Human Rights (ECHR).⁴¹ I disagree. Further, I consider that either course of action would be both disastrous and, from the perspective of someone sympathetic to political constitutionalism, extremely foolish—at least if the HRA were to be repealed without being replaced by an improved bill of rights. While the HRA has undoubtedly empowered the judiciary, and while it has undoubtedly done so in ways that pose serious challenges for political constitutionalism,⁴² repealing it now without replacing it would do nothing to curtail judicial power. Indeed, it would surely have the reverse effect. It would lead the judges to fall back on the potentially more invasive techniques and mantras of radical common law constitutionalism. It would be a move towards the “higher-order law”⁴³ of Sir John Laws, and others. While the HRA has empowered the judiciary, it has done so in a manner that is more respectful of Parliament than not. Other indirect, institutional consequences of the HRA—such as the establishment of the Joint Committee on Human Rights—which have worked to strengthen the political constitution, would be placed in jeopardy were the HRA to be repealed without being replaced.

Professor Craig thinks that my argument that proportionality is a political question for political institutions rather than a question of law for the courts is straightforwardly incompatible with the HRA and the ECHR. It is not. The next section of this essay seeks, among other things, to explain why. Professor Craig arrives at this position because he fires at an imaginary target: His aim is focused on what he thinks I must mean, not on what I have actually said. He writes, for example, that “for Tomkins the courts should not enforce most of the rights contained in the ECHR.”⁴⁴ This is an inaccurate summary of the position I set out in *The Role of the Courts*.⁴⁵ With regard to what are, in Convention terms, “qualified rights”—such as privacy and expression—I consider that the courts should be anxious to ensure that any government interference with these civil liberties is strictly in accordance with law and is justified on the evidence as being necessary—see bullet points (i) and (iii) above. All of this is plain from what I wrote in *The Role of the Courts* about judicial review,

⁴⁰ Human Rights Act, 1998, c. 42 (U.K.).

⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221.

⁴² Serious challenges, but not insurmountable ones, and certainly not fatal ones. See further below.

⁴³ See Laws, *supra* note 20.

⁴⁴ Craig, *supra* note 39, at 118.

⁴⁵ Tomkins, *supra* note 32.

powers, and evidence.⁴⁶ Expressing doubt that a proportionality analysis is always an appropriate task for a court of law is not remotely the same as saying that the courts should not protect these civil liberties at all.⁴⁷ I develop this point below.

C. Necessity, Balancing, and Proportionality

I stand by the arguments summarized in the five bullet points (i)–(v) listed above. The argument (vi), about proportionality review in the context of what in the European Convention are “qualified rights,” however, is in need of refinement. The question to be addressed is: How may the judicial enforcement of “qualified rights” be rendered compatible with political constitutionalism? If we have a mixed constitution that includes some element of judicial enforcement of qualified rights, is that constitution, in reality, not a mixed constitution, but a fully legal constitution? In what follows, I will suggest that, when carefully defined, some elements of the judicial enforcement of qualified rights are compatible with political constitutionalism and that to embrace this position does not mean that we have to abandon the political constitution.

As is well known, qualified rights in the ECHR—such as those of privacy and freedom of expression, etc.—are qualified in three ways. Public interference with the rights will be lawful if the interference is (1) prescribed by law, (2) necessary in a democratic society, and (3) in order to protect a certain, listed, public interest—such as national security. It is self-evident that some aspects of these qualifications are legal in character and that, as such, they raise questions of law appropriate for judicial determination. The first test—whether an interference with the right in question is prescribed by law—is a matter of legal interpretation. Does the government have the power to act in this manner or not? There is no objection from political constitutionalism to courts having the power to rule authoritatively on this question.⁴⁸

The third test may likewise raise questions that are appropriate for judicial determination: If the evidence shows that an interference with freedom of expression has in fact been made for an illegitimate purpose—i.e., a purpose that is not listed in the relevant article of the ECHR—then a court should have little difficulty in ruling that the interference is

⁴⁶ *Id.*

⁴⁷ Further, just because the European Court of Human Rights ruled in *Smith & Grady v. United Kingdom*, ECHR App. Nos. 33985/96 & 33986/96, 29 Eur. Ct. H.R. 493 (1999), that the Court of Appeal’s use of *Wednesbury* unreasonableness in *R v. Sec’y of State for Defence, ex p. Smith*, [1995] EWCA (Civ) 22, [1996] Q.B. 517 was insufficient to meet the requirements of the right to an effective remedy in Article 13 ECHR does not mean to say that courts in the UK are now required in all circumstances to engage in full proportionality analysis. There are any number of ways in which the Court’s ruling in *Smith & Grady* could be accommodated, confined, or distinguished.

⁴⁸ See ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 20 (2005).

unlawful. If legislation confers powers on a minister providing that they are to be exercised in order to further certain, prescribed purposes, and if a minister subsequently seeks to exercise those powers to further purposes not contemplated in the legislation, that minister may be acting unlawfully and, if it comes before them, the courts should rule on the matter.⁴⁹ The same applies in the context of the ECHR. The lists of legitimate ends, in whose name rights may be qualified, are closed. There is a particular list for each right. Checking the evidence to ensure that any particular interference has in fact been made in order to serve one of the purposes listed in the article in question ought to be a straightforward matter for legal determination. There is nothing incompatible with political constitutionalism in courts' ruling on this question. It is not that the courts are creating for themselves lists of ends in whose service rights may be qualified; the lists are prescribed in the Convention and all that the court needs to do is to check the particular interference against the relevant list.

In practice, however, few cases turn on this issue. Some cases turn on the question of whether the government truly has the legal power to interfere with the right (i.e., the first test: Is it prescribed by law).⁵⁰ But the overwhelming majority of cases concerned with qualified rights turn on the second test: Is the interference "necessary in a democratic society"? As we all know, the European Court of Human Rights has long since ruled that this is to be treated as a test of proportionality.⁵¹ This is where the problem lies: What is it that makes the proportionality assessment a legal task for the courts rather than a political choice for the government and Parliament?

This question is not meant to cast doubt on the value of proportionality. If our privacy, our freedom of expression, or our right to protest have to be limited, it is far better that they should be limited proportionately than disproportionately. Likewise reasonableness (or rationality).⁵² It is far better that government decisions are reasonable than unreasonable and it is far better that the government's powers are exercised rationally than irrationally. So, let us describe the qualities of reasonableness, rationality, and proportionality as a cluster of constitutional goods. Why are they constitutional goods? We can argue that they are constitutional goods from a number of perspectives: Because rational (or reasonable, or proportionate) decision-making is better decision-making; because it is a component of

⁴⁹ More difficult is the case where the statute confers powers on the minister leaving their scope or proper purpose unclear. I suggested in *The Role of the Courts* that in such cases the courts should refer the matter back to Parliament for the legislature to clarify what it meant. Tomkins, *supra* note 32, at 20–21. For an instance where this could have been valuable, see *R v. Sec'y of State for Health, ex p. Keen*, [1990] COD 371, (1990) 3 Admin LR 180.

⁵⁰ *Gillan v. United Kingdom*, ECHR App. No. 4158/05, para. 45, 2010 Eur. Ct. H.R. 28.

⁵¹ *Smith & Grady v. United Kingdom*, ECHR App. Nos. 33985/96 & 33986/96, para. 87, 1999 Eur. Ct. H.R. 493.

⁵² I take reasonableness and rationality to be synonymous with one another.

good governance; because it is what the governed expect; because it is what Parliament expects; and because it is fairer than the alternative. We can similarly argue that it would be constitutionally problematic or undesirable for the government to be permitted, or freely able, to engage in irrational, unreasonable, or disproportionate action or decision-making.

At the same time, however, we can readily see that an insistence on rational government is not the only constitutional good at stake. At least three other relevant constitutional goods may be identified. The first is that the government of the day should be allowed to govern. Constitutions around the world recognize that a core component of the state's power is executive in character. This executive power is vested, in large measure, in the government.⁵³ It is right that executive power is exercised by the government. Subjecting the government to review in the courts should not collapse into allowing the judges to govern in place of the government. This is a fine line to draw, as any student of administrative law understands. But, there is a line: A line that respects the constitutional good of recognizing that it is for the government to govern.

From this, we see immediately a third constitutional good, accountability. Yes, it is for the government to govern but, equally, it is a constitutional good that the government of the day is held (or, at least, is liable to be held) fully to account for the exercise of its powers. In a parliamentary democracy such as the UK this means, principally, accountability to Parliament. Ministers are rightly accountable to Parliament for their, and their departments', actions, policies, and decisions.⁵⁴ Finally, we should recognize as a constitutional good the fact that the government is chosen by force of democracy. While in a parliamentary democracy we do not elect our government as such, we do elect the House of Commons from which the government of the day emerges and to which the government is subsequently held to account. No government may survive in office unless it commands the support of the Commons, and any government that loses the confidence of the House must resign.⁵⁵ Thus, governments enjoy power because of the success of their political programs. These programs will have received the endorsement of the electorate, given the electorate's collective decision to elect to Parliament a majority of Members who will support, rather than oppose, the government of the day. That the government has a democratic mandate in this manner is, for present purposes, our final constitutional good.

Judicial review of the exercise of government powers should operate in the light of this range of constitutional goods. This is the task of constitutional judgment: To know, in any

⁵³ Some of the power is exercised by office-holders independent or semi-independent of government, such as the police or regulatory agencies; in the UK this is a matter for Parliament to determine in legislation.

⁵⁴ COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 566–660 (7th ed. 2011).

⁵⁵ See Fixed-term Parliaments Act, 2011, c. 14, § 2(3) (U.K.).

particular case, what weight to attach to each good. Let us return for a moment to bullet point (i) above: Courts should ensure that the government acts within the scope of, and not beyond, the government's legal powers. Vigorous exercise of this power is justified because our other constitutional goods should be subject to it. The government should be permitted to govern within the limits of its legal powers. The government has a democratic mandate to govern, but no democratic mandate can authorize the government to act unlawfully. The government is ordinarily and routinely accountable to Parliament, but Parliament's main concern will be to assess the government's performance politically, not to ensure that it has exercised its powers according to law. Thus, our other constitutional goods are not inappropriately compromised by the courts' rigorously ensuring that the government acts within its legal powers. Indeed, robust judicial review on this ground may strengthen and help to nurture the political constitution. Suppose that a court rules that a certain government action is unlawful because the government lacks the legal power to act in that particular way. What will the government do? In all likelihood it will turn to Parliament, seeking legislation that will provide for the powers which the court has identified it to lack. Parliament will then have the opportunity to debate what the extent of the powers should be, and it will have the chance to restrict those powers or to append to them whatever procedural or substantive safeguards it considers to be appropriate.⁵⁶

Now, contrast this with judicial review on grounds of reasonableness or proportionality. Inherent within the constitutional idea that the government should be permitted to govern is the idea that the government is entitled to exercise discretion. A challenge on grounds of reasonableness or proportionality is a challenge of discretion and not a challenge to powers. The argument is not that the government is seeking to exercise a power that it does not have. Rather, the argument is that the government is exercising a power that it does have but in a manner that goes too far. A challenge on grounds of reasonableness or proportionality cuts more deeply into the constitutional good of allowing the government to govern than does review on grounds of lack of legal powers. The electorate also has an interest in what is reasonable or proportionate for the government to do. While the electorate cannot confer on the government the power to act beyond the limits of its legal powers, the electorate surely can mandate the government to exercise its legal powers in a particular way. For example, the government has legal powers to cut public expenditure. A party may propose in an election campaign to exercise such powers drastically, in order to address what it perceives to be an excessive public debt or an excessive degree of public overspending. What if that party wins the election and forms the next government, and others subsequently consider that aspects of the spending cuts are unreasonable or disproportionate? The fact that the government has an electoral mandate to cut public spending is at least a factor to be weighed in any determination of whether the cuts really

⁵⁶ Two recent examples are cited above: *HM Treasury v. Ahmed* leading to the Terrorist Asset-Freezing etc Act 2010 and *Al Rawi v. Security Service* leading to the Justice and Security Act 2013. See *supra* notes 29–31 and accompanying text.

are reasonable or unreasonable, proportionate or disproportionate. In other words, the constitutional good of the government having a democratic mandate has, in this instance, to be accorded some weight. As does the constitutional good of accountability to Parliament. This is just the sort of disagreement in which we would expect robust parliamentary debate and detailed parliamentary scrutiny of the government's decision-making. The reasonableness or proportionality of government policy and decision-making is, in fact, the mainstay of parliamentary debate. This is as true for the high theatre of Prime Minister's Question Time as it is for legislative debates on government bills and the examination of government witnesses before select committees.

There is the possibility, therefore, that judicial review on grounds of reasonableness or proportionality may undercut any (or all) of the other values that we have identified as constitutional goods. This does not mean that judicial review on these grounds should never be countenanced. But when it is contemplated, it should be considered alongside our other constitutional goods and in their light. When it comes to review on grounds of reasonableness or proportionality, we need a judicial review that is appropriately responsive to, and respectful of, these other constitutional goods and accords them due weight. A reasonable and proportionate government is itself a constitutional good, but judicial review that over-invests in this one constitutional good at the expense of the others would make for an unbalanced constitutional order. Likewise, over-investment in any of the other constitutional goods at the expense of securing reasonable and proportionate government would be unbalanced. On this view, to say that we should never have judicial review on grounds of reasonableness or proportionality because it may sometimes undercut the value of other constitutional goods is going too far too fast. Likewise, saying that judicial review should always be available on these grounds, even at the expense of undercutting the value of other constitutional goods, is itself a disproportionate approach to constitutionalism. A balanced mix of these various constitutional goods is preferable, and a successful mix is one that achieves such a balance.⁵⁷ I do not pretend that this is easy, but it is the goal towards which I think we should work. This is what I meant, at the beginning of this essay, when I suggested that, instead of arguing about whether we have a political or a legal constitution, it would be better to argue about how we can most appropriately mix the political and legal elements of the constitution together to generate a constitutional order that is balanced and stable.⁵⁸

⁵⁷ One area of public law in the United Kingdom which is currently imbalanced—or where the current balance is plainly wrong—is that of prisoners' right to vote. The decision of the European Court of Human Rights in *Hirst v. United Kingdom (No 2)*, ECHR App. No. 74025/01, 2005 Eur. Ct. H.R. 681 is a perfect case-study of how not to rule on proportionality, as Strasbourg implicitly recognized when it modified *Hirst* in *Scoppola v. Italy (No 3)*, ECHR App. No. 126/05, 2012 Eur. Ct. H.R. 868.

⁵⁸ Just a note on stability: To suggest that the attainment of a reasonable degree of constitutional stability is a worthy goal does not mean to say that we should not continue to facilitate and, indeed, encourage argument, contestation, and debate about further constitutional reform. Stability is not the same as rigidity. One can be in

All constitutional actors have a shared responsibility to seek to achieve this balance. The specific responsibility of the courts is to check whether, in a case in which government action or decision-making is challenged on grounds of reasonableness or proportionality, a ruling on this matter would undermine the other constitutional goods we have identified. If the government's decision or action is supported by a clear democratic mandate and it can be shown that there has been effective parliamentary scrutiny, the courts should pause before ruling on the matter to ensure that they would not be jeopardizing these constitutional goods. But if the government's decision or action lacks a clear democratic mandate and there is no realistic prospect of effective parliamentary scrutiny, then it may well be that the courts can rule on the matter without jeopardizing other constitutional goods.

One consequence of this approach is that we would be likely to see stronger judicial review of government action when the decision-maker is further removed from Parliament. We might see less judicial review of the reasonableness or proportionality of ministerial decision-making because ministers have the clearest democratic mandate and are subject to the most effective parliamentary scrutiny. But if the defendant in a claim for judicial review is a chief constable, a member of a health board, an independent regulator, or a non-departmental public body, the likelihood of robust judicial review undermining our other constitutional goods is reduced. Depending on the context, and on the judicial assessment of their mandate and their political accountability, judicial review of local authorities on grounds of proportionality or reasonableness might fall somewhere in between. It is a core component of political constitutionalism that political decisions should be taken by political actors. Not all government decisions, however, are political, and many government decisions are made by officials, bureaucrats, police officers, or other non-political public office-holders.

Judicial assessment of other constitutional goods would require courts to be cognizant of, and sensitive to, a number of political considerations that some judges currently feel are beyond their appropriate scope. The argument presented here is not that the courts should be *ruling on* whether the government has a sufficient democratic mandate for its actions, or whether parliamentary scrutiny is sufficiently effective, but that the courts should be taking these matters into account when determining the extent to which it is appropriate for them to scrutinize government against standards of reasonableness or proportionality. This is not a revolutionary step. Courts in the UK already do this, for example, in cases where legislation is challenged for violating Convention rights. The decisions of the House of Lords in *Alconbury*⁵⁹ and *Animal Defenders International*,⁶⁰ and of

favor of constitutional stability without having to advocate that the constitution should be put beyond politics, or should be somehow fixed or frozen.

⁵⁹ R v. Sec'y of State for the Env't, Transp. & the Regions, [2001] UKHL 23, [2003] 2 A.C. 295.

the Supreme Court in *AXA General Insurance*,⁶¹ are good illustrations. A law of judicial review modeled on these grounds would be likely to nurture the model of parliamentary accountability beloved of political constitutionalists, not to rival it.

D. Conclusions

So, what is left of the political constitution? Plenty remains. First, there is nothing in our constitutional order that is established as being beyond the reach of Parliament. Parliamentary sovereignty continues. Some judges have hinted of ways in which the courts may in the future begin to curtail parliamentary sovereignty, but to date these are only *obiter* remarks: No case has yet been decided on such a basis.⁶² Other judges have suggested forcefully that even though they were only *obiter*, such remarks were misplaced.⁶³ Of course, the United Kingdom has committed to certain European and international obligations, and Parliament's legislation is subject to those constraints. Both the courts and Parliament have made it clear that this is because Parliament wills it to be so, not because some extra-parliamentary force has imposed its will on Parliament.⁶⁴ When an authority higher than Parliament is needed to make a change, that higher authority is the electorate. If a matter is deemed to be inappropriate for Parliament to determine, then the alternative forum is the referendum. We do not give up on the processes of politics and ask the Supreme Court to act instead. We ask the people directly. Indeed, even when governments within the United Kingdom strongly disagree with one another over a constitutional matter, they endeavor to keep their disagreements within the domain of politics and try to avoid turning the matter over to the courts for a ruling. The debate in 2012 about the legal authority required for a referendum on Scottish independence is a prime example. Dozens of contributions were made to the debate; none argued that the ideal solution would be to have the Supreme Court decide it.⁶⁵

It is beyond serious debate that the powers of the courts in the UK's public law have grown enormously in the last twenty years, but there is little evidence that these powers—or

⁶⁰ R (Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport, [2008] UKHL 15, [2008] A.C. 1312.

⁶¹ AXA Gen. Ins. v. Lord Advocate, [2011] UKSC 46, [2012] 1 A.C. 868.

⁶² See R (Jackson) v. AG, [2005] UKHL 56, [2006] 1 A.C. 262, paras. 102, 107, 159.

⁶³ TOM BINGHAM, THE RULE OF LAW 162 (2010); Lord Neuberger M.R., Lord Alexander of Weedon Lecture: *Who are the Masters Now?* para. 42 (Apr. 6, 2011).

⁶⁴ *Thoburn v. Sunderland City Council*, [2002] EWHC 195, para. 65; European Union Act, 2011, c. 12, § 18 (U.K.).

⁶⁵ After ten months of wrangling, the UK and Scottish Governments came to an agreement about the matter in October 2012. HOUSE OF LORDS CONSTITUTION COMMITTEE, THE AGREEMENT ON A REFERENDUM ON INDEPENDENCE FOR SCOTLAND, 2012–13, H.L. 62 (U.K.). The Agreement meant that the legality of the Scottish independence referendum was settled without the need for litigation.

their exercise—have supplanted the old political constitution with a new legal one. I once feared that this would occur. Looking back at some of the more extreme expressions of legal constitutionalism, it may have been a well-founded fear. Wiser heads, however, have prevailed. The new powers of our courts, whether under the Human Rights Act, the devolution legislation, or otherwise, have generally been exercised in a manner that seeks to supplement the political constitution, not to undermine it. Ours is no longer an entirely political constitution—the model of the political constitution taken alone no longer makes full sense of our contemporary constitutional experience—but the political constitution remains vibrant and vital as a core component of our increasingly rich constitutional order.

Political constitutionalists had two main reasons for opposing a turn to legal constitutionalism. These reasons were not always altogether compatible with one another. The first was that the courts were inherently conservative, and they would use their powers to quash or to limit progressive policies or legislation. The threat has not materialized. There has been little progressive legislation in recent years (the Equality Act 2010⁶⁶ may be an exception). The Labour party in government took a decisively authoritarian turn; it sought to build on and not to reverse Conservative legislation on civil liberties, the Human Rights Act notwithstanding. One of its more progressive achievements, the Freedom of Information Act 2000, was identified by Tony Blair as one of his greatest mistakes in office.⁶⁷ At the same time, the politics of the judiciary has changed since Professor Griffith wrote the first edition of his book in the mid 1970s.⁶⁸ The current generation of appeal court judges is far less obviously conservative, in the sense that Griffith defined it,⁶⁹ than was the case in the 1970s and 1980s. This is not to say that the current judges are radical progressives but in their attitudes on the relationship between public law and policy, they do not closely resemble their predecessors.

The political constitutionalists' second reason for opposing a turn to legal constitutionalism was that, in reviewing less progressive and more repressive measures, the courts would use their powers to give legitimacy to the government's otherwise highly contestable policies. Griffith argued passionately, for example, that the Official Secrets Act 1989 was an irresponsible attack on free speech.⁷⁰ At the time of the passage of that Act, there was significant disquiet expressed in Parliament. Yet, in *R v. Shayler*, the House of Lords upheld some of the Act's most coercive aspects as compatible with Article 10 ECHR.⁷¹ Such a

⁶⁶ Equality Act, 2010, c. 15 (U.K.).

⁶⁷ TONY BLAIR, A JOURNEY 516–17 (2010).

⁶⁸ JOHN A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977).

⁶⁹ JOHN A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 336 (5th ed. 1997).

⁷⁰ John A.G. Griffith, *The Official Secrets Act 1989*, 16 J.L. & Soc'y 273 (1989).

⁷¹ *R v. Shayler*, [2002] UKHL 11, [2003] 1 A.C. 247.

judgment makes it more difficult to marshal effective parliamentary or political argument in favor of reform.⁷² More telling examples are the first judgments on control orders, given by the House of Lords in 2007.⁷³ These judgments, while critical of a number of features of particular control orders, upheld the validity of the overall regime as a proportionate response to the threat of international terrorism. Yet, at the same time, Parliament's Joint Committee on Human Rights (JCHR) was gaining support from across the parties for its detailed critiques of the fundamental unfairness of the system.⁷⁴ The Committee recognized that its efforts were undercut by the Law Lords. The Government was equally quick to highlight the House of Lords' opinions as evidence that the policy was right. The critics were sidelined and control orders were left intact.⁷⁵ They were eventually recognized to be disproportionate only after a change of government.⁷⁶ That a Conservative Home Secretary, and not the courts, arrived at this conclusion, surely tells us something about the competing merits of our politics and of our law in the protection of civil liberties.

These examples are important, but they are relatively rare. The law reports are not full, as we feared they might be, with cases in which the courts have unquestioningly upheld coercive government action. On the contrary, increasingly searching and anxious scrutiny is given even in contexts where it was formerly almost entirely absent. National security is a prime example. The *Belmarsh* decision⁷⁷—in which the House of Lords ruled that the UK Government's scheme of indefinite detention without trial for suspected international terrorists was incompatible with Convention rights—was a real shock after the litany of cases in which the appeal courts had ruled that decision-making in the arena of national security was a matter for the executive and not for the judiciary.⁷⁸ Even when the government wins in national security litigation, its claims are analyzed and assessed rather than merely accepted without demur. And *Belmarsh*, of course, is far from the only national security case that the government has lost, albeit that in recent years it has been

⁷² It must be said, however, that once the Labour Government assumed office in 1997, it gave no indication that it thought that official secrets legislation needed to be liberalized.

⁷³ *Sec'y of State for the Home Dep't v. JJ*, [2007] UKHL 45, [2008] 1 A.C.; *Sec'y of State for the Home Dep't v. MB*, [2007] UKHL 46, [2008] A.C. 440; *Sec'y of State for the Home Dep't v. E*, [2007] UKHL 47, [2008] 1 A.C. 499.

⁷⁴ Adam Tomkins, *Parliament, Human Rights, and Counter-Terrorism*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 13, 34–49 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2010).

⁷⁵ *Id.*

⁷⁶ See *Terrorism Prevention and Investigation Measures Act, 2011*, c. 23 (U.K.).

⁷⁷ *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68.

⁷⁸ See, e.g., *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.); *R v. Sec'y of State for Home Affairs ex parte Hosenball*, [1977] 1 W.L.R. 766 (Eng.); *R v. Sec'y of State for the Home Dep't ex parte Cheblak*, [1991] 1 W.L.R. 890 (Eng.).

first-instance judges, and not the appeal courts, that have been more likely to find against the government.⁷⁹

To the political constitutionalists' critics, it sometimes appeared that these reasons for skepticism about judicial power meant that the courts were "damned if they did and damned if they didn't." If a court failed to intervene to quash illiberal government action it would be criticized for not protecting civil liberties, but if a court did intervene, it would be criticized for trespassing into politics. What I have tried to do in this essay, by building on, and in one respect amending my first, incomplete attempt in 2010, is to set out a vision of the constitutional role for the judiciary that avoids this trap. I want a judiciary that protects civil liberties by ensuring, among other matters, that when the government acts to infringe our liberties it does so only because Parliament has clearly authorized it. At the same time, I want a judiciary that leaves political decisions to political actors. By creating a law of judicial review that focuses on powers and that scrutinizes intensely the evidential basis that supports government interference with civil liberties, and by creating a law of judicial review that accommodates tests of reasonableness and proportionality in a manner that respects the political constitution, I think that both ambitions can be fulfilled at the same time.

I have argued that the political and the legal of the constitution can and should be mixed. I do not want to go back to the political constitution. The mixed constitution is better as long as it continues to value and to invest in the constitutional goods that the political model of constitutionalism has rightly taught us to cherish.

⁷⁹ See Adam Tomkins, *National Security and the Role of the Court: A Changed Landscape?*, 126 LAW Q. REV. 543 (2010).