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J.A.G. GRIFFITH'S NORMATIVE POSITIVISM

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Declaration

I, Majid Rizvi, declare:

(a) that this thesis has been composed by me, and

(b) that the work in this thesis is my own, and

(c) that the work has not been submitted for any other degree or professional qualification except as specified.

Signature: _____

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Abstract

This thesis provides a reinterpretation of J.A.G. Griffith's lecture 'The Political Constitution'—a reinterpretation that stresses the commitment Griffith expressed in that lecture to the normative dimension of legal positivism. I call this normative dimension 'normative positivism'. Identifying Griffith as a normative positivist serves to clarify a number of debates surrounding Griffith's arguments in 'The Political Constitution' and serves to clarify our understanding of the concept that has come to be known in UK public law scholarship in recent years as 'political constitutionalism', of which Griffith is regarded as a leading exemplar. The thesis argues that Griffith's political constitutionalism is best understood as a form of normative positivism and is very different from some more recent defences of political constitutionalism available in the scholarly literature. The thesis also considers how the big constitutional questions of the age in the UK—questions relating, for example, to bills of rights and devolution—play out in the light of our discovery and appreciation of Griffith's normative positivism.

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INTRODUCTION

This thesis provides a reinterpretation of J.A.G. Griffith's 'The Political Constitution'¹—a reinterpretation that stresses the commitment Griffith expressed in that lecture to the normative dimension of legal positivism. I call this normative dimension *normative positivism*.²

The task of providing yet another reinterpretation of 'The Political Constitution'—a reinterpretation that says something at least partially new and preferably interesting about Griffith's lecture—may upon initial reflection appear to be a challenge that is difficult to surmount. So much has been written about that lecture in the various reinterpretations that it has undergone in recent years that it would be understandable if one were to think that everything that could possibly be written about the lecture already has been. As the opening lines of a recent reinterpretation of the lecture make clear, many of Griffith's arguments in the lecture are thoroughly 'ingrained in the minds of public lawyers':

To open with J.A.G. Griffith's lecture on The Political Constitution might seem clichéd. Recent years, after all, have seen several reinterpretations of this lecture that popularized the idiom "the political constitution". Many of its claims about the relationships between law and politics and the proper roles of judges and

¹ JAG Griffith, 'The Political Constitution' (1979) 42 **Modern Law Review** 1.

² This is the label preferred by Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001). Other labels for essentially the same concept available in the scholarship include *ethical positivism* (Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing Co Ltd 1996) and *prescriptive legal positivism* (Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish 2004).).

politicians, as well as the memorable manner in which Griffith expressed them, are today so ingrained in the minds of public lawyers that it might be thought that there is no more that can be said about them.³

Of the vast body of scholarship that Griffith produced between 1947 and 2003,⁴ ‘The Political Constitution’ ranks, along with *The Politics of the Judiciary*,⁵ as among his best-known works.⁶ As Martin Loughlin writes in his tribute to Griffith, ‘[s]tudents of public law readily recognise him as the author of such aphorisms as “the constitution is what happens” [a line from ‘The Political Constitution’⁷] and for his radical critique of the politics of the judiciary.’⁸

³ Graham Gee and Grégoire Webber, ‘A Grammar of Public Law’ (2013) 14 **German LJ** 2137, 2137. Other recent reinterpretations of Griffith’s lecture include Thomas Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (2007) 70 **Modern Law Review** 250; Graham Gee, ‘The Political Constitutionalism of J.A.G. Griffith’ (2008) 28 **Legal Studies** 20, 21 (‘One could be forgiven for thinking that all that can be said about Griffith’s political constitutionalism has already been said.’).

⁴ The LSE Department of Law, where Griffith spent the majority of his career, recently produced a bibliography in his honour: Maria Bell, ‘J.A.G. Griffith (1918-2010): A Bibliography’ (2012), **The London School of Economics and Political Science** (Unpublished). Available at <<http://eprints.lse.ac.uk/46491/>> visited 22 February 2015.

⁵ JAG Griffith, *The Politics of the Judiciary* (Manchester University Press 1977).

⁶ See Gee, ‘The Political Constitutionalism of J.A.G. Griffith’ (n 3) 40 (referring to these two works as ‘the most familiar of Griffith’s works.’); Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (n 3) 250 (referring to ‘The Political Constitution’ as Griffith’s ‘most important and influential work’ and ‘one of the key texts of late twentieth-century British public law scholarship’).

⁷ Griffith, ‘The Political Constitution’ (n 1) 19 (‘The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.’).

⁸ Martin Loughlin, ‘John Griffith: An Appreciation’ [2010] **Public Law** 643, 643.

That is not to suggest, however, that these two works (that is ‘The Political Constitution’ and *The Politics of the Judiciary*) by themselves offer an adequate measure of Griffith’s impact on British constitutional thought. As Loughlin continues, ‘[a] reputation built on a passing knowledge of some of his occasional lectures and essays—works in which his captivating prose and rhetorical style could dazzle—does not yield the scholarly measure of the man.’⁹ Nor is it the case that the scholarship that has paid increasing attention to Griffith’s work in recent years has focused exclusively on Griffith’s arguments in ‘The Political Constitution’ or on his arguments about the politics of the judiciary. The January 2014 issue of *Public Law* (a journal for which Griffith himself served as founding editor in 1956 and retained its editorship until 1981¹⁰) devotes the entire space in its Articles section to articles discussing Griffith’s work—articles that cover an array of topics, including Griffith’s contributions to the field of administrative law,¹¹ his views on the Office of the Lord Chancellor,¹² and his views on the subject of Parliament and legislation.¹³

Nevertheless, ‘The Political Constitution’ remains one of Griffith’s most influential and important pieces of scholarship, and despite all that has been written about it in recent years, it would be a mistake to think that the debates surrounding the lecture have left no room for another scholarly

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Carol Harlow & Richard Rawlings, ‘Administrative Law in Context: Restoring a Lost Connection’ [2014] **Public Law** 28.

¹² Graham Gee, ‘What are Lord Chancellors For?’ [2014] **Public Law** 11.

¹³ John McEldowney, ‘J.A.G. Griffith: Parliament and Legislation’ [2014] **Public Law** 85.

intervention. That is because with all the attention that the lecture has received and with all the reinterpretations that it has undergone in recent years, the commitment Griffith expressed in that lecture to normative positivism deserves to be paid much greater attention than has hitherto been paid.¹⁴

Normative positivism is a strand of legal positivism that insists upon the conceptual separation of law and morality for the good consequences that such separation is thought to produce. Legal positivism is generally regarded as consisting of a wholly descriptive and conceptual thesis,¹⁵ namely the *separability thesis*, which is the thesis that ‘there is no necessary connection between law and morals or law as it is and [law as it] ought to be’.¹⁶ Where

¹⁴ Brief mention of Griffith’s normative positivism is found in Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution” (n 3) 257 (citations omitted) (‘the positivist position [Griffith] espouses has an explicit political point. He defends positivism as the best method for uncovering the reality beneath the layers of illusion and rhetoric. A ‘solid, positivist, unmetaphysical, non-natural foundation for analytical jurisprudence’, he insists, was essential for peering beneath the ‘elaborate façades’ and ‘out of date pieces of stage paraphernalia’ in order to find the levers of power, and the identity of those who manipulated those levers. Intellectual honesty, then, has a moral and political purpose. In this, Griffith shares H.L.A. Hart’s conviction that only positivism could make ‘men clear sighted in confronting the official abuse of power’, was most likely ‘to lead to a stiffening of resistance to evil’). See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), 123 (arguing that Griffith and other functionalists ‘espouse a kind of leftwing Benthamism, a political positivism which regards law as the necessary instrument for conveying judgments about collective welfare to the officials who will have to implement those judgments.’).

¹⁵ See Waldron, ‘Normative (or Ethical) Positivism’ (n 2) 411 (‘Legal positivism is commonly held to consist in a *purely conceptual thesis*’ (emphasis added); see also Campbell, *Prescriptive Legal Positivism* (n 2) 21 (citation omitted) (‘The theory of legal positivism is usually taken to be analytical, descriptive and explanatory.’).

¹⁶ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 601n25. See Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press 2001) 71 (‘There are many versions of legal positivism but *all of them* subscribe to the so-called separation thesis.’) (emphasis added). But see Jules Coleman’s following observation: ‘[I]n the eyes of many, there is little more than [the] warm embrace of the separability thesis that unifies legal positivists with one another. One problem with this view is that neither Joseph Raz nor I accept the separability thesis, and it may be our

conceptual and *normative* positivism part ways, however, is that, whereas the conceptual positivist's interest is in accurately describing the nature of a legal system and in accurately describing the concept of law, and whereas the conceptual positivist believes that law and morality ought to be kept separate for reasons primarily to do with descriptive accuracy, the normative positivist believes that there are 'beneficial moral consequences'¹⁷ associated with the separation of law and morality over and above descriptive accuracy for which reason positivism ought to be *chosen* as a concept of law.¹⁸ What is implicit in the argument that positivism ought to be *chosen* for instrumental reasons is the acceptance of 'the socially constructed and thus non-eternal nature of the concept of law'.¹⁹ It is the pursuit of these morally good consequences that leads the normative positivist to argue that 'it would be a *good thing* for the law to be as the [conceptual] positivist thinks it is.'²⁰ Normative positivism 'identifies the contamination of legal decision by moral judgment as a moral disadvantage; it says that we lose something of value thereby.'²¹ The 'beneficial moral consequences' argument could take a number of forms, including HLA Hart's insistence that the conceptual

shared rejection of it that is all that unites us.' Jules L Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27 **Oxford Journal of Legal Studies** 581, 582n2.

¹⁷ Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25 **Oxford Journal of Legal Studies** 493, 493-495. The phrase is Julie Dickson's, who refers to this argument as the 'Beneficial Moral Consequences Thesis'. See Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) 84-102.

¹⁸ See Frederick Schauer, 'Positivism Before Hart' in Michael Freeman and Patricia Mindus (eds), *The Legacy of John Austin's Jurisprudence* (Springer 2013) 275-280.

¹⁹ *ibid* 281.

²⁰ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 167.

²¹ *ibid*.

separation of law and morality would facilitate citizen disobedience to wicked laws,²² Jeremy Bentham's insistence that such conceptual separation would facilitate law reform,²³ and Bentham's, Thomas Hobbes's, and David Hume's insistence that the discretion of judges and other law-applying officials ought to be minimized in order to avoid the arbitrariness that would result if such decisions turned upon the moral judgment of those entrusted with the application of law.²⁴ Modern defences of normative positivism are to be found in the works of Tom Campbell,²⁵ Neil MacCormick,²⁶ Gerald Postema,²⁷ and Jeremy Waldron,²⁸ among others.²⁹

²² HLA Hart, *The Concept of Law* (Penelope A. Bulloch, Leslie Green & Joseph Raz eds, 3rd edn, Oxford University Press 2012) 210. Whether or not Hart may be classified as a full-blooded normative positivist is a matter of debate to which we turn in Chapter 2, Section 2.4.

²³ See Schauer, 'Positivism Before Hart' (n 18) 282-285. The leading modern account of Bentham's normative positivism is Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford University Press 1986), esp. Ch 9. In addition to attributing normative positivist views to Bentham, Postema also does so for Thomas Hobbes and David Hume.

²⁴ See Waldron, *Law and Disagreement* (n 20) 167.

²⁵ Campbell, *The Legal Theory of Ethical Positivism* (n 2); Campbell, *Prescriptive Legal Positivism* (n 2); Tom Campbell, *Rights: A Critical Introduction* (Routledge 2006) Ch 11.

²⁶ Neil MacCormick, 'A Moralistic Case for A-moralistic Law' (1985) 20 *Valparaiso Law Review* 1.

²⁷ Postema, *Bentham and the Common Law Tradition* (n 23).

²⁸ Waldron, *Law and Disagreement* (n 20); Waldron, 'Normative (or Ethical) Positivism' (n 2).

²⁹ Stephen R Perry, 'Interpretation and Methodology in Legal Theory' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997) 100 ('Hart's theory attributes a function to law from the point of view of the theorist, rather than from the point of view of the participants within the practice. While there is room in jurisprudence for such a methodology, it is in a number of respects unsatisfactory. The most important problem is that it effectively abandons the ambition of jurisprudence to explain the normativity of law.');

according to Waldron, it is also possible to include in this list Joseph Raz, 'The Problem about the Nature of Law' (1983) *University of Western*

When we turn to Griffith's arguments in 'The Political Constitution', we find that Griffith was expressing what turns out to be a strong commitment to normative positivism. In 'The Political Constitution', Griffith argued 'for a highly positivist view of the constitution'³⁰ and said that 'I do not believe that the concept of law is a moral concept.'³¹ However, these statements were *not* being made as a matter of what we might describe as 'disinterested observation'³² (one of the aims of a purely conceptual positivist). Far from it, there are *normative* considerations running through much of Griffith's lecture on the basis of which he was arguing *for* the conceptual separation of law and morality. There are sufficient normative ingredients in Griffith's legal positivism as expressed in 'The Political Constitution' to allow us to say with confidence that Griffith was a normative positivist. This thesis tells the story of *J.A.G. Griffith's Normative Positivism*.

Griffith himself did not describe his position in 'The Political Constitution' as 'normative positivism'; but neither did he use the words *political constitutionalism* or *modernism* or *functionalism* to describe his own views, yet these are also concepts that have come to be associated in recent years

Ontario Law Review 203, although some of Raz's other views, and in particular views he expresses in his more recent work, renders Raz's position on normative positivism unclear to Waldron. See Waldron, 'Normative (or Ethical) Positivism' (n 2) 412n7, 432n66.

³⁰ Griffith, 'The Political Constitution' (n 1) 19.

³¹ *ibid.*

³² Schauer, 'Positivism Before Hart' (n 18) 283 (arguing that Bentham and John Austin were both normative positivists and that their legal positivism was not simply 'a function of disinterested observation').

with Griffith's work.³³ The fact that Griffith did not use any of these words to describe his vision in his Chorley Lecture does not, of course, mean that his arguments have no relationship to these concepts, for 'the fact that you do not use [a] word doesn't mean you are not accessing the concept. A concept can be referred to by a word or by a paragraph.'³⁴

CLARIFYING EXISTING DEBATES

To identify Griffith as a normative positivist serves to clarify at least two sets of debates surrounding the arguments Griffith made in 'The Political Constitution'. Let us look at each of the two in turn.

1. *The Descriptivism Debate.* One such debate relates to the use of the word 'descriptive' to describe Griffith's arguments in the 'The Political Constitution' and the suggestion that Griffith's arguments in the lecture are irrelevant to normative constitutional theory. These are criticisms of Griffith's lecture that have surfaced in recent years in the existing scholarship. It has been said, for example, that Griffith's interpretation of

³³ See Paul Craig, 'Political Constitutionalism and Judicial Review' in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press 2010) ('Griffith is properly regarded as a leading exemplar of political constitutionalism'); but see Martin Loughlin, 'Modernism in British Public Law: 1919-79' [2014] *Public Law* 56, 66 (arguing that 'Griffith sits firmly within the tradition of modernism that Laski, Jennings and Robson expounded' and that it is incorrect to say that 'his school is something called "political constitutionalism" (a notion of recent coinage)'). On Griffith's 'functionalism', see Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 368: 'The functional style offered not only an analysis but a prescription: it aimed at human improvement, and in that sense it was a jurisprudential approach that was tied to a philosophy of human transformation.')

³⁴ Jeremy Waldron, 'What do the Philosophers Have against Dignity?' (September 17, 2014). *NYU School of Law, Public Law Research Paper* No. 14-59. Available at SSRN: <<http://ssrn.com/abstract=2497742>> at 1, visited 20 February 2015.

the UK constitution was that ‘it had no moral or normative content’;³⁵ that Griffith’s ‘notion of the constitution [was] purely descriptive—neither legally prescriptive nor morally normative’;³⁶ and that ‘[w]hen it came to discussing constitutional questions, Griffith only ever described—he never prescribed.’³⁷ For ease of reference, let us refer to the group of scholars who advance such criticism against Griffith as *Group A*.

A superficial reading of *Group A*’s aforementioned criticisms of Griffith might suggest that *Group A* is describing Griffith’s ‘work’³⁸ or his ‘analysis’³⁹ as being completely devoid of normative or prescriptive argument. A closer reading of *Group A*’s allegation of descriptivism against Griffith, however, reveals something different. As I will attempt to demonstrate in Chapter 3 in much greater detail than is possible in this Introduction, *Group A*’s criticism of Griffith is not that Griffith’s lecture was devoid of normative argument; (indeed scholars belonging to *Group A* expressly acknowledge Griffith’s normative arguments); instead, as I will argue in Chapter 3, scholars belonging to *Group A* presuppose a Dworkinian anti-positivist

³⁵ Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 380.

³⁶ JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007) 34.

³⁷ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 37.

³⁸ Loughlin, ‘Modernism in British Public Law’ (n 33) 66 (responding to Tomkins (n 37) and arguing that ‘it is easy—but wrong—to state that Griffith’s work is purely descriptive’); Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (n 3) 253 (responding to Tomkins (n 37) and arguing that ‘[w]e misunderstand Griffith if we see him as simply presenting a descriptive analysis’ and noting that Griffith’s ‘work is thoroughly prescriptive’).

³⁹ Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (n 3) 253 (arguing that to suggest that Griffith presented a wholly descriptive *analysis* is a misinterpretation of Griffith’s lecture).

understanding of the UK constitution (according to which understanding the UK constitution is deemed to be a repository of abstract principles that exists above the hard positive law as a form of higher constitutional law—constitutional principles that are unearthed through a process of moral interpretation⁴⁰) as the only possible understanding of the UK constitution, and their criticism of Griffith, I will argue, reflects a Dworkinian anti-positivist bias.

Thus, when Dawn Oliver argues that Griffith’s ‘interpretation’ of the UK constitution was that the constitution had ‘no moral or normative content’,⁴¹ she is presupposing the existence of a constitution as a repository of abstract principles and is, then, accusing Griffith of believing that that repository is *empty* of normative principle. However, the better reading of Griffith, I will argue, is not that he believed that the constitution is an empty repository; no, Griffith doubted or denied, *for normative reasons*, the very existence of a constitution understood as a repository of abstract principles, for which reason he famously said that ‘the constitution is no more and no less than what happens.’⁴² As Loughlin notes in the course of placing Griffith within the modernist tradition, Griffith’s ‘focus remained fixed on the system of government rather than on the constitution.’⁴³ Griffith was ‘[a]lert to the tyranny of categories’ and was ‘circumspect in discussion of ‘the

⁴⁰ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

⁴¹ Oliver, *Constitutional Reform in the United Kingdom* (n 35) 380.

⁴² Griffith, ‘The Political Constitution’ (n 1) 19.

⁴³ Loughlin, ‘Modernism in British Public Law’ (n 33) 63.

constitution’.⁴⁴ For Griffith, ‘the constitution was merely the assemblage of rules organising government, changing as the rules changed’;⁴⁵ *law*, for Griffith, ‘meant hard positive law, most authoritatively enacted in statute’⁴⁶—a claim that he made ‘with the intention of overthrowing metaphysical ideas’.⁴⁷

Drawing attention to Griffith’s normative positivism and the anti-positivist biases of his critics, thus, has the effect of clarifying a live controversy within the existing scholarship.

2. *Political Constitutionalism*. Identifying Griffith as a normative positivist also has the effect of clarifying our understanding of the concept that has come to be known in recent years in British public law scholarship as *political constitutionalism*. Richard Bellamy has recently observed that his own monograph on political constitutionalism,⁴⁸ along with Griffith’s ‘The Political Constitution’⁴⁹ and Adam Tomkins’s *Our Republican Constitution*⁵⁰ have ‘come to be seen as *prime normative statements* of political

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.* 66.

⁴⁷ *ibid.*

⁴⁸ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

⁴⁹ Griffith, ‘The Political Constitution’ (n 1).

⁵⁰ Tomkins, *Our Republican Constitution* (n 37).

constitutionalism as applied to the U.K.’⁵¹ It is, indeed, true that a discussion of political constitutionalism in present day public law scholarship in the UK would be considered incomplete without a reference to any one of these three scholars, all three of whom are generally regarded as leading representatives of this school of thought.⁵²

But what do we mean by political constitutionalism? Before we answer that question, let us consider the following remarks, not about political constitutionalism *per se*, but about ‘-isms’ in general, that one commentator makes in a discussion about legal positivism:

In talking about legal positivism, one is forced to make a preliminary point about the use of labels to describe philosophical movements. Theory-labelling is a tricky business. To be sure, labels are useful tools to refer to jurisprudential trends, but they can be misleading in so far as they are taken to convey the idea that there is a uniform trend or even a group of scholars out there—a “school”—united by a uniform and consistent research program, by the use of the same technical (epistemological, theoretical) tools, and by widely shared solutions to a set of problems.

However, a putative unified account of “legal positivism” would be patently false. Legal positivism is not (at any rate, is not now) anything resembling a school. Rather, it is an array of theses, of theoretical questions perceived of as important, and of theoretical concepts and methods of inquiry agreed upon by positivists only at a fairly high level of abstraction.⁵³

⁵¹ Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 **International Journal of Constitutional Law** 86, 90n18 (emphasis added).

⁵² See Graham Gee and Grégoire CN Webber, ‘What Is a Political Constitution?’ (2010) 30 **Oxford Journal of Legal Studies** 273; Marco Goldoni, ‘Two Internal Critiques of Political Constitutionalism’ (2012) 10 **International Journal of Constitutional Law** 926.

⁵³ Giorgio Pino, ‘Positivism, Legal Validity, and the Separation of Law and Morals’ (2014) 27 **Ratio Juris** 190, 192-193.

The first point, in the light of the above quotation, that I wish to make about political constitutionalism is that, like legal positivism, though perhaps not to the same degree as legal positivism, political constitutionalism, too, represents ‘an array of theses’⁵⁴ agreed upon by political constitutionalists, and by those who talk about political constitutionalism, only ‘at a fairly high level of abstraction.’⁵⁵

At that high level abstraction, political constitutionalism may be defined as one of two ‘[r]ival theories of the British constitution’,⁵⁶ the other one being *legal constitutionalism*, with parliamentary sovereignty being ‘rejected by strong versions of legal constitutionalism’⁵⁷ while being ‘a crucial element of political constitutionalism’.⁵⁸ Another way of describing the difference between legal and political constitutionalism may be what another recent work states is the difference between the two theories, again, stated at a fairly high level of abstraction:

Roughly speaking, political constitutionalism stands for the proposition that the limits on governmental power inherent in the concept of constitutionalism—limits that qualify the noun in the term ‘constitutional democracy’—and especially those that are expressed in terms of individual rights and liberties, are or should be predominantly political in nature, enforced through the ordinary mechanisms of Madisonian-style structural constraints and,

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Jeffrey Goldsworthy, ‘Parliamentary Sovereignty and Constitutional Change in the United Kingdom’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 55.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

especially, through electoral accountability. In other words, to a significant extent the representative nature of modern democracy provides its own built-in check on the scope of governmental power, thereby fusing the two constitutive concepts. By contrast, legal constitutionalists believe that these limits in general, and rights in particular, are or should be predominantly legal in nature and enforced through the power of courts to disapply acts that exceed them.⁵⁹

My aim in this project is to look beneath the fairly abstract accounts of political constitutionalism that are found in the above quotations. I am more interested, in other words, in exploring the diversity that exists deep *within* political constitutionalism, at least insofar as the theory is understood in British public law scholarship, and my aim is to unearth at least some of the reasons as to why that diversity exists.

About that diversity, Neil Walker has recently observed that in UK public law scholarship, the works that represent the political constitutionalist school of thought ‘occupy no single clear position, but an indistinct spectrum of possibilities.’⁶⁰ These works, Walker notes, ‘may embrace, on the one hand, a kind of realism in which the absence of a legal authority that constrains as well as enables political power casts the constitution as an arena of raw political competition’,⁶¹ and, ‘on the other hand, they may embrace a more normatively committed stance which makes a virtue of the

⁵⁹ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) 22.

⁶⁰ Neil Walker, ‘Our Constitutional Unsettling’ [2014] *Public Law* 529, 533. Among the works that Walker identifies as belonging to this collection of diverse arguments are Tomkins, *Our Republican Constitution* (n 37); Bellamy, *Political Constitutionalism* (n 48); Keith Ewing, ‘The Resilience of the Political Constitution’ (2013) 14 *German Law Journal* 2111.

⁶¹ Walker, ‘Our Constitutional Unsettling’ (n 60) 533.

constitutional prominence of political institutions and the affirmation of representative democracy and strong political accountability this implies in the modern state, even if these institutions were born in a pre-democratic age.⁶²

In order to explore this diversity within political constitutionalism, I will place side by side two contrasting versions of political constitutionalism: the version associated with the arguments Griffith made in ‘The Political Constitution’ and another version advocated by Tomkins in *Our Republican Constitution*. Once we place side by side the accounts of these two scholars, who are thought to be leading representatives of political constitutionalism, we will find that Griffith’s political constitutionalism is best understood as a form of normative positivism, while Tomkins’s political constitutionalism, rather than being a form of normative positivism, is built upon Dworkinian anti-positivist foundations.

Drawing attention to Griffith’s normative positivism, then, also has the effect of helping us make more sense of this diversity inherent within the concept of political constitutionalism. Loughlin has recently observed that ‘it is incorrect to say that Griffith’s ‘school is something called “political constitutionalism” (a notion of recent coinage)’.⁶³ But I think it is possible to sustain the argument that Griffith was, in some ways, a political constitutionalist, if we define the concept of ‘political constitutionalism’ in at least some of the ways in which we defined the concept above.⁶⁴ However, if

⁶² *ibid* 533-534.

⁶³ Loughlin, ‘Modernism in British Public Law’ (n 33) 66.

⁶⁴ See text to (n 56) – (n 62).

we are going to enlist Griffith as an ally of the political constitutionalist school of thought, we must also remember the diversity that exists within the concept of political constitutionalism, and we must also remember that Griffith's political constitutionalism is best understood as a form of normative positivism—a form of political constitutionalism that is very different from the modern defence of political constitutionalism found in the work of Tomkins.

STRUCTURE OF THE THESIS

The argument presented in this thesis will proceed as follows. **Chapter 2**, entitled *J.A.G. Griffith's Normative Positivism*, will tell the story of Griffith's normative positivism. Several arguments need to be defended along the way to presenting an account of Griffith's normative positivism. The chapter will begin by detailing the various strands of legal positivism, some of which are normative, others of which are non-normative. Having acquired the vocabulary that is necessary for a discussion of Griffith's normative positivism, this chapter will also address some ancillary questions that are necessary to address in the context of any discussion of normative positivism; these questions include whether or not normative positivism should even be considered a strand of legal positivism, whether or not normative positivism can logically co-exist with the purely conceptual form of legal positivism, and whether or not purely descriptive jurisprudence not invested in normative aims—the type of jurisprudence that some conceptual positivists claim to be engaged in—is even possible. These are questions about which legal theorists disagree, and I will address them to the extent that they are relevant to my discussion. The principal aim of this chapter,

however, is to defend the claim that running through much of Griffith's lecture is a strong commitment to normative positivism, and the chapter will defend that claim, in Sections 2.5 and 2.6, using evidence from Griffith's lecture.

If the aim of Chapter 2 is to describe what Griffith *was* saying in his lecture, the aim of **Chapter 3** is to demonstrate what Griffith *was not* saying in his lecture. Chapter 3, entitled *A Response to Griffith's Critics*, will be exactly that—a response to three of Griffith's critics. Their criticism of Griffith, I will argue, reflects an anti-positivist bias and a lack of appreciation of Griffith's normative positivism. The aim of this chapter will also be to juxtapose two accounts of political constitutionalism—one found in Griffith's lecture and the other found in the work of one of Griffith's critics, Adam Tomkins. The chapter will argue that whereas Griffith's political constitutionalism is a form of normative positivism, there is a an anti-positivist streak running through the political constitutionalism of Tomkins, which makes these two versions of political constitutionalism very different. This argument will have both a descriptive and an evaluative dimension; it will describe this key difference between the political constitutionalism of Griffith and Tomkins, and it will express a preference for the political constitutionalism of Griffith over the political constitutionalism of Tomkins precisely because, unlike Tomkins's political constitutionalism, Griffith's political constitutionalism is a form of normative positivism.

In **Chapter 4**, I will argue that the arguments Griffith presented in his lecture are best appreciated by adopting a particular vantage—that vantage is the vantage of the *citizen* who is invested in the values promoted by republican theories, such as having an involved citizenry who is able to participate in the decisions that are taken in its name using procedures that

take seriously disagreement among citizens. In particular, I will argue in this chapter that it is crucial to resist the temptation to try to make sense of Griffith's arguments from the vantage of an appeals court judge, which happens to be the vantage from which a great deal of legal writing happens to take place today.⁶⁵

In the final substantive chapter of the thesis, **Chapter 5**, I will ask what contributions, if any, can the normative positivist arguments that Griffith made in 'The Political Constitution' make to our understanding of what I refer to in this thesis as 'the narratives of devolution'.⁶⁶ Rather than providing a summary of the argument presented in Chapter 5 here, I will wait until that chapter to define what the narratives of devolution are and to consider what contributions, if any, Griffith's normative positivism can make to these narratives.

⁶⁵ James Allan, *The Vantage of Law* (Ashgate 2013) 179.

⁶⁶ I borrow this phrase from Aileen McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (April 17, 2014) **SSRN**. Available at <<http://ssrn.com/abstract=2431050>> (visited 21 February 2015); see also Gavin Anderson and others, 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate' (January 31, 2012) **UKCLA Blog**. Available at <<http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>> (visited 24 February 2015).

J.A.G. GRIFFITH'S NORMATIVE POSITIVISM

2.1 INTRODUCTION

This chapter tells the story of J.A.G. Griffith's normative positivism. A number of arguments need to be defended along the way to presenting that story, and I begin with a roadmap of how the argument will proceed.

Section 2.2 will provide an overview of the different strands of legal positivism (some of which are non-normative, others of which are normative) and will introduce the terminology that will be employed in subsequent sections of the chapter—terminology that will help us navigate through Griffith's normative positivism. The primary aim of this section is to achieve terminological and conceptual clarity so that the arguments in subsequent sections of the chapter, and indeed the remainder of the thesis, will be clearer.

Section 2.3 will address the debate as to whether the normative varieties of legal positivism discussed in Section 2.2 should even be called legal positivism. This is an important question in contemporary debates within the positivist tradition, and it is a question that is highly relevant to our discussion—we need to know whether or not what I am calling Griffith's 'normative positivism' should even be considered a strand of legal positivism, and this is a question about which leading voices within the positivist tradition disagree. Relying on the authority of those voices within the positivist tradition who answer this question in the affirmative, this section will argue that the normative strands of legal positivism *are* entitled to the

positivist mantle and will address related questions along the way—questions such as whether or not the descriptive and normative varieties of positivism can logically coexist, whether there is any value in purely analytical jurisprudence, and whether or not purely conceptual analysis of the sort that conceptual positivists claim to be engaged in is even possible without taking a normative position. These related questions are ones that I will touch upon to the extent that they are relevant to my discussion.

Section 2.4 will address the positivist commitments of Jeremy Bentham, his disciple John Austin, and HLA Hart. There are at least two reasons why it is important for this chapter to discuss in some detail Bentham's and Austin's positivism and at least one reason for discussing Hart's. First, a discussion of the positivism of Bentham and Austin helps in challenging the view, common in analytic jurisprudence, that Hart's legal positivism rendered pre-Hart versions of positivism 'obsolete or irrelevant.'¹ Secondly, and related to the first reason, the type of legal positivism that I attribute to Griffith in this chapter has more in common with Bentham's and Austin's normative positivism than with Hart's. And finally, it is worthwhile exploring Hart's positivism for the purposes of this chapter because Hart's commitment to the normative dimension of legal positivism is, probably more so than in the case of any other stalwart of the positivist tradition, most difficult to pin down. It is difficult because, while some of his arguments point in the direction of embracing normative positivism, others point the other way. Exploring the

¹ See Frederick Schauer, 'Positivism Before Hart' in Michael Freeman and Patricia Mindus (eds), *The Legacy of John Austin's Jurisprudence* (Springer 2013) 271 ('H. L. A. Hart did not invent legal positivism. Nor did his hugely influential version of legal positivism render all earlier versions obsolete or irrelevant. And although the first of these statements is hardly controversial, the second is likely to be perceived in the precincts of modern English language analytic jurisprudence as somewhere between debatable and simply wrong.' (citations omitted)).

question of whether or not Hart was a normative positivist, then, helps us appreciate that the sort of interpretive endeavour upon which this chapter is embarking can at times be difficult because the arguments of the theorist whose views are being interpreted can point in different directions, and the best that the reader can sometimes do is to make inferences about what the theorist probably meant.²

Section 2.5 is where the chapter will finally turn to discussing Griffith's legal positivism as expressed in his Chorley Lecture. Using evidence from his lecture, this section will discuss the normative dimension of Griffith's legal positivism.

Finally, Section 2.6 will try to read between the lines of a paragraph from Griffith's lecture—a paragraph that is perhaps one of the most famous descriptions of the UK constitution in British public law scholarship:

The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.³

In reading between these lines, I will argue in this section that when we read this paragraph in the light of the philosophical commitments that Griffith expressed in his lecture—a commitment to normative positivism, a commitment to democracy, and a commitment to moral anti-realism—we better understand *why* Griffith defined the UK constitution in this way.

² See James Allan, 'Positively Fabulous: Why It Is Good To Be a Legal Positivist' (1997) 10 **Canadian Journal of Law and Jurisprudence** 231 (exploring whether or not Hart was a normative positivist and discussing the need to make inferences about Hart's preferences in those instances in which Hart's arguments are unclear).

³ JAG Griffith, 'The Political Constitution' (1979) 42 **Modern Law Review** 1, 19.

2.2 THE STRANDS OF LEGAL POSITIVISM—ACQUIRING THE VOCABULARY

The purpose of this section is to discuss the various strands of legal positivism in order to acquire the vocabulary that will serve us in subsequent sections of the chapter as we attempt to navigate through Griffith's legal positivism.

It is arguably impossible to offer a 'unified account'⁴ of legal positivism. If our goal, nevertheless, is to present one thesis that, at 'a fairly high level of abstraction',⁵ is almost universally agreed upon by adherents of legal positivism, then we may say with some confidence that most, if not all, legal positivists subscribe to the so-called *separability thesis*.⁶ This thesis, stated by one of legal positivism's most distinguished proponents, is the thesis that 'it is in no sense a necessary truth that laws reproduce or satisfy certain

⁴ Giorgio Pino, 'Positivism, Legal Validity, and the Separation of Law and Morals' (2014) 27 **Ratio Juris** 190, 192-193 ('a putative unified account of "legal positivism" would be patently false. Legal positivism is not (at any rate, is not *now*) anything resembling a school.').

⁵ *ibid* (arguing that positivism represents 'an array of theses, of theoretical questions perceived of as important, and of theoretical concepts and methods of inquiry agreed upon by positivists only at a fairly high level of abstraction.').

⁶ See Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press 2001) 71 ('There are many versions of legal positivism but *all of them* subscribe to the so-called separation thesis.') (emphasis added). I say 'most, if not all' because of Jules Coleman's following observation: '[I]n the eyes of many, there is little more than [the] warm embrace of the separability thesis that unifies legal positivists with one another. One problem with this view is that neither Joseph Raz nor I accept the separability thesis, and it may be our shared rejection of it that is all that unites us.' Jules L Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27 **Oxford Journal of Legal Studies** 581, 582n2.

demands of morality, though in fact they have often done so.’⁷ That distinguished proponent, Hart, of course ‘did not invent legal positivism’,⁸ and before Hart, Bentham and his disciple Austin articulated this thesis in similar terms.⁹ Stated differently, the separability thesis, which, barring some exceptions,¹⁰ unites legal positivists, is the thesis that ‘it is essential to a legal system that what the law *is* can be established without considering what the law morally *ought to be*.’¹¹

Beyond the separability thesis, there are numerous conceptual distinctions among the different versions of legal positivism, and as we work through these differences, readers will find it useful to refer to the following diagram:¹²

⁷ HLA Hart, *The Concept of Law* (Penelope A. Bulloch, Leslie Green & Joseph Raz eds, 3rd edn, Oxford University Press 2012)185-186.

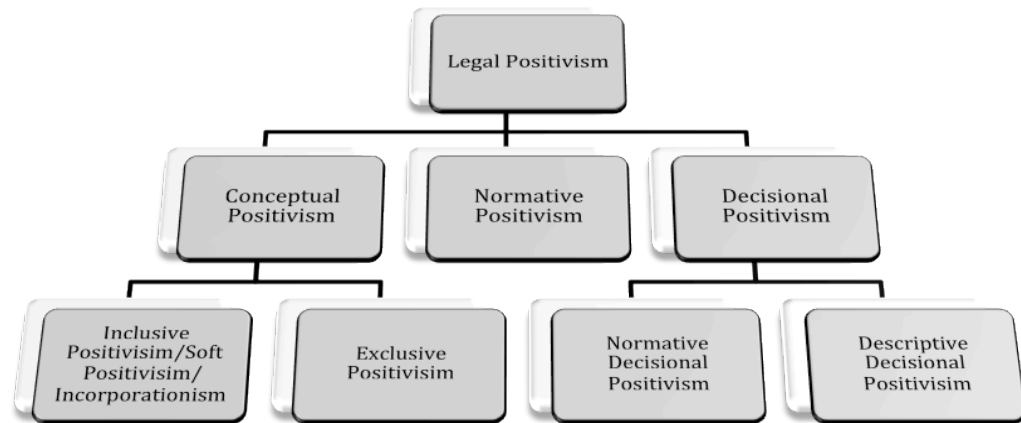
⁸ Schauer, ‘Positivism Before Hart’ (n 1) 271.

⁹ One of the best-known formulations of the separability thesis is Austin’s in John Austin, *The Province of Jurisprudence Determined* (Wilfred E. Rumble ed, Cambridge University Press 1995—first published 1832) 157 (‘The existence of law is one thing, its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate approbation and disapprobation.’).

¹⁰ See Coleman, ‘Beyond the Separability Thesis’ (n 6) 582n2.

¹¹ David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein (eds), *Law and Morality: Readings in Legal Philosophy* (3rd edn, University of Toronto Press 2007) 5 (arguing that ‘[w]hatever their other differences, positivists share [this] view’).

¹² The diagram is mine and was created employing the terminology in Schauer, ‘Positivism Before Hart’ (n 1) 275-280.



Schauer identifies three varieties of legal positivism: (i) *conceptual positivism*; (ii) *normative positivism*; and (iii) *decisional positivism*.¹³ The first of these three is a purely conceptual, non-normative thesis, the second is normative, while the third has both descriptive and normative dimensions.

Before turning to the different varieties of positivism below, I want to make a couple of points about terminology for the sake of clarification at the outset. First, there are some scholars who use the label ‘normative positivism’ to refer to a thesis that is very different from what I am calling normative positivism. These scholars define normative positivism as a thesis that defines law as a system of *norms*, which is a descriptive, non-normative thesis.¹⁴ The normative positivism I have in mind, as I stated in the introductory chapter, is, on the other hand, a normative thesis. As Jeremy

¹³ *ibid.*

¹⁴ E.g. Deryck Beyleveld and Roger Brownsword, ‘Normative Positivism: The Mirage of the Middle-Way’ (1989) 9 *Oxford Journal of Legal Studies* 463.

Waldron says about this terminological point, ‘the reader is hereby put on notice’.¹⁵

A second point of clarification I wish to make is that, as the reader will have noticed from the diagram above, the word ‘normative’ appears in the diagram twice—(i) *normative* positivism and (ii) *normative* decisional positivism. Schauer uses these two terms to distinguish between two strands of legal positivism that are both normative in character but are both conceptually distinct. The first is concerned with how we understand a legal system while the second is concerned with how judges and other decision-makers apply the law.¹⁶ The first, in other words, ‘is a program of legal understanding and not institutional design’¹⁷—it is *not* ‘about adjudication, nor about how non-adjudicative legal decisions should be made, nor about how legal institutions should be designed in order to produce better decisions.’¹⁸ The second (normative decisional positivism that is), on the other hand, *is* about adjudication and about ‘the design of legal institutions and legal decision-making procedures.’¹⁹

I will say much more about the differences between these two positivisms below, but the preliminary point of clarification I make at this stage is that when I use the term ‘normative positivism’ in this chapter (and indeed in

¹⁵ Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’* (Oxford University Press 2001) 412.

¹⁶ Schauer, ‘Positivism Before Hart’ (n 1) 278.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid* (citations omitted).

this thesis), I am using the term to refer to *both* of these varieties. In other words, for me, Griffith was a *normative* positivist in both the senses just mentioned, and where it is necessary to stress the conceptual distinction between these two types of normative positivism, I will either do so expressly or it will be clear from the context.

2.2A Conceptual Positivism

Conceptual positivism is ‘very much the modern understanding’²⁰ of legal positivism that ‘focuses on a series of conceptual claims about the relationship between law and morality.’²¹ Conceptual positivism comes in two varieties: (a) *inclusive legal positivism*²² (also known as *soft positivism*²³ or *incorporationism*²⁴) and (b) *exclusive legal positivism*.²⁵

²⁰ *ibid* 275-276.

²¹ *ibid* (abstracting away ‘interesting variations and disagreements’ within conceptual positivism).

²² Wilfrid J Waluchow, *Inclusive Legal Positivism* (Clarendon Press 1994); Kenneth Einar Himma, ‘Inclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy* (Oxford University Press 2004). For discussion, see Schauer, ‘Positivism Before Hart’ (n 1) 276.

²³ Hart, *The Concept of Law* (n 7) 250-254. For discussion, see Schauer, ‘Positivism Before Hart’ (n 1) 276.

²⁴ Jules Coleman, ‘Incorporationism, Conventionality, and the Practical Difference Thesis’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’* (Oxford University Press 2001). For discussion, see Schauer, ‘Positivism Before Hart’ (n 1) 276.

²⁵ Andrei Marmor, ‘Exclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy* (Oxford University Press 2004); Joseph Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295. For discussion, see Schauer, ‘Positivism Before Hart’ (n 1) 276.

The first variety of conceptual positivism, that is inclusive legal positivism, in ‘its purest and most capacious form’²⁶ is the thesis that ‘morality is not a necessary condition of legality in all possible legal systems in all possible worlds.’²⁷ This inclusive version of conceptual positivism holds that ‘morality, while often and sometimes even desirably part of law and part of the rule of recognition in this or that legal system, is not a component of the *concept* of law.’²⁸ And inclusive legal positivism’s ‘most significant opponent’²⁹ is another conceptual thesis, namely exclusive legal positivism. Waldron's definition of these two versions of conceptual positivism is helpful for understanding the key difference between the two; as Waldron puts it, exclusive legal positivism is the thesis that ‘law *necessarily does not* implicate morality’³⁰ whereas inclusive legal positivism is the thesis that ‘law *does not necessarily* implicate morality.’³¹ Notice how the subtle change in the order of words in the italicized text creates a meaning that is substantially different.

There are a couple of ways in which conceptual positivism (both exclusive and inclusive) is very different from other versions of legal positivism, and, accordingly, before turning to those other versions of positivism, it would be useful to highlight what those two key distinguishing features are.

²⁶ Schauer, ‘Positivism Before Hart’ (n 1) 276.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Waldron ‘Normative (or Ethical) Positivism (n 15) 414 (emphasis added).

³¹ *ibid.* (emphasis added).

Firstly, unlike normative and decisional positivism (discussed below), conceptual positivism is normally supported and presented as a *wholly descriptive* thesis.³² For the conceptual positivist, legal positivism is ‘an attribute of a concept’,³³ and ‘it is in the nature of the concept of law that morality is either no part of it [,which is the exclusive legal positivist thesis] or is not necessarily a part of it [,which is the inclusive legal positivist thesis].’³⁴

Secondly, for the conceptual positivist, any good consequences that might flow from the conceptual separation of law and morality (above and beyond the benefit of descriptive accuracy) would only be seen as ‘fortunate side-effect[s]’³⁵ of that conceptual separation. For the conceptual positivist, the conceptual distinction between law and morality would remain, regardless of whether that conceptual distinction produced any positive side-effects over and above descriptive accuracy, and that distinction would also remain ‘even if that were a sad fact about the world, and even if it led to injustice.’³⁶ As Schauer explains using an analogy, ‘just as the pernicious effects of typhoid would not lead the rational observer to deny its existence, so too would any putative deleterious effects of the conceptual separation of law and morality be irrelevant to the question of its existence.’³⁷

³² Schauer, ‘Positivism Before Hart’ (n 1) 276.

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid* 277.

³⁶ *ibid.*

³⁷ *ibid.*

With those two key distinctions between conceptual positivism and the other two varieties of legal positivism established, our discussion now turns to what those other two varieties of legal positivism, namely *normative positivism* and *decisional positivism*, are.

2.2B Normative Positivism

According to one of normative positivism's most distinguished proponents, normative positivism is the thesis that 'the law *ought* to be such that legal decisions can be made without the exercise of moral judgment'³⁸ or, to put it differently, normative positivism is the thesis that 'it would be *a good thing* for the law to be as the [conceptual] positivist thinks it is.'³⁹ That distinguished proponent, Waldron, further observes about this version of legal positivism:

Normative positivism is itself a moral claim: indeed it is a moral claim about the making of moral claims in the particular area of social life we call *law*. It identifies the contamination of legal decision by moral judgment as a moral disadvantage; it says that we lose something of value thereby.⁴⁰

Waldron considers normative positivism to be 'by far the most interesting form of legal positivism' and argues that 'it is hard to imagine how a positivist definition of the concept of law could be sustained, without eventually having to resort to some such normative thesis'.⁴¹

³⁸ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 167.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

According to Schauer, normative positivists view the concept of law like they do other concepts—‘as social artefacts, subject to the creation and re-creation by the society within which they exist’,⁴² and they believe ‘that the conceptual separation of law and morality is largely a function of *choosing* a concept of law that has [the] feature [of being conceptually distinct from morality].’⁴³ Normative positivism promotes choosing the conceptual separation of law and morality for the good consequences that would flow from such a choice. These good consequences include, to take a couple of examples, Hart’s insistence that maintaining the conceptual separation between law and morality would allow citizens to better appreciate the moral issues at stake when faced with the decision to follow or disobey iniquitous law,⁴⁴ and Bentham’s insistence that such conceptual separation would make it easier to reform the law.⁴⁵

To recap this definition, normative positivism is the view that ‘positivism is chosen by a society rather than just emerging’,⁴⁶ and adherents of normative positivism ‘offer reasons why it is better for some purpose other than descriptive accuracy’⁴⁷ for legal positivism to be chosen over other concepts of law. In other words, the normative positivist attaches to the conceptual

⁴² Schauer, ‘Positivism Before Hart’ (n 1) 277.

⁴³ *ibid*

⁴⁴ Hart, *The Concept of Law* (n 7) 210. On whether Hart may be read as being wholeheartedly committed to normative positivism, see Section 2.4 below.

⁴⁵ See Schauer, ‘Positivism Before Hart’ (n 1) 283; see also Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford University Press 1986) Ch 9 (discussing Bentham’s ‘utilitarian positivism’).

⁴⁶ Schauer, ‘Positivism Before Hart’ (n 1) 278.

⁴⁷ *ibid*.

separation of law and morality good consequences over and above descriptive accuracy, and it is the pursuit of these morally beneficial consequences that leads the normative positivist to urge that law and morality be kept separate.

2.2C Decisional Positivism

Finally, decisional positivism is a version of legal positivism that has both normative and descriptive dimensions. As I made clear in the introduction to this section,⁴⁸ the normative dimension of decisional positivism is different from the normative positivism discussed in the previous subsection (Section 2.2B) in that the normative positivism discussed in the previous subsection is about how we understand the concept of law whereas decisional positivism (the subject of this subsection) is a thesis that, in its normative dimension *encourages* a particular design of the institutions and decision-making procedures of law, and that in its descriptive dimension is a thesis about how these institutions and procedures *actually operate*.

Decisional positivism in its normative dimension—i.e. normative decisional positivism—

seeks to create institutions relying on relatively precise rules, minimizing adjudicative discretion, limiting the law-making power of judges and other law-application officials, restricting legal decision-makers to a limited set of easily identifiable sources, and in general fostering predictability and limiting judicial authority.⁴⁹

Descriptive decisional positivism, by contrast, is a descriptive thesis that—

⁴⁸ See (n 16) – (n 19) and accompanying text.

⁴⁹ Schauer, 'Positivism Before Hart' (n 1) 279.

characterizes a legal system as *positivist* insofar as it relies on, for example, statutes rather than common law, insofar as those statutes are precise rather than vague, insofar as a formalist approach dictates questions of statutory interpretation, insofar as it limits judicial discretion, and insofar as its domain of acceptable legal sources is a relatively small portion of the array of acceptable social sources.⁵⁰

Decisional positivism, thus, makes both normative and descriptive claims. Normative decisional positivism is the claim that ‘legal systems *should be* designed to minimize discretion of judges, police officers, and other legal officials’.⁵¹ Descriptive decisional positivism, on the other hand, is ‘the metric along which actual legal systems might be characterized.’⁵² Schauer gives the example of ‘the extreme of the civil law ideal type (or, perhaps better, stereotype, or maybe even caricature)’⁵³ as a legal system that ‘might lie at the pole of extreme decisional positivism’,⁵⁴ and, by contrast, ‘a legal system pervaded by common law methods, instrumentalism, and anti-formalism, arguably instantiated in the contemporary United States’⁵⁵ as a system that ‘might lie at the opposite pole of minimal decisional positivism.’⁵⁶ Thus, in its descriptive dimension, decisional positivism is ‘the scalar or non-binary measure of just how heavily legal decisions are constrained by the texts of formal legal sources and just how much of the array of those sources is a

⁵⁰ *ibid* (emphasis added).

⁵¹ *ibid* 280 (emphasis added).

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ *ibid*.

⁵⁶ *ibid*.

limited subset of the full array of social sources, a subject identifiable by pedigree and not by content.’⁵⁷

We might ask *why* normative decisional positivists such as Bentham, Hobbes, and Hume argued that the discretion of judges and other officials entrusted with the application of law ought to be minimized. Waldron notes that the reason is to avoid arbitrary government:

[For the normative decisional positivist,] putative cases of moral decision-making in law...are unsatisfactory aspects of the law to be condemned and minimized. The legal system should be reformed so that moral decision-making, by judges or officials, is eliminated as far as possible.

Why? The reason in Hobbes’s, Hume’s, and Bentham’s jurisprudence had to do with the desirability of certainty, security of expectation, and knowledge of what legally empowered officials were likely to require. If the decisions of an official turned on the exercise of his moral judgment, there would be no telling what he might come up with. From the point of view of the citizen trying to organize his life, the official’s decisions would be *arbitrary*.⁵⁸

Arbitrariness of the sort that concerns normative decisional positivists can take a number of forms; Waldron identifies three, saying that in ‘modern jurisprudence, the word “arbitrary” has at least three connotations, all of them bad’:⁵⁹

(1) Sometimes it means ‘unpredictable’, and that...was the charge that particularly worried Jeremy Bentham and other thinkers in the mainstream of British positivism. (2) Sometimes it means ‘unreasoned’, as when a decision is made on the basis of whim or reflex prejudice rather on the basis of argument. Now, these are not the same. A judicial decision can be unreasoned without being

⁵⁷ *ibid.*

⁵⁸ Waldron, *Law and Disagreement* (n 38) 167.

⁵⁹ *ibid.*

unpredictable: we may know in advance, for example, that a judge is a 'knee-jerk' conservative on some range of issues and be able to predict his response accordingly. On the other hand, a legal decision can be unpredictable without being unreasoned. We may know that the judge is going to reason morally (by his own lights) but not know what his moral framework will be. Or even if we do know that he is, say, a utilitarian, we may be unable to predict his decision because we do not know enough about his reasoning powers or about the information available to him. (3) A third sense of 'arbitrariness' is particularly important with regard to American constitutional law. Some feel that even if judges are making moral decisions as reasonably and as predictably as they can, still their decisions lack *political legitimacy*. It is for the people or the legislators they have elected to make that sort of decision; it is not for the judges to take the determination of social principle and social value into their own hands. In this democratic sense, 'arbitrary' means something like 'without authority or legitimacy'.⁶⁰

It is for these reasons that normative decisional positivists 'oppose and seek to minimize the amount of moral decision-making exercised by judges and other (unelected) officials in the legal system.'⁶¹

The normative considerations running through the normative decisional positivism of Hobbes, Hume, and Bentham, then, were their interest in minimizing discretion of those entrusted with the application of law in order to prevent the citizen from being subjected to arbitrary government. The normative positivism of all three of these philosophers is documented at

⁶⁰ *ibid* 167-168.

⁶¹ *ibid* 168.

length by Gerald Postema,⁶² while a leading modern defence of normative decisional positivism is found in the work of Tom Campbell.⁶³

2.3 ARE NORMATIVE AND DECISIONAL POSITIVISM REALLY 'LEGAL POSITIVISM'? (AND CAN NORMATIVE POSITIVISM LOGICALLY COEXIST WITH CONCEPTUAL POSITIVISM?)

Of the varieties of legal positivism discussed in the preceding section, it is conceptual positivism that is often argued to be the only version of legal positivism that is legal positivism properly understood.⁶⁴ So, for example, Jules Coleman, a prominent voice in the positivist tradition, argues that '[l]egal positivism makes a conceptual or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have had.'⁶⁵ The denial of the label 'legal positivism' to normative and decisional positivism does not necessarily consist of a denial of the existence of normative and decisional positivism as a matter of historical fact, but instead consists of the view that normative and decisional positivism are 'simply contingent or accidental

⁶² Postema, Bentham and the Common Law Tradition (n 45) esp. Ch 9.

⁶³ Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing Co Ltd 1996); Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish 2004); Tom Campbell, *Rights: A Critical Introduction* (Routledge 2006) Ch 11.

⁶⁴ As Waldron observes in the course of challenging this view: 'Legal positivism is commonly held to consist in a *purely conceptual thesis*'. See Waldron, 'Normative (or Ethical) Positivism' (n 15) 411 (emphasis added); see also Campbell, *Prescriptive Legal Positivism* (n 63) 21 (citation omitted) ('The theory of legal positivism is usually taken to be analytical, descriptive and explanatory.').

⁶⁵ Jules Coleman, 'Negative and Positive Positivism' (1982) 11 *The Journal of Legal Studies* 139, 147.

features'⁶⁶ of the work of such figures as Hobbes, Bentham, and Austin.⁶⁷ In short, for a number of scholars, conceptual positivism is the only version of legal positivism that represents the 'core commitments'⁶⁸ of legal positivism.

Schauer has recently detailed the reasons why the 'core commitments' argument is problematic. With the view of assigning conceptual positivism the status of the 'core' or genuine meaning of legal positivism and denying the positivist label to normative or decisional positivism, Schauer takes issue. He asks:

[E]xactly what kind of claim is the claim that conceptual positivism...is the "core commitment" of legal positivism? The claim is hazy, because there are different notions of what it is for something to be at the "core". The core, after all, is a spatial metaphor often ill-suited to capture notions of salience, importance, or theoretical centrality, which is why it is not self-evident that the core is the most important part of an apple or the most scientifically significant part of the planet Earth. To say that something is at the core in a non-physical way is thus to make an instrumental claim in need of further clarification. If the claim is historical, and if locating the historical core of positivism is largely an inquiry into motivation, or into the importance or salience of a particular question for particular people, then...it is difficult to deny that decisional or normative positivism and not conceptual positivism is the "core" commitment of legal positivism, at least as understood by Bentham, Austin, and most others of their generation.⁶⁹

⁶⁶ Schauer, 'Positivism Before Hart' (n 1) 285.

⁶⁷ Waldron, 'Normative (or Ethical) Positivism' (n 15) 413; Schauer, 'Positivism Before Hart' (n 1) 285.

⁶⁸ Schauer notes that '[c]haracterizing the issue in terms of the "core commitments" of legal positivism is ubiquitous': Schauer, 'Positivism Before Hart' (n 1) 286n68.

⁶⁹ *ibid* 286 (citation omitted).

It would be one thing to make a historical claim about the core commitments of, say, Austin's legal positivism, which was at times motivated by descriptivism, but it is an entirely different claim to turn that historical claim into a philosophical one; however, those who allege that conceptual positivism reflects the core commitments of legal positivism are typically presenting an argument that is philosophical, not historical.⁷⁰

What, then, are some of the arguments in defence of the *philosophical* claim that conceptual positivism is the only genuine version of legal positivism? Schauer notes that 'those subscribing to the view that the core commitment of legal positivism is a conceptual claim about [the separability of law and morality] make much of the fact that conceptual positivism is a *necessary condition* of both normative and decisional positivism, and is consequently logically and philosophically prior to them.'⁷¹ As Waldron puts it in reference to Coleman's denial of the positivist label to normative and decisional positivism, Coleman's philosophical objection is that normative positivism amounts to 'put[ting] the cart before the horse.'⁷² Conceptual positivism, in

⁷⁰ *ibid* 286-287.

⁷¹ *ibid* 287 (emphasis added).

⁷² Waldron, 'Normative (or Ethical) Positivism' (n 15) 413 (Coleman's point deserves to be taken seriously, for it amounts to a claim that what I am calling 'normative positivism' puts the cart before the horse. Coleman does not deny that early positivists like Hobbes and Bentham might have had [certain] practical interests and made [certain] normative claims that [normative positivists make.] But I think Coleman is claiming that the best that can be said for those normative positions is that they already depend on the truth of legal positivism as a conceptual thesis. For consider: if legal positivism in the form of the separability thesis is false as a conceptual matter, then normative positivism is fatuous: it values or commends a state of affairs that cannot possibly obtain. ... If, on the other hand, a robust version of legal positivism as a conceptual thesis is true, then normative positivism is equally fatuous. For if law cannot but be separate from morality—if it is not possible to grasp the concept of law without committing oneself to that separability—then normative positivism amounts to little more than opposition to anarchism. The normative positivist is simply in favour of law (as law can be shown, analytically, to be). And who isn't?).

other words, is argued to be a necessary condition for the other versions of positivism noted above, and hence the only version of legal positivism deserving of that label.

Against this claim, scholars have responded in one of two ways. One way is to argue that the logical prerequisite argument itself is problematic, and the other is to *accept* the logical prerequisite argument and yet still claim that it does not follow that we should for that reason deny the positivist label to normative or decisional positivism.

Postema takes the former approach. Postema argues that treating conceptual positivism as a prerequisite for normative and decisional positivism is based on a problematic view about the role of language in elucidating social concepts, including the concept of law:

Analytical Jurisprudence rests on a problematical philosophy of language. It mistakenly assumes that the concepts we use can be divorced from the language of everyday life in which they function. But language shapes thought, and language emerges from shared practices and patterns of meaningful human activity... Conceptual analysis is not sharply distinct from the enterprise of gaining an understanding of the practices and forms of life in which the concepts have their life. ...Jurisprudential theory, then, even when it appears to be engaged in conceptual analysis, is focused on the task of giving an account of legal institutions, and the practice and 'sensibility' that breathe life into them. This accounting can never limit itself to simple description. For these practices are not mere and mindless habits, or behavioural routines with no intrinsic significance to those who execute them. They are intelligible social enterprises with a certain, perhaps very complex, *meaning or point*.⁷³

Postema, in other words, seems to be taking the view, shared by John Finnis and Ronald Dworkin among others, that purely analytical jurisprudence (the

⁷³ Postema, Bentham and the Common Law Tradition (n 45) 332-334.

goal of the purely conceptual positivist) is not really possible without taking a normative position.⁷⁴

Schauer takes the latter approach noted above, which is that although he accepts that Postema may be correct, for the sake of argument, he invites the reader to assume that Postema is mistaken:

I assume that the three varieties of positivism sketched above are in a logical and linear relationship to each other, with conceptual positivism being a prerequisite for both normative and descriptive positivism, and normative positivism being also a prerequisite for decisional positivism. The question then is whether, as a matter of philosophy and not of history, the first should be treated as the core of legal positivism and the second and third as mere contingent offshoots not entitled to the designation “positivist” at all. If the truth of conceptual positivism is a necessary condition for the truth—or falsity—of normative positivism, and so too, *mutatis mutandis*, for decisional positivism, then conceptual positivism is the core of positivism, with normative and decisional positivism being, at best, positivism by derivation, positivism by analogy, or simply perversions of positivism.⁷⁵

Having assumed that conceptual positivism is, in fact, a logical precondition of the other forms of positivism discussed above, Schauer still wonders why it should be the case that only conceptual positivism deserves the ‘positivism’ label, using as an analogy to demonstrate his point the theory of natural selection:

[The argument that denies the positivist mantle to normative and decisional positivism] assumes that when one thing is a necessary condition for another then the former is the core concept and the latter is merely contingent. But why should that be so? Consider the theory of natural selection. In order for natural selection to be correct,

⁷⁴ See (n 101) below and accompanying text for relevant citations and discussion of this issue.

⁷⁵ Schauer, ‘Positivism Before Hart’ (n 1) 287.

there must exist a mind-independent physical reality. That form of epistemic objectivism, controversial in some circles, is a necessary condition for the evolutionary theory of natural selection, but to describe the claim of a mind-independent physical reality as the core commitment of the theory of natural selection, rather than simply a precondition or presupposition of it, misses the point of the entire theory. Even though the theory of natural selection, like any other scientific theory, is a descriptive one, a descriptive theory—or account—has a point, and we lose the point of a descriptive theory if we treat it [as] subservient to the sometimes contested facts and theories that are preconditions of its plausibility. Conceptual analysis may well be logically prior to evaluation...but it is hardly clear that what is logically prior is more important or closer to some “core.” For that we need further argument.⁷⁶

For Schauer, it is not clear why we should treat preconditions as more important than what those preconditions are preconditions of, and neither is it clear why we should regard logical relationships as more important than, say, empirical relationships:

It is true that *A* being a necessary condition of *B* does not mean that *A* logically entails *B*. And thus the fact that conceptual positivism is a necessary condition of decisional positivism does not deny that it could be a necessary condition of some alternative to decisional positivism as well. To say that conceptual positivism is the core commitment of positivism because it is a necessary condition of both decisional positivism and decisional non-positivism is to make the evaluative judgement that identifying the precondition is more important than the decision between the two consequences, but that determination is hardly logically compelled.

Moreover, there is no reason to believe that logical relationships are necessarily more important than empirical ones. Suppose, for example, that judges contingently internalized something we might call the legal point of view or legal consciousness. Were that the case, then as an empirical matter such judges might be more inclined to make decisions entirely on the basis of positive law in a society with a positivist concept of law than in one with a natural law concept. This relationship would be neither logical nor conceptual, but the

⁷⁶ *ibid* 287-288.

contingent empirical connection between the two might explain associating the two in a relationship of probabilistic causality.⁷⁷

It is, in other words, not clear, even if conceptual positivism is a logical prerequisite of normative and decisional positivism, why we should for that reason treat that precondition as the core of legal positivism, nor is it clear why logical relationships are more significant than empirical ones.

A further argument that Schauer addresses is John Gardner's claim, as Schauer reads it, that the core commitments of legal positivism are those that are shared by key figures in the positivist tradition, a list that includes Hobbes, Bentham, Austin, Kelsen, Hart, Coleman, and Raz.⁷⁸ To this Schauer responds that 'it is curious as to why that which is shared by these admittedly major figures in the positivist tradition should be considered the core commitments of positivism'.⁷⁹ He goes on to ask that if 'we can associate certain commitments with some but not all of those figures, are those commitments less important than the ones that all share?'⁸⁰ Furthermore, he notes that there are some commitments of normative positivism that are, in fact, shared by 'Hobbes, Bentham, Austin, MacCormick, Waldron, Postema, and conceivably (at least according to Waldron) Raz, among others.'⁸¹ The question before us, then is, 'whether the commitments shared

⁷⁷ *ibid* 288.

⁷⁸ John Gardner, 'Legal Positivism: 5 1□2 Myths' (2001) 46 **American Journal of Jurisprudence** 199. For discussion, see Schauer, 'Positivism Before Hart' (n 1) 288. It is unclear to me from reading Gardner whether he is actually making this claim but this is how Schauer reads him.

⁷⁹ Schauer, 'Positivism Before Hart' (n 1) 288.

⁸⁰ *ibid*.

⁸¹ *ibid*.

by some stalwarts of the positivist tradition but not others are the most important, and then we cannot avoid deciding why it is we want to know, as opposed to identifying by fiat the figures whose shared commitments are the most important.⁸² Schauer also notes that from among those legal positivists whom Gardner identifies, with the exception of Kelsen, and focusing exclusively on English language jurisprudence, the only positivist on Gardner's list whose relationship to normative positivism is difficult to establish clearly is Hart,⁸³ but that takes us back to the original question with which Schauer's article—a discussion of 'Positivism Before Hart'—is concerned, that is 'the question whether Hart's understandings of legal positivism should be considered uniquely authoritative as well as exclusive.'⁸⁴

Schauer's argument, in sum, is that '*even if* conceptual positivism is a logical prerequisite for normative or decisional positivism, nothing about which lies at the core and which is at the fringe flows from that fact.'⁸⁵ Furthermore, 'since the alleged priority of conceptual positivism follows even less historically than philosophically, there is no reason, at least on the basis of the existing arguments, for treating normative and decisional positivism as less entitled to the positivist mantle than conceptual positivism.'⁸⁶ Normative and decisional positivism both 'have their roots well planted in

⁸² *ibid* 289.

⁸³ See Section 2.4 below

⁸⁴ Schauer, 'Positivism Before Hart' (n 1) 289.

⁸⁵ *ibid* (emphasis added).

⁸⁶ *ibid*.

the positivist tradition, no more but no less than conceptual positivism',⁸⁷ and there is no 'reason to suppose that one more than the others lies at some supposed core of legal positivism.'⁸⁸ All three versions of legal positivism are 'important for some purposes and less so for others, and little would be lost if we were to recognize that we have inherited from the positivist tradition a multiplicity of positivist views, each of which have their virtues, and each of which have their purposes.'⁸⁹

Waldron has, similarly, argued that the worries that many conceptual positivists have that lead them to make the 'core commitments' argument are misconceived:

[I]t is surely worth discussing the general shape or character of a positivist jurisprudence, quite apart from the particular content that fills that shape. After all, legal positivism is a label associated with a very broad cluster of theories. At the level of the 'positivity' of law that interests legal positivists: some are interested in the separation of law and morality at the retail level; some are interested in the textual and/or rule-like qualities of law, for reasons that go beyond or stand apart from the separability thesis; some are interested in law as a distinctive institution and its institutional characteristics; and some are interested in the ethical autonomy of various legal-professional roles, such as judging. (We will call this 'Menu A'.) And at the level of what they see as the affirmative value or function of law (or legality or the rule of law), some normative theorists are interested in peace, some are interested in predictability (and other values connected with predictability, such as utilitarian prosperity or Hayekian autonomy), some are interested in the control of power, some are interested in democracy, some are interested in political obligation and/or legitimacy, and some are interested in the conditions of social coordination. (We will call this 'Menu B'.)

⁸⁷ *ibid.*

⁸⁸ *ibid.* 290.

⁸⁹ *ibid.*

Those who resist the general jurisprudential methodology associated with normative positivism may do so because they fear that a particular one of these interests from Menu B is being foisted on legal positivists—as though they must all have the programmatic interests that, say, Bentham or Hobbes had, or not count as real positivists at all. But *the fear is groundless*.⁹⁰

Why does Waldron think Coleman’s and other positivists’ worry is groundless? He says that Campbell and Postema and others ‘who emphasize the normative dimension of positivist jurisprudence are *not trying to foist their particular normative programme onto positivists in general* (though no doubt they have their own views on the normative issues).’⁹¹ For Waldron, what normative and decisional positivists are doing, instead is that they are ‘simply saying that the selection of something from Menu A [see above⁹²] as the aspect of positivity to focus on in one’s jurisprudence is not intelligible on its own, and cannot credibly be presented as a matter of pure ‘analysis’.’⁹³ For Campbell and Postema, and Waldron himself, for items from Waldron’s ‘Menu A’⁹⁴ to be to be ‘intelligible,’⁹⁵ they ‘must be *motivated*.’⁹⁶ Thus, what positivists such as Campbell, Postema, and Waldron are saying, in Waldron’s view, is that ‘we do not fully understand a positivist theory of law until we can map a choice from Menu A onto a choice from Menu B.’⁹⁷

⁹⁰ Waldron, ‘Normative (or Ethical) Positivism’ (n 15) 432-433 (emphasis added).

⁹¹ *ibid* (emphasis added).

⁹² See text to (n 90).

⁹³ Waldron, ‘Normative (or Ethical) Positivism’ (n 15) 433.

⁹⁴ See text to (n 90).

⁹⁵ Waldron, ‘Normative (or Ethical) Positivism’ (n 15) 433.

⁹⁶ *ibid* (emphasis added).

⁹⁷ *ibid*.

We are still left with answering the second part of the two-part question that serves as the title of this section, which is the question of whether or not conceptual positivism can logically coexist with normative positivism. The answer to this question is that it depends on what the specific beliefs are of the conceptual positivist and the normative positivist about the nature of and the creation of concepts, and their beliefs about whether or not concepts can be created or identified for purely descriptive reasons. Thus, as Schauer argues, '[i]f the conceptual positivist believes that there is a pre-existing concept that can be described without having or presupposing normative commitments, and if the normative positivist believes that constructing a concept of law must be based on normative considerations, then the two are incompatible.'⁹⁸ On the other hand, it is possible to argue that normative and conceptual positivism can coexist 'if one believes that concepts can be created for normative reasons without themselves being normative, or if one believes that people can have normative reasons for identifying and stressing non-normative concepts'.⁹⁹

I close this section with the observation that some works in the scholarly literature doubt the value of non-normative, purely conceptual analysis,¹⁰⁰

⁹⁸ Schauer, 'Positivism Before Hart' (n 1) 283n53.

⁹⁹ *ibid.*

¹⁰⁰ Brian Leiter, *Naturalizing Jurisprudence* (Oxford University Press, 2007) Ch 4; Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001) 355; Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Skepticism' (2011) 31 *Oxford Journal of Legal Studies* 663. For discussion, see Schauer, 'Positivism Before Hart' (n 1) 276.

and others also doubt that purely conceptual analysis is even possible,¹⁰¹ arguing that it is not possible for concepts to be described ‘without taking any moral or normative freight.’¹⁰² Hart, of course, argued that it *is* possible, arguing in the *Postscript to The Concept of Law* that his account ‘is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear’¹⁰³ in his account of law, and Coleman has expressed agreement with Hart.¹⁰⁴ Waldron, in an article in which he promotes a democratic version of normative positivism, weighs in on this issue:

For the most part, the methodological argument has been about whether there *can* be a purely descriptive jurisprudence uninvested with evaluative content. Those who believe that there can be such a jurisprudence have not wanted to deny that there can also be a normative jurisprudence. Thus, in the *Postscript* to the second edition of *The Concept of Law*, Hart writes that he is willing to concede that evaluative theories like those of Dworkin or Finnis are “of great

¹⁰¹ E.g. John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011) 3 (‘It is often supposed that an evaluation of law as a type of social institution...must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that no theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.’); Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 143 (‘Hart’s ambition of a purely descriptive solution to the central problems of legal philosophy is misconceived, as are the comparable ambitions of many leading political philosophers.’).

¹⁰² Schauer, ‘Positivism Before Hart’ (n 1) 276.

¹⁰³ Hart, *The Concept of Law* (n 7) 240.

¹⁰⁴ Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) 178 (‘Hart can, and surely would, accept the normativity of conceptual analysis of law while insisting—quite rightly—that his is a project of descriptive jurisprudence—by which he means only that it is not undertaken with the goal of warranting an inference from legality to legitimacy. If such an inference is warranted, it will be on substantive, and not conceptual or logical, grounds.’).

interest and importance as contributions to an evaluative justificatory jurisprudence.” His comments are purely defensive: he just does not want a descriptive or a conceptual jurisprudence to be precluded out of hand. Hart does say—slightly less defensively—that his sort of jurisprudence offers “an important *preliminary*” to any useful moral criticism of law,” just as Jules Coleman wants to insist—first things first, as it were—that “jurisprudence does not *begin* by trying to determine which features of law are important or interesting.” Even though it may go on to be evaluative (and democratic and whatever you like), it has to begin by giving a plausible non-evaluative account of what law essentially is.¹⁰⁵

Waldron is willing to concede that Hart’s and Coleman’s opinion on this matter may be ‘made to look plausible in the case of...[a] sort of ultra-abstract general jurisprudence’,¹⁰⁶ but argues that in the case of jurisprudence of the sort envisaged by a normative positivist philosophy, and of the sort that is the subject of both Waldron’s article and my thesis, is ‘bound to be a value-laden jurisprudence.’¹⁰⁷ For the purposes of the present discussion, then, what we may say about this debate is that even if purely analytical jurisprudence *is* a possibility, it is in any event not the type of jurisprudence that the present discussion is concerned with, being a jurisprudence that is both normative and evaluative. Even if purely analytical jurisprudence of the sort envisaged by Hart and Coleman is a possibility, Griffith’s positivism, in any event, was of the normative variety and was very much what Waldron would describe as a ‘value-laden jurisprudence.’¹⁰⁸

¹⁰⁵ Jeremy Waldron, ‘Can There Be a Democratic Jurisprudence?’ (2009) 58 **Emory Law Journal** 675, 681-682 (citations omitted).

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

2.4 BENTHAM, AUSTIN, AND HART

This section turns to a discussion of the legal positivism of Bentham, Austin and Hart. The justification for doing so for the purposes of this chapter was made clear in the introduction. To repeat, the justification for considering Bentham's and Austin's positivist convictions for the purposes of this chapter is that their positivist convictions are closer to Griffith's than to the positivist convictions of Hart and other post-Hart legal positivists, who focus only or predominantly on the non-normative versions of positivism. Furthermore, a discussion of Bentham's and Austin's positivism helps in challenging the common belief that pre-Hart versions of legal positivism are not entirely relevant to modern positivist jurisprudence. And the justification for considering Hart's positivism, other than the fact that his positivism represents the dominant view about modern positivism in general, is that it is unclear whether or not Hart ought to be described as a normative positivist. Asking the question of whether or not Hart was a normative positivist, then, helps us appreciate the difficulties associated with an interpretive exercise of the sort in which this chapter is engaged, such difficulties being the result of the ambiguous nature of the arguments of the theorist whose work is being examined.

2.4A *Bentham and Austin*

It is widely recognized that both Bentham and his disciple Austin 'constantly insisted on the need to distinguish, firmly and with maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this

apparently simply but vital distinction.¹⁰⁹ Thus, to say that Bentham and Austin espoused, using the terminology introduced in Section 2.3, the variety of positivism known as conceptual positivism ‘should attract little disagreement.’¹¹⁰

However, Bentham’s and Austin’s commitment to positivism is not limited to the conceptual variety. Both Bentham and Austin’s commitment to the separation of law and morality was not simply ‘a function of disinterested observation’,¹¹¹ given that both believed ‘that there was a non-descriptive point in separating law from morality, and that point was *to facilitate the reform of the law*.’¹¹² I italicize a portion of the previous sentence because that italicized text captures one of the primary beneficial moral consequences on the basis of which both Bentham and Austin encouraged the separation of law and morality—that such separation would facilitate law reform. As James Allan puts it in a recent book: ‘The claim or insistence, that what law is and what it ought to be should be kept separate, *lies at the heart of the Benthamite project*. You need to know what you have before you can improve it, reform it and make it better’.¹¹³ As Schauer notes:

Bentham was...a vehement critic of existing law, both in detail and in the large. The common law was for him anathema, as was judicial legislation and the entirety of the law of evidence, and these examples demonstrate the scale of Bentham’s critique. His objections to English

¹⁰⁹ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 **Harvard Law Review** 593, 594.

¹¹⁰ Schauer, ‘Positivism Before Hart’ (n 1) 283.

¹¹¹ *ibid.*

¹¹² *ibid* (emphasis added).

¹¹³ James Allan, *The Vantage of Law* (Ashgate 2013) 9 (emphasis added).

law went to large blocks of it—perhaps all of it—and separating what law is from what law ought to be, and thus separating law and morality, was essential to Bentham’s aim of reforming the substance and structure of the English legal system. Moreover,...Bentham’s normative agenda was not subsidiary to his conceptual or descriptive program. On the contrary, it was his normative agenda that drove the importance of distinguishing law as it is from law as it ought to be. In terms of motivation—which is of course not the same as logical or conceptual priority—there is little doubt that Bentham’s conceptual positivism was developed for normative reasons.¹¹⁴

For Bentham, and Austin as well, therefore, the positivist separation of law and morality was a matter of *choosing* a concept of law that would facilitate law reform.

We may say based on the above evidence that Bentham and Austin were both normative positivists, although matters are less clear than in Bentham’s case with regard to Austin’s commitment to normative positivism, for Austin also suggested that he had purely descriptive goals.¹¹⁵

What about the *normative decisional positivism* (that is, the view that the discretion of judges and others entrusted with the application of law ought to be minimized) of Bentham and Austin? Taking Bentham first, it is clear that Bentham believe that the discretion enjoyed by legal decision-makers ought

¹¹⁴ Schauer, ‘Positivism Before Hart’ (n 1) 283 (citations omitted).

¹¹⁵ *ibid* 283-284 (‘Things are not so clear with respect to Austin, who plainly had some goals that were purely descriptive. But Austin also pursued an extensive law reform agenda, described the advantages of distinguishing the legal is from the legal ought for reasons other than descriptive accuracy, believed that his normative law reform positions were facilitated by his theory of law and that his theory of law flowed from his utilitarianism, and in his later writings on codification showed an especially strong normative side. Moreover, there is reason to believe that Austin’s reputation as non-normative has been fuelled, in part, by the less normative goals of some of his successors—Thomas Erskine Holland, especially—whose expositions of Austinian ideas stripped away the normative aspects that for Austin co-existed with the descriptive.’) (citations omitted).

to be minimized, arguing as he did for the codification of the law in order to ‘preclude judges and other legal decision-makers in individual cases from making political, policy, economic, or moral judgments.’¹¹⁶ In Bentham’s vision of the law, the discretion enjoyed by judges was to be minimized to such an extent that, ‘if it had to exist at all, [judicial decision-making had to be limited] to the application of linguistically clear codes to particular events, with legal outcomes to be reached almost entirely by applying the ordinary meaning of the terms in the legal codes to the facts of particular cases.’¹¹⁷ Allowing judges and other decision-makers to determine moral questions ‘was simply not part of the process’¹¹⁸ for Bentham, and these views are a clear indication of Bentham’s normative decisional positivist views.

Was Austin a normative decisional positivist as well? Austin was not opposed to the same degree as Bentham to decision-making by judges, and Austin’s views on the matter evolved over the course of his career:

In the *Province of Jurisprudence Determined*, [Austin] says very little about judging or judge-made law, but does describe it as “highly beneficial and even absolutely necessary,” even while criticizing judges for legislating in a “timid, narrow, and piecemeal manner” and “legislating under cover of vague and indeterminate phrases.” But by the time Austin turned his attention more directly to codification, he not only wrote extensively in support of legislative codification generally, but also described it as “expedient,” especially in light of the “evils inherent in judiciary law,” evils he discussed at some length.¹¹⁹

¹¹⁶ *ibid* 284.

¹¹⁷ *ibid*.

¹¹⁸ *ibid*.

¹¹⁹ *ibid* 285 (citations omitted).

Schauer's analysis of Austin's work reveals that although Austin held somewhat different views from Bentham on the nature of and the desirability of common law decision-making and on what form codification ought to take, it is nevertheless the case that Austin ought to be classified as a normative decisional positivist, holding as Austin did 'the view that the legal system should be structured so that both the subjects of the law and the legal decision-makers who apply, interpret, and enforce it need have little recourse to morality (or policy, for that matter).'¹²⁰

Bentham and Austin held views that qualify both of them as conceptual, normative, and normative decisional positivists. These views were very similar to the positivist views expressed by Griffith in his Chorley Lecture, as we shall see in Section 2.5 below, following a discussion of the positivist convictions of Hart.

2.4B Hart

Out of all the scholars discussed herein, Hart's commitment to normative positivism is arguably the most difficult to prove, for in his key works on legal positivism, he made statements that could be read as pointing in both directions. That is to say, parts of these key works may be interpreted in a way that depicts Hart as being sympathetic to normative positivism and other parts may be read in a way that depicts him as not being so.

Among those key works, the most suitable to consult in order to ascertain Hart's commitment to normative positivism are Hart's 1958 article in the

¹²⁰ *ibid.*

Harvard Law Review that sparked his well-known debate with Lon Fuller¹²¹ and *The Concept of Law*, described by Coleman as ‘the most important and influential book in the legal positivist tradition’—a book whose ‘importance is undisputed’ but a book about which ‘there is a good deal less consensus regarding its core commitments, both methodological and substantive.’¹²²

To read into Hart’s work a normative positivist position, one can turn to Chapter 9 of *The Concept of Law*, where Hart details the good consequences that he thinks would result from *choosing* a positivist over a natural law understanding of law. Towards the close of that chapter, he details what is at stake in choosing the wider (positivist) concept of law versus the narrower (natural law) understanding of law when he says:

For what really is at stake is the *comparative merit* of a wider and a narrower concept or way of classifying rules.... If we are to make a *reasoned choice* between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.

The wider of these two rival concepts of law includes the narrower. If we adopt the wider concept, this will lead us in theoretical inquiries to group and consider together as ‘law’ all rules which are valid by the formal tests of a system of primary and secondary rules, even though some of them offend against a society’s own morality or against what we may hold to be an enlightened or true morality. If we adopt the narrower concept we shall exclude from ‘law’ such morally offensive rules. It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept.¹²³

¹²¹ Hart, ‘Positivism and the Separation of Law and Morals’ (n 109); Lon L. Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 **Harvard Law Review** 630.

¹²² Coleman, ‘Incorporationism, Conventionality, and the Practical Difference Thesis’ (n 24) 99.

¹²³ Hart, *The Concept of Law* (n 7) 209 (emphasis added).

Hart's choice of words 'reasoned choice' and 'comparative merit' in the quotation above do suggest a sympathy towards normative positivism—the idea that a positivist understanding of law ought to be chosen for instrumental reasons.¹²⁴ What are these instrumental reasons? By adopting the wider, positivist understanding of law, he says, 'we can accommodate within it the study of whatever the special features morally iniquitous laws have, and the reaction of society to them.'¹²⁵ That, for Hart, is a good consequence of adopting a positivist understanding of law. On the other hand, are the consequences of adopting a narrower, natural law understanding of law (which says that morally iniquitous law is not really 'law') more beneficial to society than the consequences of adopting the wider positivist understanding? Hart does not believe so:

What then of the practical merits of the narrower concept of law in moral deliberations? In what way is it better, when faced with morally iniquitous demands, to think 'this is in no sense law' rather than 'This is law but too iniquitous to obey or apply'? Would this make men more clear-headed or readier to disobey when morality demands it? Would it lead to better ways of disposing of the problems such as the Nazi regime left behind? No doubt ideas have their influence; but it scarcely seems that an effort to train and educate men in the use of a narrower concept of legal validity, in which there is no place for valid but morally iniquitous laws, is likely to lead to a stiffening of resistance to evil, in the face of threats of organized power, or a clearer realization of what is morally at stake when obedience is demanded. ...Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great

¹²⁴ See Schauer, 'Positivism Before Hart' (n 1) 277n34.

¹²⁵ Hart, *The Concept of Law* (n 7) 209.

the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.¹²⁶

Hart continues until the end of the chapter to argue that the beneficial consequence of adopting a positivist understanding of law—that consequence being that a positivist understanding would encourage resistance to immoral or iniquitous law—offers the best reason for citizens of a legal system to adopt a positivist understanding of law. And when Hart famously debated Lon Fuller in the pages of the *Harvard Law Review*, there, too, Hart, in defending the positivism of Bentham and Austin, talked about the beneficial consequences of adopting a positivist conception of law.¹²⁷

If the above offers the best evidence in support of the claim that Hart was sympathetic to normative positivism, other aspects of his legal positivism point in the opposite direction. In the *Postscript to The Concept of Law*, Hart stresses that his account ‘is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral grounds the forms and structures which appear in [his] general account of law, though a clear understanding of these is...an important preliminary to any useful moral criticism of law.’¹²⁸

In the light of the above evidence pointing in opposite directions, scholars have, understandably, concluded that it is not possible to say with confidence whether or not Hart belongs to the normative positivist school of

¹²⁶ *ibid* 210.

¹²⁷ Hart, ‘Positivism and the Separation of Law and Morals’ (n 109).

¹²⁸ Hart, *The Concept of Law* (n 7) 240.

thought, but neither, they say, is it possible to reach with certainty the opposite conclusion. Julie Dickson, for example, writes:

Hart appears to present the issue of whether to classify morally iniquitous law as law or not as a *choice*, and to contend that the choice is to be influenced by the intellectual and moral beneficial consequences resulting from one way of classifying it over another. This view sits awkwardly with the approach taken to characterising law elsewhere in [*The Concept of Law*], where Hart appears to regard his task as being to explain the *nature* of law, and where he seems to view law as having a nature, and as having essential properties which make it into what it is, and which are capable of being ascertained. If this is so, then it is incongruous to speak in terms of choosing to view law in one way or another depending on the beneficial consequences of so doing.¹²⁹

Endorsing Dickson's description of Hart's contradictory views noted above as 'awkward[]', Schauer argues that '[e]ven if the warrant for characterizing Hart as a normative positivist is questionable, the justification for claiming that his positivism was entirely descriptive is equally so.'¹³⁰

It is, furthermore, unclear as to what Hart's views were on normative decisional positivism—the view that judicial discretion ought to be minimized. Allan argues that Hart does not make clear his views on normative decisional positivism except in 'the most indirect way',¹³¹ and one would, accordingly, have to make inferences as to what Hart's views on the subject are. On the one hand, some of Hart's arguments in *The Concept of*

¹²⁹ Julie Dickson, 'Is Bad Law Still Law? Is Bad Law Really Law?' in Maksymilian Del Mar and Zenon Bankowski (eds) *Law as Institutional Normative Order* (Ashgate 2009) 164 (first emphasis added).

¹³⁰ Schauer, 'Positivism Before Hart' (n 1) 278n34.

¹³¹ Allan, 'Positively Fabulous' (n 2) 232.

Law suggest that judicial law-making is inevitable, and perhaps even desirable, as when he says in the *Postscript* to that book:

That judges should be entrusted with law-making powers to deal with disputes which the law fails to regulate may be regarded as a *necessary price to pay* for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature.¹³²

On the other hand, Allan argues that some of Hart's other works on Bentham and some of the arguments that he makes in other works reflect views that may be read as being sympathetic to normative decisional positivism; Allan, however, accepts that these conclusions are speculative:

Recalling that Hart welcomes at least the minimum exercise of discretion that the penumbra of uncertainty provides, where would it be most defensible to put him in the range between one who desires relatively little judicial discretion and one who desires relatively great judicial discretion? One can infer, in reading essays like 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' and some of his essays on Bentham, that Hart would have disapproved of pervasive, or relatively great amounts of, judicial discretion. ...[However,] [h]ow exactly this Hart of mine would have advocated limiting that discretion—by not adopting a Bill of Rights say, or by shunning civil law drafting techniques, or by proscribing a full-blooded purposive approach to statutory interpretation—is far too speculative....¹³³

The question whether Hart was a normative positivist or normative decisional positivist is one that is difficult to answer, as evidenced from the above, and the best one can do is to make inferences about what Hart probably meant. Schauer's observation is perhaps the best way to close this section, which is, to repeat, that 'even if the warrant for characterizing Hart

¹³² Hart, *The Concept of Law* (n 7) 275 (emphasis added). See also Allan, 'Positively Fabulous' (n 2) 234 for similar quotations from *The Concept of Law* that suggest that Hart held this view about the inevitability, and perhaps even desirability, of judicial lawmaking.

¹³³ Allan, 'Positively Fabulous' (n 2) 236 (citations omitted).

as a normative positivist is questionable, the justification for claiming that his positivism was entirely descriptive is equally so.¹³⁴

2.5 GRIFFITH'S NORMATIVE POSITIVISM

We are finally in the position, having acquired the necessary vocabulary and having cleared some of the jurisprudential ground that is necessary to cover in a discussion of normative positivism, to discuss Griffith's commitments to normative positivism.

Griffith discusses legal positivism in his lecture on a number of occasions. Early on in the lecture, he refers to the work of positivists such as M. Duguit whose work he found influential. Speaking of Duguit, he writes that Duguit 'seemed to me to present the nearest thing to a solid, positivist, unmetaphysical, non-natural foundation for analytical jurisprudence.'¹³⁵ 'I read him avidly',¹³⁶ he writes, and recalls that 'I wrote a long essay about him for my tutor Ivor Jennings who never returned it or, for all I know, read it.'¹³⁷

Much of the space in the lecture is devoted to Griffith's critique of the anti-positivist accounts of his contemporaries Lord Hailsham,¹³⁸ Lord Scarman,¹³⁹ and Ronald Dworkin.¹⁴⁰ Dworkin's *Taking Rights Seriously* was

¹³⁴ Schauer, 'Positivism Before Hart' (n 1) 278n34.

¹³⁵ Griffith, 'The Political Constitution' (n 3) 6.

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (First Edition, Collins 1978).

¹³⁹ Sir Leslie Scarman, *English Law: The New Dimension* (Stevens 1974).

a recent publication at the time of Griffith's lecture, and of Dworkin's claim in that book that his theory 'identifies a particular conception of *community morality* as decisive of legal issues',¹⁴¹ Griffith writes that Dworkin attempts 'to hide in a mist of words the conflict which is the characteristic of our society.'¹⁴² Dworkin's notion of a community morality, according to Griffith, is 'nonsense at the very top of a very high ladder.'¹⁴³

Griffith's clearest endorsement of positivism comes much later in the lecture when he writes:

I do not believe that the concept of law is a moral concept. Of course I will, as cheerfully and as seriously as the next person, engage in discussions about the value of individual laws and pass moral judgments about them. But laws are merely statements of a power relationship and nothing more. A law remains a political act about which it is indeed possible to hold opinions. But it can be called good only in the limited sense that a number of people hold that opinion of it. If I had to find a name for this position I would call it Mini-Austinism. ...

I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position; that laws made by those in authority derive validity from no other fact or principle, and so impose no moral obligation of obedience on others; that so-called individual or human rights are no more and no less than political claims made by individuals on those in authority; that a society is endemically in a state of conflict between warring interest groups, having no consensus or unifying principles sufficiently precise to be the basis of a theory of legislation.¹⁴⁴

¹⁴⁰ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

¹⁴¹ *ibid* 126 (emphasis added).

¹⁴² Griffith, 'The Political Constitution' (n 3) 11.

¹⁴³ *ibid*.

¹⁴⁴ *ibid* 19.

Griffith describes his position as ‘Mini-Austinism’¹⁴⁵ and, like Austin, we see Griffith in this paragraph endorsing the separability thesis.¹⁴⁶ Griffith’s claim that ‘I do not believe that the concept of law is a moral concept’¹⁴⁷ is the clearest endorsement of conceptual positivism if there ever was. Recall from Section 2.2 that conceptual positivism is the claim, as Schauer explains it, that legal positivism is ‘an attribute of a concept’,¹⁴⁸ and ‘it is in the nature of the concept of law that morality is either no part of it or is not necessarily a part of it.’¹⁴⁹ Griffith too believes that morality is not part of the concept of law, and for Griffith, just as for Hart,¹⁵⁰ the existence of law does not impose on citizens ‘the moral obligation of obedience’,¹⁵¹ a connection between Griffith and Hart that Tom Poole also draws in a recent work.¹⁵²

What Griffith is also doing in the paragraph just quoted is endorsing the meta-ethical theory known as *moral anti-realism*. Anti-realism is the view that denies the *moral realist* claim that ‘there are moral facts which

¹⁴⁵ *ibid.*

¹⁴⁶ Austin, *The Province of Jurisprudence Determined* (n 9) 157.

¹⁴⁷ Griffith, ‘The Political Constitution’ (n 3) 19.

¹⁴⁸ Schauer, ‘Positivism Before Hart’ (n 1) 276.

¹⁴⁹ *ibid.*

¹⁵⁰ Hart, *The Concept of Law* (n 7) 209-210.

¹⁵¹ Griffith (n 3) 19.

¹⁵² Thomas Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (2007) 70 *Modern Law Review* 250, 257 (‘Griffith shares H.L.A. Hart’s conviction that only positivism could make ‘men clear sighted in confronting the official abuse of power’, was most likely ‘to lead to a stiffening of resistance to evil.’) (citation omitted).

determine the truth or falsity of the judgments people make'.¹⁵³ Moral anti-realists, in other words, believe that:

*[T]here are only moral judgments and the people who make them. Some of the judgments that are made we like, and some we do not like. Some we repudiate and some we cherish. Some we ignore, and some we ride out to kill for. But there are no objective matters of fact which justify these attitudes or which make any of the judgments correct or any of them incorrect.*¹⁵⁴

Thus, when Griffith writes that '[a] law remains a political act about which it is indeed possible to hold opinions... [but that] it can be called good only in the limited sense that a number of people hold that opinion of it',¹⁵⁵ he is endorsing moral anti-realism. I will come back to the relationship between Griffith's moral anti-realism and his other commitments (namely his commitments to democracy and normative positivism) later in the chapter.¹⁵⁶

For present purposes, however, the argument worth stressing is that like Bentham and Austin, and among contemporary scholars like Campbell, Waldron, and Postema and others, Griffith was not a purely conceptual positivist whose positivism was merely 'a function of disinterested observation'.¹⁵⁷ Griffith was not merely interested in describing the nature of the legal system or in accurately describing attributes of the concept of law in a conceptual positivist fashion. No, Griffith, in his Chorley Lecture argues

¹⁵³ Waldron, *Law and Disagreement* (n 38) 165.

¹⁵⁴ *ibid.*

¹⁵⁵ Griffith, 'The Political Constitution' (n 3) 19.

¹⁵⁶ See Section 2.6 below.

¹⁵⁷ Schauer, 'Positivism Before Hart' (n 1) 283.

'for a highly positivist view of the constitution'¹⁵⁸—he argues, as a normative positivist would, for *choosing* a concept of law that sees law, the way a conceptual positivist describes it, for normative reasons. As Poole has observed, 'the positivist position [Griffith] espouses has an explicit political point.'¹⁵⁹ Griffith was advocating a program of legal understanding in which a positivist conception of law and morality is chosen for instrumental reasons.

Griffith was also a normative decisional positivist. Recall from Section 2.2 that normative decisional positivism is the view that 'legal systems *should be* designed to minimize the discretion of judges, police officers, and other legal officials'.¹⁶⁰ Recall also that the reasons normative decisional positivists believe that the discretion of judges and other law-applying officials should be minimized have to do with an interest in preventing the citizen from being subjected to arbitrary government.¹⁶¹ Who knows what the judges would come up with, believes the normative decisional positivist, if the judges' decisions were largely based on their own version of morality, and so the normative decisional positivist attempts to minimize the discretion enjoyed by judges and other officials in the legal system entrusted with the function of applying the law in order to minimize the possibility of arbitrary government.¹⁶²

¹⁵⁸ Griffith, 'The Political Constitution' (n 3) 19 (emphasis added).

¹⁵⁹ Poole, 'Tilting at Windmills? Truth and Illusion in "The Political Constitution"' (n 152) 257 (noting further that Griffith 'defends positivism as the best method for uncovering the reality beneath the layers of illusion and rhetoric.') (citation omitted).

¹⁶⁰ Schauer, 'Positivism Before Hart' (n 1) 280 (emphasis added).

¹⁶¹ Waldron, *Law and Disagreement* (n 38) 167.

¹⁶² *ibid.*

Arbitrariness for the normative decisional positivist could take a number of forms, and I noted above¹⁶³ Waldron's discussion of at least three possible ways in which legal decisions may be appear to the normative decisional positivist to be arbitrary.¹⁶⁴ The sense of 'arbitrariness' of legal decisions that Griffith was interested in minimizing was the third sense in which Waldron describes the concept of arbitrariness:

Some feel that even if judges are making moral decisions as reasonably and as predictably as they can, still their decisions lack *political legitimacy*. It is for the people or the legislators they have elected to make that sort of decision; it is not for the judges to take the determination of social principle and social value into their own hands. In this democratic sense, 'arbitrary' means something like 'without authority or legitimacy'.¹⁶⁵

As I shall demonstrate in the next paragraph with evidence from Griffith's lecture, Griffith was a normative decisional positivist who wanted to avoid the arbitrariness that would result if the decisions of *unelected* judges, whose decisions lack political legitimacy, turned on their moral judgment.

What evidence do we have that Griffith was a normative decisional positivist interested in minimizing the discretion of judges for democratic reasons? An argument running through much of Griffith's lecture was his opposition to the adoption, in the United Kingdom, of a bill of rights. Griffith believed in minimizing the discretion of judges and opposed handing over to judges the power to interpret 'woolly principles and even

¹⁶³ See text to (n 60).

¹⁶⁴ Waldron, *Law and Disagreement* (n 38) 167-168.

¹⁶⁵ *ibid* 168.

woollier exceptions'¹⁶⁶ under a bill of rights. In other words, Griffith opposed bills of rights because of his interest in avoiding the arbitrariness that would result from giving judges strong interpretive powers that judges normally enjoy under such legal instruments. This opposition to bills of rights, driven by his normative decisional positivism, is evident on a number of occasions in his lecture, arguably most clearly so in the following quote:

[W]e should not try to solve our problems by the application of...a Bill of Rights. If we incorporate the European Convention into our domestic law, [important political] questions...will be left for determination by the legal profession as they embark on the happy and fruitful exercise of interpreting woolly principles and even woollier exceptions. ...

The solution to such problems should not lie with the imprecisions of Bills of Rights or the illiberal instincts of judges. ...

If we had a Bill of Rights, ...political questions of much day-to-day significance would, even more than at present, be left to decision by the judiciary.¹⁶⁷

Griffith believed that bills of rights hand over strong interpretive powers to judges. He believed that it is important for a legal system to minimize the discretion of law-applying judicial officials in order to avoid the arbitrariness that would result from, in Waldron's words, 'the contamination of legal decision by [the] moral judgment'¹⁶⁸ of unelected judges. Tom Campbell describes the version of normative positivism that opposes bills of rights in this manner as a form of *democratic positivism*:

[Democratic positivism is] a prescriptive version of legal positivism according to which rule governance is seen as an essential ingredient

¹⁶⁶ Griffith, 'The Political Constitution' (n 3) 14.

¹⁶⁷ *ibid.*

¹⁶⁸ Waldron, *Law and Disagreement* (n 38) 167.

of any social and political organisation that effectively promotes the human rights values of wellbeing, equality and respect for persons. Democratic positivism focuses on the value of rules, their impartial administration and their democratic legitimation. Rights feature in democratic positivism both in the formulation of what constitutes democracy (such as the right to vote and freedom of speech) and in the emphasis on having rules that are designed to promote wellbeing in ways that respect the equal worth of human beings.

The prime analytical recommendation in the articulation of democratic positivism is that we confront directly the ambiguity of such statements as ‘you have a right to life’ which may be taken to be either an ‘is’ or an ‘ought’ statement. Statements that this or that person has this or that right may be taken as factual assertions, that there is in place in a specific community/society/law an effective entitlement, or as prescriptive assertions that there ought to be such an effective entitlement in place. Ambiguous talk of moral or human rights that run the ‘is’ and the ‘ought’ together in ways that suggest that people in some mysterious way do have rights that they do not in practice have, although perhaps they ought to have, is an impediment both to clear thinking about rights and to their effective articulation and implementation.¹⁶⁹

Griffith did not articulate with the same level of detail the theory of democratic positivism as does Campbell in the quotation above, but Griffith’s opposition to bills of rights for democratic reasons does suggest that Griffith may appropriately be described as a democratic positivist—someone who promotes the positivist separation of law and morality for democratic reasons.

To close this section, it is worth reiterating that Griffith’s legal positivism was not of the purely conceptual variety. Unlike a great many adherents of contemporary legal positivism, Griffith was not simply interested in accurately describing the nature of a legal system or interested in accurately

¹⁶⁹ Campbell, *Rights* (n 63) 193.

describing the concept of law.¹⁷⁰ Far from it, he urged for the adoption of a positivist conception of law for normative reasons. Griffith believed that the decisions that govern us ought to be taken by democratically accountable officials rather than by unelected judges. Thus, he said, ‘Bills of Rights...merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political. I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable.’¹⁷¹ He re-articulated his arguments against bills of rights and his belief in the need to place our faith in the democratic process in an article published shortly after the enactment of the Human Rights Act 1998, an article in which he discussed the ‘dangers of entrusting the judiciary with too much power at the expense of the democratic process.’¹⁷²

2.6 THE CONSTITUTION IS WHAT HAPPENS: GRIFFITH’S DEMOCRATIC POSITIVISM AND HIS MORAL ANTI-REALISM

Griffith famously defined the UK constitution in his Chorley Lecture in the following memorable way:

The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.¹⁷³

¹⁷⁰ For a discussion of conceptual positivism, see Section 2.2A above.

¹⁷¹ Griffith, ‘The Political Constitution’ (n 3) 16.

¹⁷² JAG Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 **The Modern Law Review** 159, 159.

¹⁷³ Griffith, ‘The Political Constitution’ (n 3) 19.

More than two decades later, Griffith wrote again about the concept of unconstitutionality in the context of the UK constitution:

It is not therefore possible to argue that there is something unconstitutional or unhistorical or logically perverse in asserting, as does Sir John [Laws], that judges should further invade the province of Executive decision-making by the extension of judicial review. What can be argued is whether particular invasions are politically unwise or undesirable.¹⁷⁴

Why did Griffith describe the constitution in this way? Some commentators have interpreted Griffith's description of the UK constitution in ways that, I believe, are not entirely fair to Griffith, and in Chapter 3, I will offer a defence of Griffith that counters those interpretations of Griffith's words. But before turning to what I believe these words do *not* mean, I want in this section to argue what I think they *do* mean.

My argument in this section is that when Griffith's description of the UK constitution quoted above and his views on the concept of unconstitutionality in the context of the UK constitution are read in the light of Griffith's other philosophical commitments, we better understand why Griffith defined the UK constitution in the manner that he did. There is a certain coherence, I will argue, in defining the constitution the way Griffith did and in holding normative positivist views, holding the views that Griffith did about democracy, and subscribing, as Griffith did, to the meta-ethical theory known as moral anti-realism.

In order to defend this argument, I will address two questions. Section 2.6A will ask why legal positivism is an attractive theory for someone committed

¹⁷⁴ Griffith, 'The Brave New World of Sir John Laws' (n 172) 175.

to democracy, and Section 2.6B will ask why legal positivism is an attractive theory for someone committed to moral anti-realism.

2.6A Why Griffith the Democrat Found Legal Positivism Attractive

Why would a democrat—a partisan of democracy if you will—find legal positivism attractive? Not every theorist committed to democracy finds legal positivism attractive, of course. Ronald Dworkin is a prominent example. In a book review of a book by legal positivist Jules Coleman,¹⁷⁵ Dworkin provided a reappraisal of legal positivism—a reappraisal in which he argued that positivism once ‘had a democratic flavor’¹⁷⁶ but that that democratic flavour no longer remained:

The political influence of legal positivism has sharply declined in the last several decades..., and it is no longer an important force either in legal practice or in legal education. Government has become too complex to suit positivism's austerity. The thesis that a community's law consists only of the explicit commands of legislative bodies seems natural and convenient when explicit legislative codes can purport to supply all the law that a community needs. When technological change and commercial innovation outdistance the supply of positive law, however—as they increasingly did in the years following the Second World War—judges and other legal officials must turn to more general principles of strategy and fairness to adapt and develop law in response. It then seems artificial and pointless to deny that these principles, too, figure in determining what law requires. Following the war, moreover, the idea steadily gained in popularity and in constitutional practice that the moral rights people have against lawmaking institutions have legal force, so that if the legislature condemns a class of citizens to second-class status, its act is not simply wrong but also void. Once again, it seemed increasingly pointless to declare that these moral constraints on government were not themselves part of the community's law. The political appeal of positivism correspondingly drained away. It was associated no longer

¹⁷⁵ Coleman, *The Practice of Principle* (n 104).

¹⁷⁶ Ronald Dworkin, ‘Thirty Years on’ (2002) 115 *Harvard Law Review* 1655.

with democratic progress, but with conservative majoritarianism; it was liberal judges who appealed to morality in justifying greater legal protection for individual rights. Most academic lawyers assumed that if a general theory about the nature of law was needed at all, it had to be more subtle than legal positivism.¹⁷⁷

This is not a flattering reappraisal of legal positivism, and for someone committed both to legal positivism and democracy, it seems important to respond to Dworkin's claims and to defend legal positivism from a democratic perspective.

Just exactly that type of defence is provided in a recent article by Waldron, who argues that he has 'more faith in positivist jurisprudence than Dworkin does'.¹⁷⁸ Waldron argues that what explains, at least in part, Dworkin's views about positivism quoted above is the fact that Dworkin 'associates democracy with a jurisprudence of rights enforced by the judiciary'.¹⁷⁹ Democracy, of course, is an 'essentially contested concept',¹⁸⁰ and some theorists define that concept to mean much more than just a thin procedural idea of majority rule and prefer a substantive conception of democracy that includes the protection of substantive rights; as one commentator puts it, '[t]he concept of democracy...is a broad enough church to encompass both thin and fat, procedural and substantive, conceptions of democracy.'¹⁸¹

¹⁷⁷ *ibid* 1677-1678.

¹⁷⁸ Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (n 105) 683.

¹⁷⁹ *ibid* 682.

¹⁸⁰ WB Gallie 'Essentially Contested Concepts' (1965) 56 **Proceedings of the Aristotelian Society** 167.

¹⁸¹ James Allan, 'Thin Beats Fat Yet Again—Conceptions of Democracy' (2006) 25 **Law and Philosophy** 533, 535.

Dworkin's preference for the thicker, substantive conception of democracy is well known.¹⁸²

Waldron, however, in his democratic defence of legal positivism, rejects Dworkin's expansive definition of democracy:

I am not going to take [the Dworkinian line]. I do not want this to be just another argument about the affinity between legality and the substantive rights that these more expansive theorists associate with democracy. I do not just want to say, cheaply, that democracy is ultimately about individual rights; and law is too; therefore law is intrinsically democratic. I want a more robustly democratic jurisprudence than that.¹⁸³

For Waldron, democracy means something different. Waldron's conception of democracy is closer to the republican ideal rather than the liberal conception of democracy,¹⁸⁴ and he elaborates upon this republican conception in the following way:

For me, democracy includes the idea that rulers are chosen by the people whom they rule, the people determine the basis under which they are governed, and the people choose the goals of public policy, the principles of their association, and the broad content of their laws. The people do all this by acting, voting, and deliberating as equals, through elections and through their relations with representatives. The reference to the discipline of equality—acting, voting, and deliberating as equals—is crucial. People disagree and they need

¹⁸² E.g. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 17 ('Democracy means government subject to conditions—we might call these the "democratic" conditions—of equal status for all citizens.').

¹⁸³ Waldron, 'Can There Be a Democratic Jurisprudence?' (n 105) 680.

¹⁸⁴ See Michael J Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press 1998) 27 ('The liberal begins by asking how government should treat its citizens, and seeks principles of justice that treat persons fairly as they pursue their various interests and ends. The republican begins by asking how citizens can be capable of self-government, and seeks the political forms and social conditions that promote its meaningful exercise.') (citation omitted).

formal procedures to come to decisions from the baseline of those disagreements. And when I talk of decisions made among the people, I mean to refer to rather formal aspects of those decisions—formal in the sense of procedures disciplined at all times by the principle of political equality and by an awareness that lapses into informality often connote the lazy privileging of some voices over others.¹⁸⁵

Griffith, too, like Waldron, was sceptical of the liberal conception of democracy, as he made clear both in his critique of Scarman, Hailsham, and Dworkin in ‘The Political Constitution’¹⁸⁶ and in his critique of Sir John Laws.¹⁸⁷

To return to our discussion, then, why would a democrat like Waldron or Griffith, who holds something akin to a republican conception of democracy, find legal positivism attractive? What does a democratic defence of legal positivism look like? What do legal positivism and democracy have in common in terms of what they value?

Provenance. One answer to the questions just asked is that both democrats and legal positivists stress the importance of the *sources* of law. Positivists, as Waldron notes, are preoccupied with the issue of sources; they ‘present conceptions of law that are dominated by issues about provenance—where law comes from, how and by whom it is made.’¹⁸⁸ The preoccupation with sources was a feature of the early legal positivism of Hobbes,¹⁸⁹ Bentham¹⁹⁰

¹⁸⁵ Waldron, ‘Can There Be a Democratic Jurisprudence?’ (n 105) 680.

¹⁸⁶ Griffith, ‘The Political Constitution’ (n 3).

¹⁸⁷ Griffith, ‘The Brave New World of Sir John Laws’ (n 172).

¹⁸⁸ Waldron, ‘Can There Be a Democratic Jurisprudence?’ (n 105) 684.

¹⁸⁹ Thomas Hobbes, *Leviathan* (Richard Tuck ed., Cambridge University Press 1996—first published 1651) 183-184.

and Austin,¹⁹¹ all of whose positivism, unlike modern legal positivism, considered law to be the command of a sovereign. The question of source was so important for the early positivists that in this early positivist jurisprudence, '[o]ther questions, posed by an older tradition in jurisprudence—What is the content of the command? Is it just? Is it reasonable?—are brushed aside in this *imperious preoccupation with provenance*.'¹⁹²

Modern positivism, of course, rejects the command theory of law—a revision to positivist jurisprudence brought about by Hart's theory of law as 'the union of primary and secondary rules.'¹⁹³ Notwithstanding that rejection of the command theory of law, modern legal positivism remains preoccupied with the sources of law. As Waldron notes, 'Hart and his followers believe that rules of recognition identify rules as law mainly by their institutional pedigree—i.e., the mode of their enactment or where and how they were first laid down.'¹⁹⁴

¹⁹⁰ See HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press 1982).

¹⁹¹ Austin, *The Province of Jurisprudence Determined* (n 9).

¹⁹² Waldron, 'Can There Be a Democratic Jurisprudence?' (n 105) 685 (citation omitted) (emphasis added).

¹⁹³ Hart, *The Concept of Law* (n 7) Ch 5.

¹⁹⁴ Waldron, 'Can There Be a Democratic Jurisprudence?' (n 105) 685-686 (noting at 686n33 that '[m]odern positivists disagree about whether the criteria are solely matters of pedigree or whether they may also include criteria of morality and justice' but that 'even among those who think that a rule of recognition might include criteria of morality and justice, few countenance the possibility that moral criteria might do this work all by themselves without any reference to sources.').

What does a democratic positivist—that is, someone committed to legal positivism for democratic reasons—have to say about the issue of provenance? The answer, in two words, is *political legitimacy*. The democrat cares about a host of questions to do with what the source is of laws that govern a democratic society:

When there is a question about enforcing a given norm, a democrat will want to ask hard questions about its origin: where and by whom was the decision made that *this* should be one of the norms enforced in this society? If it was controversial, then how was that controversy resolved? Who exactly participated in the decision, and on what terms and through what processes did they participate? You may say that *anyone* interested in political accountability (not just a democrat) will want to press these questions. But a democrat will press them because he has very strong views about how decisions like these should be made. He believes that in principle *everyone* who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be adopted. He believes that every society should set up political institutions that embody this principle and should seek to reform or subordinate decision-making institutions that operate on any other basis.¹⁹⁵

Whereas the Hobbesian positivist's preoccupation was with there being a determinate sovereign, the democratic positivist's interest is not so much in who *is* the sovereign but rather '*who gets to be the sovereign*'.¹⁹⁶ For those committed to democracy, the question of who made the law, argues Waldron, is 'indispensable'.¹⁹⁷ Partisans of democracy are especially concerned with sources 'because they know that those whose enfranchisement they want to secure—"the common people"—are those who have historically been excluded from any participation in the processes by which norms for their

¹⁹⁵ *ibid* 688.

¹⁹⁶ *ibid* 689.

¹⁹⁷ *ibid*.

society are chosen.’¹⁹⁸ Thus, ‘[a]n interest in sources...is not just a hobby for democrats; it is a matter of *principle*, in regard to which they think experience shows that special vigilance is necessary.’¹⁹⁹ Moreover, for the democrat, what matters in addition to what the sources of law are is the concern that laws ‘come from the right source *in the right way*.’²⁰⁰

A democrat who is concerned with what the sources are of particular laws for reasons just outlined would worry about an anti-positivist notion of law that assigns pre-political validity to a norm. A democratic positivist would worry about claims that there is a ‘right answer’ in ‘hard cases’²⁰¹—a notion that, as one democratic positivist argues, fails ‘to distinguish invocations of morality that are supposed to be legally binding from those that are simply cases of judges exercising discretion.’²⁰² If an anti-positivist argues that a certain outcome is the right answer in a given case, the democratic positivist would want to know why. What is the source of that right answer? Who enacted that rule? Was it enacted democratically? How do we know that what the anti-positivist is claiming to be law is not simply the feelings of the particular judge or legal theorist? These are hard questions to which a democratic positivist would demand an answer as part of her allegiance to democracy.

¹⁹⁸ *ibid* 690

¹⁹⁹ *ibid* (emphasis added).

²⁰⁰ *ibid* 691 (emphasis added).

²⁰¹ Claims that are made in the anti-positivist jurisprudence of Ronald Dworkin. For a discussion of Dworkinian anti-positivism, see Chapter 3.

²⁰² Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86, 91.

Democracy and the Separability Thesis. The separability thesis was discussed above as a feature of legal positivism that unites nearly all legal positivists.²⁰³ Here, I consider the attraction of the separability thesis from a democratic perspective.

For Waldron, it is not difficult to explain ‘the discomfort of a democratic jurisprudence with any content-based criterion which refuses to recognize as law what a democratic legislature has enacted on the ground that it conflicts with what is taken to be justice.’²⁰⁴ In other words, a partisan of democracy should be uncomfortable with the idea that a democratically-enacted norm may be denied the label ‘law’ because it violates the subjective sense of justice of a judge or legal theorist or other person. Democrats, for Waldron, ‘are likely to insist *as part of our allegiance to democracy* that any content-based prejudices must be pushed aside in order to allow the people to choose freely for their law whatever norms they think appropriate.’²⁰⁵ Waldron acknowledges that this may be a ‘heretical position’²⁰⁶ for some modern philosophers, such as Dworkinians, who would say that their ‘allegiance to democracy (their theory of democratic legitimacy) has limits, which are defined by the essentials of their favorite theory of justice or theory of human rights.’²⁰⁷ From the Dworkinian or other anti-positivist (natural law) perspective, ‘democratic decision making can be tolerated only when the people do not get it too far wrong, or only when the people's decisions are not

²⁰³ See Section 2.2 above.

²⁰⁴ Waldron, ‘Can There Be a Democratic Jurisprudence?’ (n 105) 698.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

²⁰⁷ *ibid* (citation omitted).

too egregiously offensive to the political philosopher's independently established sense of justice and rights.'²⁰⁸

A democratic positivist, however, 'more than most other political theorists, [is] sensitive to the realities of *moral disagreement*.'²⁰⁹ Democratic positivists—

expect there to be disagreement about justice in an ordinary polity under normal conditions; they believe these disagreements should be resolved politically by fair procedures of voting; but they have no reason to say that anyone is required to change his *opinion* about justice simply because he was defeated in a fair vote. Accordingly, the democrat will accept that any given law may be regarded as unjust—or as embodying a mistake or misapprehension about justice—by a substantial percentage of those to whom it applies. If he believes nevertheless that the losers are required to accept the outcome of a fair vote (despite their views about justice), he will want to separate the proposition that a given norm was adopted in the right way from the proposition that it was the right norm to adopt. And this will be something like a democratic version of the separability thesis.²¹⁰

In other words, a democratic positivist expects there to be disagreement about notions of justice, and she believes that those disagreements ought to be voted upon and decided in a democratic way. Democratic positivists are very uncomfortable with the idea that the subjective sense of justice of a judge or theorist should trump a decision reached pursuant to a fair and democratic procedure. For the democratic positivist, it is important to separate 'the proposition that a given norm was adopted in the right way from the proposition that it was the right norm to adopt.'²¹¹

²⁰⁸ *ibid.*

²⁰⁹ *ibid* 700 (emphasis added).

²¹⁰ *ibid* (citations omitted).

²¹¹ *ibid.*

My argument for the purposes of this section is that when Griffith defines the constitution as ‘the constitution is no more and no less than what happens’,²¹² he is doing so as a democratic positivist for whom the democratic provenance of law is indispensable and for whom there are democratic reasons for separating law and morality. Griffith was a democratic positivist who worried about anti-positivist notions of law that were being advanced by his contemporaries²¹³—anti-positivist notions that assigned pre-political validity to the liberal principles that, his contemporaries argued, underpin what they considered to be the ‘constitution’. Griffith was uncomfortable with such anti-positivist understandings, in part, because it was unclear what the democratic provenance was of such liberal ‘constitutional’ rules that his contemporaries were defending and partly because he was uncomfortable with the idea that a subjective sense of justice of his liberal contemporaries was being advanced as ‘constitutional’ rules able to trump the democratic process.

Loughlin has recently provided a reinterpretation of Griffith’s lecture in which he reads Griffith in a similar way. Loughlin argues that for Griffith, ‘law meant hard positive law, most authoritatively enacted in statute’²¹⁴—a claim that Griffith made ‘with the intention of overthrowing metaphysical ideas (rule of law, separation of powers), puncturing common law myths, and ensuring that law could be placed at the service of scientific progress.’²¹⁵

²¹² Griffith, ‘The Political Constitution’ (n 3) 19.

²¹³ By which contemporaries I mean Scarman, Hailsham, Dworkin, and Laws.

²¹⁴ Martin Loughlin, ‘Modernism in British Public Law: 1919-79’ [2014] **Public Law** 56, 66.

²¹⁵ *ibid.*

Loughlin ascribes these views to what he calls the Modernist school of thought in UK public law. I believe that Loughlin's interpretation of Griffith may also be defended as a democratic positivist interpretation once we consider the reasons that Loughlin argues Griffith and other modernists were wary of describing the 'constitution' in expansive terms:

[The modernists'] focus remained fixed on the system of government rather than on the constitution. Alert to the tyranny of categories, they were circumspect in discussion of 'the constitution'. For modernists, the constitution was merely the assemblage of rules organising government, changing as the rules changed; any more abstract understanding of the term was felt to be a ploy to protect the values of the old regime which a new social order sought to overthrow.²¹⁶

Loughlin is correct to say that Griffith and other modernists rejected the abstract notion of 'the constitution' for the reasons he states, but I believe that, given Griffith's democratic positivist views, it is also possible to attribute Griffith's reluctance to speak of 'the constitution' in the same way as his liberal contemporaries because of the discomfort that he felt with anti-positivist notions of law. As any democratic positivist would be, Griffith valued the democratic provenance of law and was, to quote Waldron, very 'sensitive to the realities of moral disagreement',²¹⁷ a sensitivity that becomes evident in Griffith's lecture when he writes: 'All I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement.'²¹⁸ Griffith was aware in 1978 just as much as constitutional law scholars are aware to this day that,

²¹⁶ *ibid* 63.

²¹⁷ Waldron, 'Can There Be a Democratic Jurisprudence?' (n 105) 700.

²¹⁸ Griffith, 'The Political Constitution' (n 3) 12.

as leading modern textbooks remind us, in ‘the United Kingdom, the term ‘unconstitutional’ has *no defined content*’²¹⁹ and that there ‘seems no obvious criterion for deciding what is constitutional and what is not, and no authoritative selection of provisions which could be called ‘the constitution’.’²²⁰ Griffith, the democratic positivist, was very aware of the dangers of allowing unelected judges, about whom he said ‘I would trust no more than I trust princes’,²²¹ of having the power to declare their own moral preferences to be ‘constitutional’ rules that would put those rules beyond debate and beyond the democratic process. By arguing that ‘the constitution is no more and no less than what happens’,²²² Griffith the democratic positivist attempted to avoid the dangers to democracy that he believed were posed by the anti-positivist notions of the constitution promoted by his contemporaries. For Griffith the democratic positivist, the democratic provenance of law, as Richard Bellamy puts it in a discussion of normative positivists in general, ‘form[ed] an essential feature of its political legitimacy.’²²³

Griffith’s definition of the constitution ‘as no more and no less than what happens’²²⁴ is also explained, however, by his commitment to the meta-ethical theory known as moral anti-realism, to which we now turn. In order

²¹⁹ Anthony Bradley, Keith Ewing and Christopher Knight, *Constitutional and Administrative Law* (16th edition, Pearson 2014) 23-24 (emphasis added).

²²⁰ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 13.

²²¹ Griffith, ‘The Brave New World of Sir John Laws’ (n 172) 165.

²²² Griffith, ‘The Political Constitution’ (n 3) 19.

²²³ Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (n 202) 91.

²²⁴ Griffith, ‘The Political Constitution’ (n 3) 19.

to defend this claim, I will explore the question of why legal positivism might be an attractive theory for someone committed, as Griffith was, to moral anti-realism.

2.6B Griffith's Moral Anti-Realism and His Vision of the Constitution

I mentioned in the previous section the difference between moral anti-realism and moral realism, and noted that Griffith's arguments in his Chorley Lecture may be read as endorsing moral anti-realism.²²⁵ In this section, I explore the relationship between moral anti-realism and normative positivism. My argument in this section will be that Griffith's definition of the UK constitution (quoted above²²⁶) is also explained by his moral anti-realism.

Recall that a moral anti-realist believes that there are no objectively right answers, but only what people feel about the wrongness or rightness of something. Allan argues that for the democrat and the moral anti-realist, normative decisional positivism, the view that the discretion of judges ought to be minimized, is an attractive position because in 'a world where objective moral facts simply do not exist, where evaluations of right and wrong are in effect personal sentiments..., a judge's moral views seem unlikely to be any better than anyone else's.'²²⁷ So, the moral anti-realist, therefore, is likely to wonder: 'Why should an unelected judge's moral sentiments or judgment

²²⁵ See text to (n 153) – (n 154).

²²⁶ See text to (n 173) – (n 174).

²²⁷ Allan, 'Positively Fabulous' (n 2) 240.

over-ride those of the elected law-makers?’²²⁸ For the moral anti-realist, then, normative decisional positivism—the thesis that judicial discretion ought to be minimized for democratic reasons and in order to avoid arbitrary government²²⁹—is attractive because for someone who does not believe there are any ‘mind-independent’²³⁰ realities—for someone who does not believe, in other words, that there are objectively right answers—it is unlikely that that person would believe that judges have at their disposal objectively ‘right answers’ that ought to trump decisions reached by a majority of legislators who have been elected by a majority of citizens.²³¹

Another question that Waldron has addressed is whether the moral *realist* has any reason to find normative positivism *unattractive*. In other words, is it also the case that for the moral realist, natural law theory (which suggests that there are objective, morally correct answers) is attractive and normative positivism unattractive? Waldron does not believe so. Waldron argues that even if there may be objectively right answers, we have no way of determining what those answers are. As he puts it, even if there are such right answers, the answers do not ‘reach out...and grab the decisionmaker’.²³² Even if we accept as a matter of fact that there are

²²⁸ *ibid.*

²²⁹ See text to (n 58).

²³⁰ But see Waldron, *Law and Disagreement* (n 38) 164n1 (‘Some realists insist that [the facts which make some moral judgments...true and others false] must be ‘external’ or ‘mind-independent’; but this is too strong, since many realists do not want to deny that there would be no moral facts if conscious agents like ourselves did not exist, nor do they need to deny that reference to beliefs or feelings is sometimes included in the truth-conditions of moral propositions.’).

²³¹ Allan, ‘Positively Fabulous’ (n 2) 240-241.

²³² Waldron, *Law and Disagreement* (n 38) 186.

objectively right answers, that fact ‘does not drive the judge to pursue it, let alone determine that he will reach it. Different judges will reach different results even when they all take themselves to be pursuing the right answer’.²³³

For Waldron, it is not moral subjectivity but *moral disagreement* ‘that gives rise to our worries of judicial moralizing.’²³⁴ And ‘since realists have almost nothing of interest to say about the resolution of moral disagreement, they have nothing to offer to allay those concerns.’²³⁵ Waldron’s point is that arbitrariness exists under either philosophy (moral realism or moral anti-realism), and so the reasons that normative positivists find judicial law-making undesirable—reasons to do with ‘the desirability of certainty, security of expectation, and knowledge of what legally empowered officials [are] likely to require [of citizens]’²³⁶—are also reasons for the moral *realist* to support normative positivism:

If moral realism is false, then what clash in the court-room and in the political forum are people’s differing attitudes and feelings, and there will seem to be something *arbitrary* about any one of them prevailing over any of the others, when none can be certified, so to speak, on any credentials other than the fact that some people find it congenial. If realism is true, then what clash in the courtroom and in the political forum are people’s differing beliefs...about moral matters of fact. But that these are beliefs *about matters of fact* does not detract in any way from what will still seem to be a certain arbitrariness in one of them prevailing over any of the others...[A]rbitrariness is there, on either meta-ethical account.²³⁷

²³³ *ibid.*

²³⁴ *ibid* 187.

²³⁵ *ibid* 187.

²³⁶ *ibid* 167.

²³⁷ *ibid* 186-186.

Thus, since arbitrariness remains on either a moral realist or a moral anti-realist account, there is no reason to believe that the moral realist has more reason than the moral anti-realist to reject normative positivism; far from it, if arbitrariness is there on either meta-ethical account, then there is reason even for the moral *realist* to subscribe to normative positivism.

Let us return, now, to the question with which we are concerned in this subsection, namely the relationship between Griffith's moral anti-realism and his definition of the UK constitution.

I conclude this discussion with the observation that when Griffith was arguing that 'the constitution is no more and no less than what happens',²³⁸ I believe he was saying so not just as a democratic positivist (an argument I defended above²³⁹) but also as a moral anti-realist. His definition of the constitution as nothing more and nothing less than 'what happens'²⁴⁰ ought to be read alongside Griffith's commitment to moral anti-realism, a commitment that Griffith expresses in the following quote: 'A law remains a political act about which it is indeed possible to hold opinions. But it can be called good only in the limited sense that a number of people hold that opinion of it.'²⁴¹ Griffith was worried about invocations of morality (that reflect no more than the moral feelings of the invoker) being described as 'constitutional' rules when there is no reason, Griffith likely believed, to

²³⁸ Griffith, 'The Political Constitution' (n 3) 19.

²³⁹ See Section 2.6A.

²⁴⁰ Griffith, 'The Political Constitution' (n 3) 19.

²⁴¹ *ibid.*

believe that the views of judges who are declaring those rules to be constitutional rules are any better in moral terms than the views of the average individual. For reasons noted above, I believe that Griffith found normative positivism attractive not only because he was a democrat but *also* because he was a moral anti-realist. As Loughlin has observed, for Griffith, 'law meant hard positive law, most authoritatively enacted in statute'²⁴²—a claim that Griffith made 'with the intention of *overthrowing metaphysical ideas*'.²⁴³

²⁴² Loughlin, 'Modernism in British Public Law' (n 214) 66.

²⁴³ *ibid* 66 (emphasis added).

A RESPONSE TO GRIFFITH'S CRITICS

3.1 INTRODUCTION

I turn, in this chapter, to a defence of Griffith against the criticism of three of his critics, namely JWF Allison, Dawn Oliver, and Adam Tomkins. The principal argument of this chapter is that the criticism of these critics reflects a Dworkinian anti-positivist bias; Griffith's critics, I will attempt to demonstrate, presuppose a Dworkinian anti-positivist understanding of the UK constitution as the only possible understanding of it, on the basis of which presupposition they launch their critique against Griffith. In other words, their criticism of Griffith, I will argue, reflects a Dworkinian anti-positivist bias and a lack of appreciation of Griffith's normative positivism.

Among the three critics of Griffith discussed herein, I will spend the most amount of time on Tomkins's critique of Griffith. This is so because both Tomkins and Griffith together are often thought to be leading representatives of the school of thought known as political constitutionalism, yet a key difference between the two scholars' political constitutionalism—that difference being that Griffith's political constitutionalism is a form of normative positivism whereas Tomkins's political constitutionalism is built upon an understanding of the UK constitution that is Dworkinian anti-positivist in character—is rarely brought out in the scholarship. It will, therefore, be my aim in this chapter to draw attention to this key difference between the political constitutionalism of Tomkins and Griffith. This

argument, as I will make clear towards the end of the chapter, will have both a descriptive and an evaluative dimension.

3.2 DWORKINIAN ANTI-POSITIVISM AND ITS CRITICISM

Let us begin with a discussion of Dworkinian anti-positivism and some of its criticisms. A discussion of Dworkinian anti-positivism is necessary before we can turn to defending Griffith against the Dworkinian anti-positivist biases of his three critics.

3.2A Dworkinian Anti-Positivism

In *Taking Rights Seriously*, Dworkin argued that legal positivism ‘provides a theory of hard cases’¹ and argued that positivists misunderstand what judges do in such cases. Hard cases, according to Dworkin, are those cases in which ‘a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance’.² In such instances, Hart argued that judges use their discretion to make new law, but for Dworkin, this was a defect in positivist theory because of its neglect of the role that *principles* play in hard cases.

Dworkin argued that when the existing law does not provide clear instructions to judges on how to decide a case, ‘one party may nevertheless

¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 81. For an accessible discussion of Dworkin’s legal theory, see JG Riddall, *Jurisprudence* (2nd ed., Oxford University Press 2005).

² *ibid.*

have a right to win.’³ Even in hard cases, he argued, the judge has a duty to *discover* what the *pre-existing* rights are of the parties rather than to engage in retrospective law-making. Dworkin considered this to be a defect of Hart’s theory insofar as it allowed for retrospective law-making, which Dworkin criticized on democratic grounds.⁴ Dworkin believed that in hard cases, judges unearth the moral principles that underpin the legal system—principles that exist underneath the hard positive law and principles that provide judges with a ‘right answer’⁵ in hard cases. As Jeremy Waldron memorably put it in his tribute prepared for Dworkin’s memorial service in London in 2013:

He had the effrontery to suggest that there were right answers to the legal problems posed in hard cases and that it mattered whether we got the answers right or wrong. This was a view which many disparaged, but it was a view that respected the position of plaintiffs and petitioners as people coming into law to seek vindication of their rights, not just as lobbyists for a quasi-legislative solution. It was a position, too, that respected the obligation of judges never to give up on the sense that the existing law demanded something of them, even in the most difficult disputes. ...

Dworkin helped us chart the topography of law; for the *corpus juris* is not just a heap of norms; beneath the explicit rules there are *principles* and policies that a legal system has committed itself to implicitly, over the years; deep subterranean channels of moral concern that flow through every part of the law.⁶

³ *ibid.*

⁴ *ibid* 84-85, cited in HLA Hart, *The Concept of Law* (Penelope A. Bulloch, Leslie Green & Joseph Raz eds, 3rd edn, Oxford University Press 2012) 275, where Hart discusses and responds to this critique.

⁵ Dworkin, *Taking Rights Seriously* (n 1) 279.

⁶ Jeremy Waldron, ‘Ronald Dworkin: An Appreciation’ (June 7, 2013). **NYU School of Law, Public Law Research Paper No. 13-39**. Available at <<http://ssrn.com/abstract=2276009>> 2-3 (final emphasis added).

These principles, for Dworkin, consist of *rights* rather than *policies*.⁷ In Chapter 4 of *Taking Rights Seriously*, Dworkin draws a distinction between legal arguments concerned with policy versus legal arguments concerned with rights. The former, argues Dworkin, ‘justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole.’⁸ By contrast, ‘[a]rguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.’⁹

For Dworkin, there was a weakness in legal positivism to the extent that it did not account, in its notions of legal validity, for how principles acquire their validity. Principles, argued Dworkin, cannot be traced back to Hart’s ‘rule of recognition’.¹⁰ The origin of principles ‘lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.’¹¹ The continued power of principles, he argued, ‘depends upon this sense of appropriateness being sustained.’¹² For Dworkin, it is not possible to talk of principles to be overruled or repealed because when their significance in the legal system declines, they ‘are eroded, not torpedoed.’¹³ Dworkin acknowledged that ‘if

⁷ Dworkin, *Taking Rights Seriously* (n 1) 82.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ Hart, *The Concept of Law* (n 4) 100.

¹¹ Dworkin, *Taking Rights Seriously* (n 1) 40.

¹² *ibid.*

¹³ *ibid.*

we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument' and we would mention 'any statute that seemed to exemplify that principle'.¹⁴ However, 'we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude.'¹⁵

Dworkin's argument of how judges decide hard cases was further developed in *Law's Empire*.¹⁶ In this book, Dworkin built his theory of law as a theory of adjudication, i.e. as a theory of how judges decide hard cases. Using the metaphor of a 'chain novel', he likened legal interpretation to literary interpretation, arguing that in order to understand legal interpretation, we have to imagine an exercise in which a judge deciding a case is like a novelist engaged in the project of writing a chain novel.¹⁷ For Dworkin, judges are like chain novelists in that 'each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under *law as integrity*.'¹⁸

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

¹⁷ *ibid* 228-229.

¹⁸ *ibid* 229 (emphasis added).

The notion of 'law as integrity' was another key theme in *Law's Empire*.¹⁹ It ought to be regarded as an admirable achievement to summarize the argument presented in *Law's Empire*, in particular this notion of law as integrity, in but a few paragraphs, which is credit that is rightly due to Waldron, who lucidly summarizes Dworkin's arguments in the book in the following excerpt:

In an argument of quite stunning complexity, his 1986 book *Law's Empire* set out grounds for the responsibility that lawyers and judges have to the laws as a whole, including their responsibility to measures enacted by people who may not have shared their views about justice. Our job, he said, as lawyers, scholars, and judges, is to bring interpretive coherence—integrity—to the whole body of the law.

The unearthing of these principles and the burden of this integrity meant that legal reasoning, in Ronnie's opinion, *is a form of moral reasoning*. This was the artery of his jurisprudence: that legal reasoning *is a form of moral reasoning*. Certainly, it is a complicated and uneasy form, for it depends on judgments about the moral importance of contingent events like enactment and the setting of precedents that ordinary moralizing does not concern itself with. "Nothing guarantees that our laws will be just," Ronnie acknowledged. But that doesn't mean that we separate the relation between law and morality; it means we complicate the relation between law and morality. Like a system of ethics that has to deal with the moral significance of promises we wish had never been made, so too the morality of law has to come to terms—come to *moral* terms—with statutes we wish had never been passed and precedents we wish had not been laid down. But the mark of legality is the felt need to respect those with whom we share the community, including those whose decisions we disagree with—to respect on moral grounds the legacy that they have contributed to, as we expect them to respect the legacy—the same legacy of law—that we have contributed to.

As I said, the affirmation of this entanglement of law and morality was the artery of Ronnie's jurisprudence. And for the philosophy of law generally, these are ideas of momentous importance. They will resonate down the generations. They are not uncontroversial by any means, but the controversies they provoke have been productive,

¹⁹ *ibid* Ch 7.

sparklingly productive, in the otherwise desiccated landscape of our subject.²⁰

As Waldron puts it, ‘the *artery* of Dworkin’s jurisprudence’ was the ‘entanglement of law and morality’ as well as his argument that ‘legal reasoning is a form of moral reasoning’—a form of reasoning in which, by unearthing the ‘deep subterranean’ principles to which the legal system has committed over time, we, ‘as lawyers, scholars, and judges...bring interpretive coherence—*integrity*—to the whole body of the law.’²¹

3.2B A Critique of Dworkinian Anti-Positivism

Richard Bellamy advances four arguments against Dworkin’s anti-positivist arguments detailed above. First, he argues that Dworkin’s ‘holistic approach to the law can often be *arbitrary*, encouraging the application of principles and considerations in settled parts of the law that are remote from, and inappropriate to, the case at hand.’²² Bellamy is sceptical of Dworkin’s claim that the herculean effort that a Dworkinian judge must engage in to bring interpretive coherence to the law is possible at all times.²³ That coherent picture, argues Bellamy, may not be forthcoming in all cases:

Different parts of the law give different weights to different goods, values and types of moral claim. Civil and criminal cases tend to operate with different standards of evidence and notions of responsibility, for example. Even similar areas of the law may involve

²⁰ Waldron, ‘Ronald Dworkin’ (n 6) 3-4.

²¹ *ibid* (emphasis added).

²² Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 76 (emphasis added).

²³ *ibid*

quite different criteria. Principles and considerations relevant to cases of sex discrimination, say, may be quite inappropriate to issues of race. Dworkin's holistic approach may force a coherence that does not and should not obtain, by treating very different areas as if they were the same.²⁴

For Bellamy, Dworkin conceals the problems that become evident with his theory down in the quagmire of detail by arguing at a very high level of abstraction. Down in that quagmire of detail, Bellamy argues, 'the moral considerations involved [may be] of quite diverse and incommensurable kinds',²⁵ in which case, Dworkin's 'appeal from rights in one part of the law'²⁶ and their application to a different part of the law may lead to incoherence rather than coherence.

Bellamy's second criticism of Dworkin's theory is that 'decisions based on rights need not yield a right answer.'²⁷ There may be more than one answer that appears to be equally right, and although Dworkin does not deny that rights may conflict or that conflicting rights may require to be balanced, Dworkin still believes that a right answer exists and that the judge will still be able to strike the appropriate balance between the conflicting rights. This, argues Bellamy, 'assumes commensurability at some level that may not exist.'²⁸ John Mackie points out this weakness in Dworkin's right-answer thesis in the following way:

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.* 77.

²⁷ *ibid.*

²⁸ *ibid.* (citation omitted).

This argument assumes too simple a metric for the strength of considerations, that such strengths are always commensurable on a linear scale, so that the strength of the case for one side must be either greater than that of the case for the other side, or less, or else they must be equal in the sense of being so finely balanced that even the slightest additional force on either side would make it the stronger. But in fact considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced. Consider the analogous question about three brothers: Is Peter more like James than he is like John? There may be an objectively right and determinable answer to this question, but again there may not. It may be that the only correct reply is that Peter is more like James in some ways and more like John in others, and that there is no objective reason for putting more weight on the former points of resemblance than on the latter or vice versa. While we might say that Peter's likeness to James is equal to his likeness to John (because neither is determinately the greater), this does not mean that any slight additional resemblance to either would decide the issue; hence, it does not mean that this equality expresses an improbably exact balance.²⁹

Dworkin's theory, in short, does not take account of reasonable disagreement that may exist in the exercise of balancing rights.³⁰ Dworkin suggests that there is a pre-existing right answer even in the case of conflicting rights, but his theory does not take account of what Waldron has said about moral realism, which, as we saw in Chapter 2, is that even if moral realism is true and there are objectively right answers, humans do not have the capacity to make those right answers true: 'making true and making false are not things that facts do to judges.'³¹

²⁹ John Mackie, 'The Third Theory of Law' (1977) 7 *Philosophy & Public Affairs* 3, 9.

³⁰ Bellamy, *Political Constitutionalism* (n 22) 77.

³¹ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 186.

A third criticism Bellamy advances against Dworkin's theory is that the latter's theory of individual rights does not take account of when rights need and should be balanced against the public interest. 'Rights certainly deserve', argues Bellamy, 'to be regarded as weighty interests that any view of the public interest should take into account' but that, as Dworkin himself acknowledges, '[r]ights often derive their rationale not from their benefit to the rights holder *per se* but from the public goods they promote'.³² For Bellamy, '[l]ittle would ever be done if collective benefits could never outweigh individual rights.'³³ Yet, if we accept the need to value rights for the public interest that they promote, then Dworkin's theory has a problem, which is that if 'such considerations are likely to alter according to circumstances', then that makes 'the prospective almost *a priori* account of law [Dworkin] seeks impossible.'³⁴

Finally, a fourth criticism Bellamy advances against Dworkin's theory is that it requires judges to interpret the law in its morally best light, a requirement that Bellamy believes is difficult to sustain 'in the face of the limitations of human reasoning which appear to allow for rival claims to be made.'³⁵ This goes back to the point made above about the irrelevance of moral objectivity and the inability of humans to have a mechanism of finding the morally 'right' answer even if that answer objectively exists.³⁶ There is, Bellamy argues, 'no reason to suppose that the judiciary will concur on the

³² Bellamy, *Political Constitutionalism* (n 22) 77.

³³ *ibid.*

³⁴ *ibid.* 78.

³⁵ *ibid.*

³⁶ Waldron, *Law and Disagreement* (n 31) 186.

morally best view of the law any more than the rest of the population if reasonable disagreements in this area are possible.’³⁷ In fact, ‘insisting that judges look for some comprehensive, objective theory of the law is *more likely* to generate such disagreements than a more modest approach.’³⁸ In other words, if applying rules can be difficult because of their open texture, as positivists insist, then applying Dworkinian ‘abstract principles of justice seems likely to be even more indeterminate.’³⁹

Not only does Dworkin’s theory not ‘rule out’ instances of judicial discretion, his theory of interpretation, indeed, ‘actively encourages [discretion].’⁴⁰ Bellamy believes that ‘[b]y inviting judges to offer a view of “good” law rather than law *per se*, Dworkin turns judges from third party arbiters into participants in many of the disagreements that it is politics’ rather than the law’s role to resolve.’⁴¹ He concludes that ‘[f]ar from promoting fidelity to law, the very ambition of Dworkin’s approach risks undermining it by making law appear to be little more than the contentious opinion of a particular person.’⁴²

³⁷ Bellamy, *Political Constitutionalism* (n 22) 78.

³⁸ *ibid* (emphasis added).

³⁹ *ibid* 79.

⁴⁰ *ibid*.

⁴¹ *ibid*.

⁴² *ibid*.

3.3 A RESPONSE TO GRIFFITH'S CRITICS

This section turns to a defence of Griffith against the criticism of three of his critics, namely Dawn Oliver, JWF Allison, and Adam Tomkins. In the case of all three critics, I will argue that their critique of Griffith reflects a Dworkinian anti-positivist bias and a lack of appreciation of Griffith's normative positivism.

3.3A Oliver and Allison

Let us begin with Dawn Oliver's discussion of Griffith's arguments in 'The Political Constitution':

It will be remembered that Griffith, in his lecture in 1979, argued that 'the constitution is no more and no less than what happens' and that political decisions should be taken by politicians, not judges. He argued from and for a highly positivist interpretation of the Constitution, with no 'oughts' or moral content. He accepted that this does not prevent people from arguing for moral or self-interested positions about what the Constitution ought to be and what the law ought to provide, but his interpretation was that the Constitution was the result of the settlement of various conflicts between classes and interests over the years and had no moral or normative content.⁴³

Oliver argues that Griffith's 'interpretation' of the UK constitution was that 'the Constitution...had no moral or normative content.'⁴⁴ For Oliver, Griffith could have interpreted the 'Constitution' as being one that has 'oughts' or moral content, but he did not. The question that arises, then, from reading Oliver's critique of Griffith is this: What *is* a constitution that has moral or normative content?

⁴³ Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 380.

⁴⁴ *ibid.*

For an answer to this question, we can turn to TRS Allan's recent publication in which he describes what such a vision of the UK constitution might be. Allan begins Chapter 1 of his book *The Sovereignty of Law* with the question, 'What is the British Constitution and where can we find it?'⁴⁵ He reports what are some well-known features of the UK constitution, which include: that it is 'unwritten'—or more accurately, 'non-codified';⁴⁶ that it has 'multifarious' sources, which include 'ideas and ideals of liberty and justice';⁴⁷ that it is 'the product of both history and morality';⁴⁸ and that its institutional arrangements 'afford at least a basic structure for legitimate democratic government'.⁴⁹ But for Allan, to really understand the British constitution, we need something more: 'To understand the constitution is...to grasp the *principles* that underpin and justify our practice. We must make sense of an evolving historical legal and political order, insofar as we can, by reference to the *moral or political values* that inform and explain our continuing adherence to it.'⁵⁰

The influence of Dworkin's jurisprudence on Allan's understanding of the UK constitution is easily discernible. In fact, Allan expressly acknowledges in a footnote in his introductory chapter the influence of Dworkin's theory of legal-interpretation-as-moral-interpretation on Allan's understanding of

⁴⁵ TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press 2013) 17.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid* (emphasis added).

law.⁵¹ According to that Dworkinian anti-positivist understanding, ‘the *corpus juris* is not just a heap of norms; beneath the explicit rules there are principles and policies that a legal system has committed itself to implicitly, over the years; deep subterranean channels of moral concern that flow through every part of the law’⁵²—deep subterranean principles that judges unearth through a process of legal interpretation, which Dworkin and Allan both see as a form of *moral* interpretation. For Allan, the UK constitution is not just a heap of norms; the UK constitutional system has, in Allan’s view, committed itself to deep subterranean principles that judges and others involved in the practice of law uncover through a process of legal interpretation, which is a form of moral interpretation.

Allan’s work is described in public law scholarship as being representative of the school of thought known as *common law constitutionalism*. Martin Loughlin observes that what unites this group of scholars is the belief ‘that the common law is a repository of the basic rules of governmental authority, that these common law rules can be understood to provide a framework of rights that operate to protect liberty, and that the judiciary is now becoming conscious of its duty to rework constitutional fundamentals by fully explicating the meaning of these rules in legal-rational terms.’⁵³ In Dworkinian terms, we might say that for common law constitutionalists, the

⁵¹ *ibid* 6n14.

⁵² Waldron, ‘Ronald Dworkin’ (n 6) 3-4.

⁵³ Martin Loughlin, ‘Towards a Republican Revival?’ (2006) 26 **Oxford Journal of Legal Studies** 425, 425. Works that Loughlin cites as being representative of this school of thought include T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993); Sir John Laws, ‘Law and Democracy’, 1995 **Public Law** 72; Sir Stephen Sedley, ‘The Sound of Silence: Constitutional Law Without a Constitution’ (1994) 110 **Law Quarterly Review** 270.

British constitution is a repository of substantive liberal principles that judges uncover through a process of legal/moral interpretation.

Let us now return to Oliver's critique of Griffith, in which she says that Griffith argued 'from and for a highly positivist interpretation of the Constitution, with no 'oughts' or moral content.'⁵⁴ I agree with that description to some extent. Griffith *was* arguing, in Griffith's own words, '*for* a highly positivist view of the constitution'⁵⁵ and was doing so *from* the perspective of a legal positivist.⁵⁶ But notice how Oliver formulates her critique from the perspective of a Dworkinian anti-positivist when she changes the word 'view'⁵⁷ (that Griffith uses to describe his vision of the UK constitution) to the word 'interpretation'⁵⁸ that Oliver uses to describe Griffith's argument. For Oliver, there exists a liberal constitution—a repository of liberal principles—which principles can be unearthed through a process of moral/legal *interpretation*. She presupposes the existence of such a liberal constitution and then suggests that Griffith's 'interpretation' of that liberal constitution was that it had 'no moral or normative content.'⁵⁹ Oliver assumes that Griffith *accepted* that the constitution was a repository of such abstract principles but that he denied that it had any normative content. However, as I demonstrated in Chapter 2, it is not that Griffith accepted the

⁵⁴ Oliver, *Constitutional Reform in the United Kingdom* (n 43) 380.

⁵⁵ JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 19.

⁵⁶ See Chapter 2.

⁵⁷ Griffith, 'The Political Constitution' (n 55) 19.

⁵⁸ Oliver, *Constitutional Reform in the United Kingdom* (n 43) 380.

⁵⁹ *ibid.*

existence of a constitution-as-a-repository-of-abstract-principles and then went on to suggest that that repository is empty of normative principles; no, for Griffith that repository of liberal principles either did not exist or could not be proven to exist. Griffith was a normative positivist, a democrat, and a moral anti-realist for whom there were normative reasons for denying the existence of a 'constitution' understood as a repository of abstract principles, for which reason he said that 'the constitution is no more and no less than what happens.'⁶⁰ As Loughlin notes in the course of placing Griffith within the modernist tradition, Griffith's 'focus remained fixed on the system of government rather than on the constitution.'⁶¹ Griffith was '[a]lert to the tyranny of categories' and was 'circumspect in discussion of 'the constitution'.⁶² For Griffith, 'the constitution was merely the assemblage of rules organising government, changing as the rules changed'.⁶³

Thus, Oliver's reading of Griffith contains at least two mistakes. Her first mistake is that she associates Griffith's legal positivism with a wholly descriptive thesis, which is a common misinterpretation of legal positivism. As Tom Campbell writes, 'the theory of legal positivism is usually taken to be analytical, descriptive, and explanatory. The point of legal positivism, on this view, is to provide an accurate account of law as it actually is rather than as it ought to be. This, it is assumed, follows from the positivist insistence that natural law theory neglects the logical distinction between description and prescription, and in particular confuses the analysis of law

⁶⁰ Griffith, 'The Political Constitution' (n 55) 19.

⁶¹ Martin Loughlin, 'Modernism in British Public Law: 1919-79' [2014] **Public Law** 56, 63.

⁶² *ibid.*

⁶³ *ibid.*

with its critique.⁶⁴ The difficulty with this view, Campbell argues, is that it fails to distinguish between the *content* of law and the *form* of law. As Campbell notes, we can challenge this commonly held view about legal positivism ‘if we distinguish prescriptions relating to the content of a law from those relating to its form’;⁶⁵ we can argue that it is useful ‘to regard legal positivism as a normative theory which seeks to determine what the law ought to be, not with respect to its *content* but with respect to its *form*.’⁶⁶ Oliver fails to recognize that Griffith was not a purely conceptual positivist attempting merely to accurately describe the nature of a legal system; he was a normative positivist who, like other normative positivists such as Campbell, ‘expresse[d] a preference for a certain type of legal system, where...there is a set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters’.⁶⁷ Griffith preferred a legal system that Campbell describes as a system containing rules that citizens can easily understand and that judges can apply ‘without recourse to controversial first-order moral judgments.’⁶⁸

Oliver’s second error in her reading of Griffith, as noted above, is that she presupposes the existence of a Dworkinian liberal constitution as the only understanding of the UK constitution and then accuses Griffith of denying

⁶⁴ Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish 2004) 21.

⁶⁵ *ibid.*

⁶⁶ *ibid.* (emphasis added).

⁶⁷ *ibid.* 114.

⁶⁸ *ibid.*

that constitution ‘moral or normative content’,⁶⁹ not realizing that Griffith in fact denied or doubted the very existence of such a constitution. Griffith’s repository was not empty; Griffith doubted the very existence of such a repository.⁷⁰ Campbell, again, has illuminating comments in this regard:

Law, as all practitioners know, Dworkin argues, is full of principles, with basically moral content. These principles, such as equality before the law, or that no one should benefit from his or her own wrongdoing, can override rules in the service of rights and therefore justice, and these principles cannot be understood and applied, Dworkin argues, without the exercise of moral judgment.

With this sort of analysis, Dworkinians have convinced several cohorts of students and hence generations of present and future judges that it is the adjudicative duty of judges to make the law ‘the best that it can be’ and, by ‘the best that it can be’, he means, ultimately, the way that most nearly accords with the moral views of the individual judge, in practice with the concurrence of sufficient of his or her colleagues to carry the day in court. True, he applies this in the main to constitutional cases, and presents this as a way of interpreting existing legal materials, not creating law from scratch. Nevertheless, at bottom his theory is that ‘the law’ (and not just constitutional law) contains fundamental moral judgments of the judge, that is, moral judgments about substantive right and wrong, moral justice and injustice.⁷¹

It is easy to see how a scholar who holds a Dworkinian understanding of the constitution as a set of liberal principles would regard Griffith’s ‘interpretation’ of the constitution as lacking in moral or normative content. But Oliver’s starting point is a Dworkinian understanding of the constitution which itself is not without challenge. As Campbell argues, a Dworkinian ‘model of law as an extrapolation from judicial morals’ can be challenged ‘on the grounds that Dworkin overestimates the judicial capacity

⁶⁹ Oliver, *Constitutional Reform in the United Kingdom* (n 43) 380.

⁷⁰ Loughlin, ‘Modernism in British Public Law’ (n 61) 63-66.

⁷¹ Campbell, *Prescriptive Legal Positivism* (n 64) 113 (citations omitted).

to know what is morally right or wrong, and that the diversity of reasonable moral views that individual judges may hold is incompatible with producing an actual legal system that manifests the qualities of being both principled and coherent.⁷² The problem with Dworkin's vision of the law is that '[t]here are just too many judicial cooks with a hand in this particular law-making broth.'⁷³

Oliver is not alone in approaching Griffith's lecture from Dworkinian anti-positivist presuppositions and in accusing Griffith's notion of 'the constitution' as lacking in normative content. JWF Allison does the same when he writes:

[Griffith's] notion of the constitution is purely descriptive—neither legally prescriptive nor morally normative. ...
...On the issue of fidelity to the politics of the political constitution...Griffith's famous lecture, is, at best, paradoxical, and, at worst, contradictory. His notion of the political constitution is purely descriptive but his political approach is, as such, prescriptive – 'to liberate the processes of government'. A descriptive political constitution and a prescriptive politics is the paradox or contradiction that Griffith's lecture has left for those it has influenced.⁷⁴

Here again, we find a scholar who presupposes a Dworkinian notion of 'the constitution' (whose normative character is defined by its underlying substantive principles) and who makes the erroneous assumption that if a scholar such as Griffith denies such an abstract concept of 'the constitution',

⁷² *ibid* 114.

⁷³ *ibid*.

⁷⁴ JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007) 34-35 (citation omitted).

that his ‘notion of the constitution’ is for that reason ‘purely descriptive—neither legally prescriptive nor morally normative.’⁷⁵

3.3B Tomkins

Let us now turn to Tomkins’s critique of Griffith. Tomkins considers Griffith’s ‘The Political Constitution’ as ‘the most important statement on the political model of constitutionalism.’⁷⁶ Notwithstanding that somewhat favourable comment and a few others, much of Tomkins’s discussion of Griffith is critical of what he perceives to be Griffith’s ‘constitutional descriptivism’.⁷⁷ Thus, about Griffith’s argument in ‘The Political Constitution’, he writes that ‘there is one major limitation to Griffith’s position’, which is that ‘the argument presented in ‘The Political Constitution’, for all its passionate rhetoric, was in constitutional terms, wholly descriptive.’⁷⁸

A superficial reading of these words might suggest that Tomkins is saying that Griffith’s analysis was devoid of normative argument. That is how Thomas Poole reads Tomkins’s claim when he argues that Tomkins’s description of Griffith’s analysis as wholly descriptive ‘underestimates the polemical dimension of Griffith’s work.’⁷⁹ ‘We misunderstand Griffith’, says Poole, ‘if we see him as simply presenting a descriptive analysis. His work is

⁷⁵ *ibid.*

⁷⁶ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 36.

⁷⁷ *ibid.* 38.

⁷⁸ *ibid.* 37.

⁷⁹ Thomas Poole, ‘Tilting at Windmills? Truth and Illusion in ‘The Political Constitution’ (2007) 70 *Modern Law Review* 250, 253.

thoroughly prescriptive, and recognises itself as such, fighting the good fight against a host of liberal and conservative enemies, natural lawyers all.’⁸⁰ Others, too, have interpreted Tomkins’s argument to mean that he is denying the normative arguments present in Griffith’s work.⁸¹

But that is not exactly what Tomkins is saying. Contrary to how Poole and others read Tomkins on this point, I do not believe Tomkins is saying that Griffith’s ‘analysis’⁸² or his ‘work’⁸³ was entirely descriptive. In fact, on several occasions in his critique of Griffith, Tomkins acknowledges Griffith’s prescriptive arguments.⁸⁴ A closer reading of Tomkins’s critique of Griffith reveals that Tomkins is doing something different. Rather than completely ignoring Griffith’s prescriptive arguments, what Tomkins is actually doing is drawing a distinction between *constitutional* prescriptions on the one hand and non-constitutional prescriptions on the other. Consider the following quote and focus on the sentences in bold:

[T]here is one major limitation to Griffith’s position....This [limitation] is that the argument presented in ‘The Political Constitution’, for all its passionate rhetoric, was in constitutional terms wholly descriptive. While **Griffith expressed forthright political opinions (for example, ‘political decisions should be taken by politicians...who are removable’, and ‘we need to force**

⁸⁰ *ibid.*

⁸¹ E.g. Graham Gee and Grégoire CN Webber, ‘What Is a Political Constitution?’ (2010) 30 **Oxford Journal of Legal Studies** 273, 280-81; Graham Gee, ‘The Political Constitutionalism of J.A.G. Griffith’ (2008) 28 **Legal Studies** 20, 32.

⁸² Poole, ‘Tilting at Windmills? Truth and Illusion in ‘The Political Constitution’ (n 79).

⁸³ *ibid.*

⁸⁴ E.g. Tomkins, *Our Republican Constitution* (n 76) 37-38 (acknowledging Griffith’s ‘forthright political opinions’ and his philosophical and political objections to his liberal contemporaries).

governments out of secrecy and into the open) these were articulated solely at the level of politics and not as matters of constitutional analysis. When **he insisted that the ‘accountability of our rulers should be real and not fictitious’** he was not expressing his view of what the constitution requires, but merely his own political preference.

When it came to discussing constitutional questions, Griffith only ever described—he never prescribed. His position was not that the arguments of Scarman, Hailsham, and Dworkin [contemporaries of Griffith whose work he criticizes at the start of his lecture] were unconstitutional: only that they were **politically unwise and philosophically mistaken. ...**

...Griffith’s defence of the political constitution was entirely descriptive. He may have **believed that the political model of accountability was to be preferred over the legal.** He may have **considered it to be both more democratic and more effective.** But he did not believe the political model of accountability to be constitutionally required; still less constitutionally entrenched.⁸⁵

As the arguments in bold make clear, Tomkins is not ignoring Griffith’s prescriptive arguments at all, so it is incorrect for Poole and others to say that Tomkins is accusing Griffith of presenting a wholly descriptive *analysis* or that Tomkins is saying that Griffith’s *work* was entirely descriptive. What Tomkins is doing, instead, is drawing a distinction between prescriptions that are ‘constitutional’ and those that are not. For example, immediately after acknowledging Griffith’s prescriptive arguments, Tomkins says that these prescriptive arguments ‘were articulated solely at the level of politics and not as matters of *constitutional* analysis.’⁸⁶ Similarly, immediately after acknowledging Griffith’s statement that ‘the accountability of our rulers should be real and not fictitious’,⁸⁷ Tomkins writes that this prescriptive argument does not mean that Griffith was expressing a view on ‘*what the*

⁸⁵ *ibid* 37-38 (emphasis added).

⁸⁶ *ibid* 37 (emphasis added).

⁸⁷ Griffith, ‘The Political Constitution’ (n 55) 16.

constitution requires, but merely his own political preference.’⁸⁸ And similarly, again, he writes that Griffith did not argue that Scarman’s, Hailsham’s, and Dworkin’s arguments were ‘*unconstitutional*: only that they were politically unwise and philosophically mistaken.’⁸⁹ There is, in other words, a difference in Tomkins’s view between those prescriptions that reach the level of being ‘constitutional’ prescriptions and those that do not.

Tomkins’s distinction between constitutional and non-constitutional prescriptions raises the obvious question: what exactly is the difference between a constitutional and a non-constitutional prescription? How do we determine whether a prescription is constitutionally required or ‘entrenched’⁹⁰ on the one hand and not on the other? In the United Kingdom—which ‘lacks a Constitution with a capital ‘C’⁹¹—how do we determine whether and how a prescription achieves the status of a *constitutional* prescription? How do we make the determination as to whether or not a prescription is constitutionally entrenched in the context of a constitution whose meaning is deeply contested and unsettled, marked by great ‘uncertainty and disputation over the sources of constitutional change’⁹²? As leading textbooks on the subject remind us, in the United Kingdom, the word ‘unconstitutional’ has ‘no defined content’;⁹³ there exists

⁸⁸ Tomkins, *Our Republican Constitution* (n 76) 37 (emphasis added).

⁸⁹ *ibid* 37-38 (emphasis added).

⁹⁰ *ibid* 38.

⁹¹ Anthony King, *The British Constitution* (Oxford University Press 2007) 5.

⁹² Neil Walker, ‘Our Constitutional Unsettledness’ [2014] *Public Law* 529, 542.

⁹³ Anthony Bradley, Keith Ewing and Christopher Knight, *Constitutional and Administrative Law* (16th edition, Pearson 2014) 23-24.

no 'obvious criterion for deciding what is constitutional and what is not, and no authoritative selection of provisions which could be called 'the constitution'.⁹⁴ Tomkins does not tell us what he believes the process is of determining how a prescription reaches the status of a 'constitutional' prescription, yet this is a process that is in no way clearly established, as Anthony Bradley, Keith Ewing and Christopher Knight observe:

When used concerning executive decisions, 'unconstitutional' implies that a decision is not merely incorrect in law but also contrary to fundamental principle....

However, *it may not be easy to determine whether the boundary between constitutional and unconstitutional conduct has been crossed, especially where there is no universally accepted rule of conduct.* Different politicians may take opposing views of the constitutional propriety of the acts of a government. Unpopular proposals for new legislation are not for that reason unconstitutional, but a Bill which sought to destroy essential features of the electoral system or to give the Cabinet power to overrule decisions of the courts could rightly be described as unconstitutional.

Another difficulty in determining what is constitutional in a given situation is that there may be no relevant precedent.⁹⁵

To demonstrate the point made in the last sentence, the authors cite the example of when an agreement to differ on an issue of economic policy in 1932 was described as 'unconstitutional', that attack on the Government's conduct faced the following rejoinder:⁹⁶ 'Who can say what is constitutional in the conduct of a National Government? It is a precedent, an experiment, a new practice, to meet a new emergency, a new condition of things.'⁹⁷

⁹⁴ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 13.

⁹⁵ Bradley, Ewing and Knight, *Constitutional and Administrative Law* (n 93) 24 (emphasis added).

⁹⁶ *ibid.*

⁹⁷ HC Deb, 8 February 1932, col 535 (Mr Baldwin), cited in Bradley, Ewing and Knight, *Constitutional and Administrative Law* (n 93) 24.

It is incumbent upon Tomkins to tell his readers what his method is of determining how a prescription achieves the status of a constitutional prescription for his criticism of Griffith to make sense. As we shall see shortly, Tomkins does not expressly provide an answer to this question, but we can make inferences as to what his answer might be. In order to make such inferences we need to look closely at how Tomkins believes he can *improve* upon what he takes to be Griffith's 'constitutional descriptivism'.⁹⁸

In *Our Republican Constitution*, Tomkins seeks to present 'a republican reading of the British constitution.'⁹⁹ He is critical of what he takes to be the orthodox vision of the UK constitution, which he terms 'legal constitutionalism'.¹⁰⁰ He seeks to replace this orthodoxy with 'an older, political, approach to the constitution', which approach he argues 'should be seen as resting on republican foundations.'¹⁰¹ This approach 'is one that derives from an analysis of the [republican] values inherent in the British constitutional order.'¹⁰²

How does Tomkins believe he can improve upon what he takes to be Griffith's 'constitutional descriptivism'? Consider the following quote:

The argument in this book takes issue with Griffith's descriptivism. My view, *contra* Griffith, is that the government is accountable to

⁹⁸ Tomkins, *Our Republican Constitution* (n 76) 38.

⁹⁹ *ibid* vii.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*.

¹⁰² *ibid* viii.

Parliament not only because, as matter of fact this is true, but also because the constitution insists upon it. Ministerial responsibility is, I will argue, a prescriptive rule as well as a descriptive practice. Similarly, I will suggest, when judges intervene in the business of parliamentary government they are not simply rewriting the unwritten constitution—they are not simply altering what the constitution describes—they are doing something which is different from what the constitution previously prescribed. In other words they are doing something that would previously have been *unconstitutional*.¹⁰³

Tomkins's goal is to show that a breach of, say, the rules relating to ministerial responsibility or an instance of judicial activism does not simply reflect a change in the constitution but instead reflects unconstitutional behaviour. He believes that whereas Griffith's response to such changes in constitutional practice would have been to say that there had occurred a change in the nature of the constitution itself, Tomkins's argument is that such changes ought to be regarded as *unconstitutional*.

Tomkins believes that 'the model of the political constitution was never grounded in theory.'¹⁰⁴ Griffith and other advocates of the political model of constitutionalism, in Tomkins's view, 'never explained the norms or values on which the model was founded.'¹⁰⁵ For Tomkins, the lamentable result of this (perceived) gap in Griffith's account is that this gap has allowed the 'legal constitutionalists...to brush the political constitution to one side.'¹⁰⁶ And to plug this gap, Tomkins believes more can be done than Griffith accomplished:

¹⁰³ *ibid* 38-39 (emphasis added).

¹⁰⁴ *ibid* 40.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*.

For Griffith, all that those of us who are not legal constitutionalists can do is politically to lament the foolishness of turning to the new model, of relying on the courts rather than on politicians to find ways of holding government to account. I disagree. I think that there is more we can do. For sure, we can show that legal constitutionalism is politically undesirable. *But we can also take the argument to a new level. We can also show that it is unconstitutional.*¹⁰⁷

To improve upon Griffith's argument, then, Tomkins believes that he can 'take the argument to a new level'¹⁰⁸ and show not only that a turn to legal constitutionalism is politically undesirable but also that it is unconstitutional. And how does Tomkins intend to demonstrate the unconstitutionality of the legal model of constitutionalism? By 'ground[ing] the model of the political constitution normatively' and by 'show[ing] that it is not a mere description of what happens (or perhaps used to happen) but that it is also a prescription of what ought to happen.'¹⁰⁹ This is something that Tomkins believes Griffith never did. Tomkins argues that 'no matter how earnestly [Griffith] considered the model to be wise, he never thought of it as being required, ordained or entrenched.'¹¹⁰ This, for Tomkins, is a mistake. Thus, Tomkins's aim in *Our Republican Constitution* is to show that the model of the political constitution is based on certain 'constitutional' values, and these values, according to Tomkins, are the values of republicanism. To 'unearth and reveal those [republican] values'¹¹¹—that is the goal of Tomkins's book.

¹⁰⁷ *ibid* 39-40 (emphasis added).

¹⁰⁸ *ibid* 40.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

¹¹¹ *ibid*.

Notice the question-begging meaning of ‘constitutional’ and ‘unconstitutional’ in Tomkins’s analysis. He argues that the goal of his book is to show that the political model of constitutionalism is not simply a description of what happened in the past but is something that was previously constitutionally ‘ordained’ or ‘entrenched’. He wants to show that a move to legal constitutionalism is ‘unconstitutional’ because it is different from what happened in the past. He argues that ‘when judges intervene in the business of parliamentary government they are not simply rewriting the unwritten constitution—they are not simply altering what the constitution describes—they are doing something which is different from what the constitution previously prescribed...they are doing something that would previously have been unconstitutional.’¹¹² But how did the political model of constitutionalism achieve that ‘constitutional’ status in the first place? What is the source of the constitutional rule that judges must not ‘intervene in the business of parliamentary government’¹¹³? Consider Neil Walker’s following observations in his review of Tomkins’s book:

[W]hat precisely is the relationship between historical understanding and normative projection in Tomkins’ constitutional methodology? Both a strong and a weaker connection might in principle be posited. The strong thesis holds that there is only one “true” meaning, or at least an undeniably best interpretation, of the constitutional record, that this should serve as the critical standard of present and projected constitutional doctrine and practice, and that doctrine and practice that does not meet this standard can rightly be branded as “unconstitutional.” In at least some passages, it is clear that it is this strong thesis that Tomkins seeks to defend (see e.g. 40). On the basis of his rediscovery of the republican pedigree of the seventeenth century, he wants to argue not only that liberal constitutionalism is

¹¹² *ibid* 39.

¹¹³ *ibid*.

inadequate in its conception of liberty and ineffective and undemocratic in its judge-centredness, but also that, far from possessing any explanatory privilege, it actually *betrays* the best understanding of the constitution. Yet surely this is to claim too much, especially when we consider how many parts of the republican settlement were diluted or displaced with the rise of cabinet government and a partisan party system from the eighteenth century onwards. Just who, and on what basis, are we expecting to convince when we seek to swap one categorical historical judgment (underpinning the liberal consensus) with another? And even if the new republican interpretation of history were objectively compelling, and were generally accepted as such, why should this revised pedigree in any case be decisive of our future normative order?¹¹⁴

When we ask the questions that I asked above immediately before quoting Walker, it becomes evident what Tomkins's underlying theoretical assumptions are about the nature of the UK constitution. These assumptions, as it turns out, are not very different from the general assumptions of those whom he considers his adversaries and whom he labels 'legal constitutionalists'.¹¹⁵

Let me state clearly what I am *not* claiming. What I am not saying is that Tomkins's vision of the UK constitution is identical to that of the common law constitutionalists insofar as what this school of thought believes are the substantive values underpinning the UK constitution. But what I *am* claiming is that Tomkins, like the common law constitutionalists, believes that there exists a repository of abstract principles that we can identify as 'the constitution' that exists in the form of a higher constitution—principles that can be unearthed through a process of moral interpretation and principles that deserve our obedience on account of their moral weight. One

¹¹⁴ Neil Walker, 'Review' (2007) 11 *Edinburgh Law Review* 126, 128-129.

¹¹⁵ Tomkins, *Our Republican Constitution* (n 76) 10-31.

difference between his repository of principles and the common law constitutionalists' repository is that the latter's repository can generally be located within the school of political liberalism whereas Tomkins's preferred values are to be located within what he takes to be republicanism. Another difference is that the common law constitutionalists rely on a combination of history and the common law as their repository while Tomkins relies on the achievements of Parliament combined with history.¹¹⁶ But their underlying vision of 'the constitution' is the same. Both believe in the very existence of that repository of abstract principles (liberal or republican), and both believe in using history 'like a trump card in a game of whist':

What unites the historical aspect of common law constitutionalism with the republican argument of Tomkins is a shared belief that there exists some critical period during which the 'true' nature of the British constitution is revealed, and that the task of the constitutional historian or theorist is to identify this definitive moment and then, by removing the corruptions beneath which it has become buried, to restore its normative authority. The claims of the common law constitutionalists ultimately run back to the myth of some ancient Anglo-Saxon constitution that formed the repository of our immemorial liberties and was stifled under the Norman yoke. For Tomkins, it is the assertion that the true character of the constitution is revealed through the frame of mid-17th century civic republicanism. In both cases, the past is being treated ideologically, as a field in which, as Oakeshott would say, we are able to exercise our moral and political opinions like whippets on Sunday afternoons.¹¹⁷

It is difficult not to see the parallel that exists between the Dworkinian anti-positivist vision of law and Tomkins's vision of what he takes to be the UK constitution. Tomkins, too, seems to think that underneath the hard positive law, the UK constitution has committed itself, to borrow Waldron's words, to

¹¹⁶ *ibid* Ch 3.

¹¹⁷ Loughlin, 'Towards a Republican Revival?' (n 53) 432-433

‘deep subterranean channels of moral concern’¹¹⁸ —principles of republicanism—principles that Tomkins believes ‘flow through every part of the [constitution]’¹¹⁹ and that, owing to their moral weight, deserve our obedience. Tomkins sees himself as a Dworkinian Hercules attempting to provide the best possible interpretation that he can of the UK constitution, and his interpretation is that the principles that the UK constitution has committed itself to over the centuries are the principles of republicanism.

I am also not claiming, of course, that Tomkins agrees with every aspect of Dworkin’s jurisprudence; that would be far too speculative a claim to make because nowhere does Tomkins explicitly associate himself with Dworkin’s legal-theoretical school of thought, or with any other jurisprudential school of thought for that matter. In fact, Tomkins expressly repudiates in his book the Dworkinian policy/principle distinction on the grounds that it is ‘never justified’¹²⁰ or ‘grounded in principle’¹²¹ but ‘merely asserted’,¹²² but his own reliance on history to promote his republican argument deserves the same criticism.¹²³ Notwithstanding Tomkins’s repudiation of that aspect of Dworkinian jurisprudence, what I *am* claiming is that there is a certain affinity between Dworkin’s vision of law and Tomkins’s vision of what he takes to be the ‘constitution’. And this vision is very different from Griffith’s

¹¹⁸ Waldron, ‘Ronald Dworkin’ (n 6) 3-4.

¹¹⁹ *ibid.*

¹²⁰ Tomkins, *Our Republican Constitution* (n 76) 24.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ See Loughlin, ‘Towards a Republican Revival?’ (n 53) 432-433.

vision of the UK constitution. When Tomkins criticizes Griffith for the latter's 'constitutional descriptivism', what he is in effect criticizing Griffith for is for not believing that there is a repository of principles that exists above the hard positive law that Tomkins refers to as the 'constitution'. Tomkins's error, like Allison's and Oliver's error discussed above, in his reading of Griffith is that he believes that Griffith's repository is empty of normative content, when what Griffith actually believed is not that his repository of principles is empty of normative content but rather that the kind of repository of abstract principles, to which his liberal contemporaries subscribed, either did not, or could not be proven to, exist.¹²⁴

It was in order to avoid the arbitrariness of this very approach (of arguing about the existence of a repository of abstract principles that we could call 'the constitution') that Griffith resisted defining the 'constitution' in such anti-positivist terms. Loughlin is correct when he writes that, for Griffith, 'law meant hard positive law, most authoritatively enacted in statute', a claim that Griffith 'made with the intention of overthrowing metaphysical ideas'.¹²⁵ It was to avoid the arbitrariness of the approach of Dworkin and other liberal constitutionalists of his contemporary era that Griffith argued 'for a highly positivist view of the constitution'.¹²⁶ I stress the 'for' in the previous sentence to repeat the principal argument of Chapter 2, which is that Griffith argued for the conceptual separation of law and morality for *normative* reasons—Griffith, as I said so often in the previous chapter, was a normative positivist. And his critics who accuse him of 'descriptivism' or of

¹²⁴ See Loughlin, 'Modernism in British Public Law' (n 61) 63-66. See also Chapter 2, Section 2.6 above.

¹²⁵ *ibid* 66.

¹²⁶ Griffith, 'The Political Constitution' (n 55) 19 (emphasis added).

having a 'descriptive' notion of the constitution not only presuppose a Dworkinian understanding of the UK constitution as the only possible understanding of it but also show a lack of appreciation of Griffith's normative positivism.

In an effort to improve upon Griffith's alleged 'descriptivism', Tomkins has arguably made things worse from a republican perspective by conceding ground to his opponents that he should not have conceded. He has presupposed the same general understanding of the UK constitution as the understanding of those whom he accuses of being 'legal constitutionalists', and to concede his opponents that ground—i.e. to accept that the constitution is a repository of what can easily be described as, in effect, his preferred substantive values¹²⁷—is something that, as I will argue in the following section, makes his republican programme in some ways unattractive from a republican constitutionalist perspective.

3.4 REPUBLICANISM AND NORMATIVE POSITIVISM

This section turns to the relationship between republicanism and normative positivism. I will attempt to demonstrate in this section that there is a certain affinity between republicanism and normative positivism, which affinity is lost if a theorist attempts, as Tomkins does, to build a republican argument on an anti-positivist foundation. This affinity between normative positivism and republicanism may be described as an interest that both theories have in a strong democratic theory of legal authority according to which theory a law acquires its legitimacy from its being adopted by

¹²⁷ For such a criticism of the Dworkinian conception of law, see Campbell, *Prescriptive Legal Positivism* (n 64) 113-114.

democratic institutions that include procedures that show respect to disagreement among citizens. Section 3.4A below, therefore, is intended to demonstrate that relationship between republicanism and normative positivism.

Section 3.4B, however, draws attention to the differences in normative positivism and republicanism in order to make clear that what I am not claiming is that both normative positivism and republicanism in all its forms have identical values. I will demonstrate these differences by looking at the debate as to whether or not judicial review is compatible with republicanism. That, however, is the descriptive dimension of my argument in Section 3.4B, which will also have an evaluative dimension. In its evaluative dimension, my conclusion in Section 3.4B will be that a republican theorist who is willing to countenance a strong form of judicial review also compromises the commitment to a strong democratic theory of legal authority that a republican is expected to endorse and shows a lack of faith in one's fellow citizens to govern themselves according to the principles of republicanism.

3.4A The Affinity Between Republicanism and Normative Positivism

What is the relationship between republicanism and normative positivism? To answer this question, I want to begin this subsection by considering the following question: what should a republican jurisprudence look like? To unpack the term 'republican jurisprudence', let us begin by considering the meaning of *republican* as it pertains to this discussion.

To a political theorist, republican political theory is considered today to be the primary alternative to its liberal counterpart. Republican political theory may be traced back to an ancient political tradition, a tradition to which there has been 'more than twenty-five centuries' of contribution from the

works of ‘Aristotle to Montesquieu, Rousseau, [and] Arendt, and from Cicero [and] Machiavelli to Harrington, Paine, [and] Jefferson.’¹²⁸ Founded on values traceable to this ancient tradition, modern republicanism has established itself today, following a revival that goes back a few decades, as a major alternative to political liberalism.¹²⁹

Modern republicanism is a ‘very broad church’¹³⁰ capable of accommodating a range of different values, about which values there is not always agreement.¹³¹ For one strand of modern republicanism, the most important republican value is freedom or liberty understood as independence from arbitrary power—a value that is often phrased as *freedom as non-domination*.¹³² Other republican theorists view non-domination in less

¹²⁸ Samantha Besson and José Luis Martí, ‘Law and Republicanism: Mapping the Issues’ in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 3.

¹²⁹ *ibid* 3-4.

¹³⁰ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 3.

¹³¹ Besson and Martí, ‘Law and Republicanism’ (n 128) 3-4 (‘[W]hile everyone accepts that republicanism is a heterogeneous tradition that has historically grown around distinct lines of thought and involving very different accounts of politics and democracy, there is no agreement on how many republican streams or schools there are and what they are. Civic republicanism, Aristotelian republicanism, neo-Roman republicanism, neo-Athenian republicanism, socialist republicanism, communitarian republicanism, and even liberal republicanism are often distinguished. But there is no consensus on how to define each of these groups of thoughts and how to distinguish republicanism from other competing political doctrines, such as liberalism, communitarianism, or socialism.’).

¹³² See Frank Lovett, ‘Republicanism’, in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition). Available at <<http://plato.stanford.edu/archives/win2014/entries/republicanism/>> (visited 3 October 2015). Works that Lovett cites as belonging to this brand of republicanism include Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) Chs 1-4; Philip Pettit, *On the People’s Terms* (Cambridge University Press 2012) Ch 1; Quentin Skinner, ‘Freedom as the Absence of Arbitrary Power’ in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008);

substantive and more procedural terms or consider *participation in self-government* to be a key republican value and stress the role of representative legislatures in realizing that value.¹³³ There is, furthermore, disagreement among republican theorists as to the level of citizen participation that is required by their respective visions of republicanism,¹³⁴ as well as disagreement about the extent to which judicial review is expected to play a part in upholding republican values; judicial review and republicanism are compatible according to some theorists¹³⁵ of republicanism but incompatible according to others.¹³⁶

Victoria M. Costa, 'Neo-Republicanism, Freedom as Non-Domination, and Citizen Virtue' (2009) 8 **Politics, Philosophy, and Economics** 401; Cécile Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9 **European Journal of Political Theory** 48.

¹³³ Bellamy, *Political Constitutionalism* (n 22); Jeremy Waldron, 'Judicial Review and Republican Government' in Christopher Wolfe (ed), *That Eminent Tribunal: Judicial Supremacy and the Constitution* (Princeton University Press 2004).

¹³⁴ See Iseult Honohan, 'Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 84 ('[R]epublicans disagree on the appropriate extent of citizen participation as well as on the relative powers of representative legislatures and judicial institutions. It has become almost commonplace to distinguish civic (or neo-Roman) republicanism, based on non-domination, and attributing only instrumental value to political participation, from civic humanism (or neo-Athenian republicanism), attributing intrinsic or ultimate value to such participation.').

¹³⁵ Cass R Sunstein, 'Beyond the Republican Revival' (1988) 97 **Yale Law Journal** 1539; Frank Michelman, 'Foreword: Traces of Self Government' (1986) 100 **Harvard Law Review** 4. For discussion, see Honohan, 'Republicans, Rights, and Constitutions' (n 134).

¹³⁶ Bellamy, *Political Constitutionalism* (n 22); Waldron, 'Judicial Review and Republican Government' (n 133).

Those differences may, however, be abstracted away in the pursuit of an all-encompassing principle to which most, if not all, republicans are committed, and that principle is the principle of ‘government by the people’.¹³⁷

The question with which this section is concerned—the question of what a republican *jurisprudence* ought to look like—is concerned with the relationship between the values of the political theory of republicanism and a theory of law. If we accept that ‘any normative political theory ought to entail its own normative legal theory’,¹³⁸ then what republican jurisprudence seeks to do is to provide the most suitable normative *legal* theory for the normative *political* theory of republicanism. Put differently, the political theory of republicanism ‘entails *legal* republicanism, just as political liberalism implies some kind of legal liberalism.’¹³⁹

A useful definition of ‘legal republicanism’ is provided by Samantha Besson and José Luis Martí, who argue that there are two dimensions to legal republicanism: (i) *republican law*, which, in its *substantive* dimension is ‘about the content of law’ and in its *procedural* dimension is about the ‘structure and the form of the law’;¹⁴⁰ and (ii) *republican jurisprudence*, which is ‘a jurisprudence that analyses legal concepts and the functioning of law according to the principles of republicanism.’¹⁴¹ The authors provide a

¹³⁷ Tierney, *Constitutional Referendums* (n 130) 3.

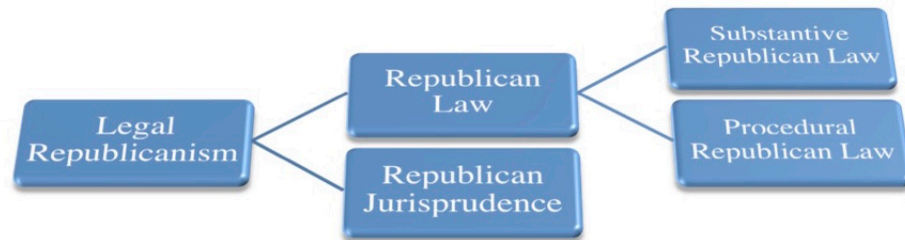
¹³⁸ Besson and Martí, ‘Law and Republicanism’ (n 128) 26.

¹³⁹ *ibid* (emphasis added).

¹⁴⁰ *ibid* 28.

¹⁴¹ *ibid* 27.

visual representation of how these concepts relate to each other which looks something like the following:¹⁴²



For the purposes of this section, I am most interested in the box marked ‘republican jurisprudence’. I am interested in exploring the sense in which legal theory may be said to be a *republican* legal theory.

Besson and Martí argue that a ‘republican lawyer is expected to endorse a strongly democratic theory of legal authority’ according to which theory a ‘law’s legitimacy stems from its adoption by democratic institutions, showing due respect to actual disagreements among citizens.’¹⁴³ The authors further note that ‘someone committed to a democratic theory of legal authority ought to endorse a normative approach to legal positivism’.¹⁴⁴ What the authors are suggesting here is that the legal theory of *normative positivism*—a theory I discussed in Chapter 2—is the most appropriate theory of law to endorse for someone who is committed to a strong democratic theory of legal authority. And since a republican theorist is ‘expected to endorse a strongly

¹⁴² *ibid* 28.

¹⁴³ *ibid* 30-31 (citation omitted).

¹⁴⁴ *ibid* 32 (citation omitted).

democratic theory of legal authority',¹⁴⁵ it follows, in the authors' view, that a republican ought to endorse the legal theory of normative positivism. It is my aim in the following discussion to demonstrate why I think Besson and Martí are correct.

A Democratic Theory of Legal Authority. I noted above Besson and Martí's definition of a strong democratic theory of authority according to which a law is deemed legitimate if passed by a democratic institution in a process that accords respect to disagreement among citizens.¹⁴⁶ Why does law enacted by a democratic institution that pays respect to disagreement among citizens command our respect? One answer is that 'majority-decision commands our respect precisely because it is the one decision-procedure that does not, by some philosophical subterfuge, try to wish the facts of plurality and disagreement away.'¹⁴⁷

Waldron develops a theory of democratic authority that contrasts the standard account of legal authority developed by Joseph Raz. According to Raz's 'normal justification thesis':

[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.¹⁴⁸

¹⁴⁵ *ibid.* 30-31.

¹⁴⁶ *ibid.*

¹⁴⁷ Waldron, *Law and Disagreement* (n 31) 99.

¹⁴⁸ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 53, cited in Waldron, *Law and Disagreement* (n 31) 99n37.

Raz's thesis is related mainly to what he takes to be the principal demand that a law makes of those to whom it applies, mainly the demand that the law is complied with. Waldron's interest, however, is in exploring the space between 'defying or ignoring a statute or other legal decision' on the one hand and 'working responsibly for its repeal or reversal' on the other hand.¹⁴⁹ For Waldron, a law or legal decision that exists at the moment as law makes a demand of responsible citizens 'for a certain sort of recognition and...respect—that *this*, for the time being, is what the community has come up with and that it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it.'¹⁵⁰ If, in other words, we lose in a free and fair vote, it does not mean that we immediately disparage the law or legal decision; we should accept it for the time being and ought to work responsibly towards its amendment or repeal.

Waldron's theory of authority takes seriously what he terms the 'circumstances of politics',¹⁵¹ an idea developed from John Rawls's 'circumstances of justice'.¹⁵² The circumstances of politics involve 'the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.'¹⁵³ For Waldron,

¹⁴⁹ Waldron, *Law and Disagreement* (n 31) 100.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid* 101.

¹⁵² John Rawls, *A Theory of Justice* (Harvard University Press 1971) 126-130, cited in Waldron, *Law and Disagreement* (n 31) 102.

¹⁵³ Waldron, *Law and Disagreement* (n 31) 102.

the circumstances of politics are ‘indispensable for our understanding of procedural decision-rules, like majority-decision, and the concomitant ideas of authority, obligation, and respect.’¹⁵⁴

For the purposes of this chapter, what is important to note about Waldron’s circumstances of politics is that, notwithstanding the competing understandings of republicanism mentioned above, the central values of republicanism can only be secured under conditions that take moral and political disagreement seriously.¹⁵⁵ Let us take a core republican value mentioned above—freedom as non-domination—and consider two competing interpretations of it put forward by Pettit and Bellamy. As we shall see below, regardless of their differences, as Marco Goldoni puts it, ‘both approaches allegedly take into account the so-called “circumstances of politics”’ and under both approaches, it may be said that ‘a polity can be said to secure non-domination to its members if and only if moral and political disagreement is taken seriously.’¹⁵⁶

Let us take Pettit’s interpretation of the republican value of freedom as non-domination. For Pettit, ‘one agent dominates another if and only if they have certain power over that other, in particular a power of interference on an arbitrary basis.’¹⁵⁷ In other words, domination occurs when one agent has

¹⁵⁴ *ibid.*

¹⁵⁵ Marco Goldoni, ‘A Normative Positivism for the Deliberative Republic’ (2011) **SSRN**. Available at <<http://papers.ssrn.com/abstract=1753761>> (visited 25 February 2015) 5.

¹⁵⁶ *ibid.*

¹⁵⁷ Pettit, *Republicanism* (n 132) 52 (citations omitted).

‘arbitrary sway’ over another.¹⁵⁸ Pettit’s republican political theory ‘holds out the ideal of a regime that protects people from domination without itself being a dominating force in their lives.’¹⁵⁹ As I said above, disagreement and the ‘circumstances of politics’ are central to Pettit’s republicanism, as he makes clear when he writes:

Disagreement is inherently associated with a pluralistic democracy, so that there is little or no hope of finding a stable overlap between people’s private interests. Nevertheless, people do continue to argue with one another about what they ought to do together—they do not just come to blows and resign themselves to their differences—finding considerations that they equally recognize as relevant. And yet people do not themselves manage to generate consensus out of that argument, since they may weigh those considerations differently or apply them on the basis of different empirical assumptions. In these circumstances—the circumstances of democratic politics—the only possible basis on which to identify public-interest policies is as those policies that are not ruled out by mutually acceptable, commonly accepted reasons and that are selected for implementation by procedures that are not ruled out by such mutually acceptable, commonly accepted reasons.¹⁶⁰

For Pettit, the public interest is defined ‘on the basis of an active enterprise of democratic discussion and contestation amongst the citizenry’, and the public interest ‘requires institutions that make room for such deliberative processes.’¹⁶¹

¹⁵⁸ *ibid.*

¹⁵⁹ Phillip Pettit, ‘Law and Liberty’ in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 59.

¹⁶⁰ *ibid* 57 (citation omitted).

¹⁶¹ *ibid* 58.

Bellamy sees the value of non-domination in less substantive and more procedural terms than Pettit. For Bellamy, Pettit and other republicans 'have supposed that legal constitutionalism offers the best means of ensuring governments pursue policies that treat all with equal concern and respect.'¹⁶² This approach, he argues, is based on a strategy 'of an idealized politics from which all the sources of reasonable disagreement have been removed'—a strategy that leads to a form of 'judicial domination'.¹⁶³ Bellamy stresses the need for a political process that takes seriously the value of political equality and a process 'that allows all citizens to count equally, even if they disagree'¹⁶⁴ with actual outcomes of the democratic process. For Bellamy, a 'better candidate'¹⁶⁵ for securing the goal of non-domination, therefore, is the democratic process itself rather than the courts.

Whatever their differences, both Bellamy and Pettit stress what I have been referring to in this chapter as a strong democratic theory of legal authority that takes into account Waldron's 'circumstances of politics'. Both theorists take political and moral disagreement to be realities that a polity must take very seriously if it is to secure the republican goal of liberty as non-domination.¹⁶⁶

Now, the republican focus on the realities of political and moral disagreement and the circumstances of politics may be contrasted with

¹⁶² Bellamy, *Political Constitutionalism* (n 22) 175.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ See Goldoni, 'A Normative Positivism for the Deliberative Republic' (n 155) 5.

contemporary liberalism in important ways. As Goldoni notes, 'liberal theories of [authority] claim that consent is the ground for the legitimacy of government', and '[a]utonomy can be reconciled with the directives of authority only insofar [as] the latter is recognized by consent.'¹⁶⁷ Placing consent 'at the core of the liberal conception of legitimate authority brings with it the lack of acknowledgment of disagreement in legal reasoning.'¹⁶⁸ Furthermore, the Dworkinian idea of 'rights as trumps' does not fit very well within a theory of democratic authority for which moral and political disagreement is so central.¹⁶⁹ Dworkin's idea of rights as trumps 'does not resolve disagreement about the content of the rights' but 'simply take[s] for granted that there is a convergence at least around the kind of rights deemed to be trumps.'¹⁷⁰ For republicans, by contrast, taking disagreement seriously means, as Besson argues, that we should ensure that 'those institutions which are most representative of our disagreements and democratically most legitimate...have the last word on reasonably contested issues.'¹⁷¹

We have established so far the centrality of the circumstances of politics for theories of republicanism. How does that centrality make normative positivism an appropriate jurisprudential theory for a republican theorist to endorse?

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing 2005) 159.

In the previous chapter, I detailed the normative reasons for a theorist committed to democracy to endorse legal positivism as a theory of law.¹⁷² These reasons were the stress that legal positivism places on the *provenance* of laws and the *separability* of law and morality. For a normative positivist who promotes the separation of law and morality for democratic reasons [hereinafter a ‘democratic positivist’], I detailed the reasons that this preoccupation with sources of law and the separation of law and morality are important.

Taking *sources* first, as Waldron argues, ‘when there is a question about enforcing a given norm, a democrat will want to ask hard questions about its origin: where and by whom was the decision made that *this* should be one of the norms enforced in this society? If it was controversial, how was that controversy resolved? Who exactly participated in the decision, and on what terms and through what processes did they participate?’¹⁷³ For the democratic positivist, ‘in principle *everyone* who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be adopted.’¹⁷⁴ If a society does not allow for such participation, the democratic positivist believes that its institutions ought to be reformed.¹⁷⁵

¹⁷² See Chapter 2, Section 2.6

¹⁷³ Jeremy Waldron, ‘Can There Be a Democratic Jurisprudence?’ (2009) 58 **Emory Law Journal** 675, 688.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

Taking, next, the positivist insistence on the separation of law and morality, there is a certain discomfort, for the democratic positivist, with the idea that ‘a content-based criterion’ refuses to ‘recognize as law what a democratic legislature has enacted on the ground that it conflicts with what is taken to be justice.’¹⁷⁶ It ought to be discomforting to a democratic positivist that a subjective sense of justice of a judge or theorist is allowed to set aside a democratically enacted norm. For democratic positivists, what is included in their ‘allegiance to democracy’ is the idea that ‘any content-based prejudices must be pushed aside in order to allow the people to choose freely for their law whatever norms they think appropriate.’¹⁷⁷ Democratic positivists believe in doing so because they are cognizant of, and very sensitive to, the realities of disagreement; democratic positivists ‘expect there to be disagreement about justice in an ordinary polity under normal conditions’,¹⁷⁸ and they believe that such disagreements ought to be resolved democratically. The positivist insistence on the separation of law and morality means, for the democratic positivist, that we should separate ‘the proposition that a given norm was adopted in the right way from the proposition that it was the right norm to adopt.’¹⁷⁹

It is difficult not to see the affinity that republican theories noted above have with normative positivism, given the stress that both theories place on a strong democratic theory of legal authority that deems it ‘indispensable’¹⁸⁰

¹⁷⁶ *ibid* 700.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid* 689.

that a given norm come from a democratic source through a process that takes disagreement among citizens about the content of that norm seriously. It is for this reason that Besson and Martí conclude that ‘legal republicanism ought to encompass a [normative] positivist theory of law, because it cannot rely on the existence of a natural, pre-political validity.’¹⁸¹ In other words, for both the republican and the normative positivist, to quote Bellamy, ‘the democratic provenance of a law forms an essential feature of its political legitimacy.’¹⁸² This is the affinity between republicanism and normative positivism to which I have so far attempted to draw attention.

That is not to suggest that republicanism in all its forms has all the same values as normative positivism, as the following subsection demonstrates. As I discuss in the following subsection, although normative positivism has a general aversion to judicial discretion and seeks to minimize it as far as possible,¹⁸³ there are versions of republicanism that actively encourage judicial review. It is to the question of the compatibility of republicanism with judicial review that we now turn.

3.4B Republicanism and Judicial Review

Is judicial review compatible with republicanism? The answer, of course, depends on what substantive values of republicanism we value the most (or more than others). Various theorists who refer to themselves as ‘republican’

¹⁸¹ Besson and Martí, ‘Law and Republicanism’ (n 128) 32.

¹⁸² Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 **International Journal of Constitutional Law** 86, 91.

¹⁸³ See Chapter 2, Section 2.2 (especially the discussion of ‘normative decisional positivism’).

come to different conclusions on the question of the compatibility of judicial review with republicanism.¹⁸⁴

In the early stages of the revival of republicanism that occurred over three decades ago, legal scholars considered judicial review to be compatible with republicanism.¹⁸⁵ A feature of that republican revival, as mentioned above, has been the development of a strand of republicanism that sees ‘freedom as non-domination’ to be a key republican value. These scholars view judicial review as among a number of institutional constraints that makes possible the realization of that value.¹⁸⁶ Other republican theorists, however, consider participation in self-government to be a key republican value and stress the role of legislatures in realizing that value.¹⁸⁷ For this latter group of scholars, judicial review does not meet the demands of the republican ideal of self-government and ought to be rejected for that reason.¹⁸⁸ Thus, one vision of republicanism sees judicial review as an ingredient of republicanism that helps realize the goal of non-domination,¹⁸⁹ while the

¹⁸⁴ For a discussion of how different republican theorists answer the question of whether judicial review is compatible with republicanism based on what republican value(s) they cherish the most, see Honohan, ‘Republicans, Rights, and Constitutions’ (n 134).

¹⁸⁵ Sunstein, ‘Beyond the Republican Revival’ (n 135); Frank Michelman, ‘Foreword: Traces of Self Government’ (135). For discussion, see Honohan, ‘Republicans, Rights, and Constitutions’ (n 134).

¹⁸⁶ A prominent example is Pettit, *Republicanism* (n 132). See, however, (n 189) below. For a discussion of Pettit’s views on judicial review, see Honohan, ‘Republicans, Rights, and Constitutions’ (n 134).

¹⁸⁷ Bellamy, *Political Constitutionalism* (n 22); Waldron, ‘Judicial Review and Republican Government’ (n 133).

¹⁸⁸ See Honohan, ‘Republicans, Rights, and Constitutions’ (n 134) 85.

¹⁸⁹ Pettit argues that although judicial review is seen as among the institutional constraints able to realize the goal of non-domination, it does not follow that he deems it as a necessary

other sees judicial review as an impediment to participation in self-government.

3.4B(i) Michelman and Sunstein

Frank Michelman was among the legal scholars who, during the early years of the republican revival, argued that judicial review ought to be seen as a vehicle for the realization of the republican goal of citizen participation.¹⁹⁰ In one such work, Michelman argues for the need to ‘refocus constitutional vision on a republican notion of jurisgenerative politics as the crux of political freedom.’¹⁹¹ Michelman believes that for republican citizenship to be meaningful in the modern state, what is necessary is ‘admission to full and effective participation in the various arenas of public life’,¹⁹² and he argues that the courts provide a deliberative forum that facilitates such participation. In Michelman’s vision of republicanism, the ‘courts play an active and generative role’ in what he calls a ‘dialogic and non-authoritarian conception of constitutionalist practice’.¹⁹³

ingredient of his republicanism: ‘I have not said anything on whether there should be a written as distinct from an unwritten constitution; on what the exact scope of a constitution should be; or on whether there should be room for judicial review on the American model, for the sort of review associated with European constitutional courts, or for some other mode of policing the government’s conformity to the constitution. All such questions are matters that can be resolved only in the light of empirical research and empirically informed modeling of constitutional arrangements. Nothing is a matter of sacred, democratic writ.’ Philip Pettit, ‘Two-dimensional Democracy and the International Domain’ Draft for conference presentation, **NYU Law School** (4 October 2002). Available at <<http://www.iilj.org/courses/documents/HC2004.Pettit.pdf>> 27 (visited 26 February 2015).

¹⁹⁰ Frank Michelman, ‘Law’s Republic’ (1988) 97 **Yale Law Journal** 1493; Michelman, ‘Foreword: Traces of Self Government’ (n 135). For discussion, see Honohan, ‘Republicans, Rights, and Constitutions’ (n 134).

¹⁹¹ Michelman, ‘Law’s Republic’ (n 190) 1524.

¹⁹² *ibid* 1533.

¹⁹³ *ibid* 1507.

Cass Sunstein, like Michelman, contributed to the constitutional law literature during the early days of the republican revival by arguing for an active role for the courts in realizing republican values.¹⁹⁴ For Sunstein, republicanism ‘sees political liberty in collective self-determination’ and ‘while it does not regard political participation as the sole good life for human beings, it attempts to provide outlets for citizen control and local self determination.’¹⁹⁵ Sunstein’s defence of judicial review is one that considers the practice of judicial review necessary to compensate for the quality, or lack thereof, of deliberation in non-judicial institutions. Sunstein’s argument in favour of judicial review is that the courts have the capacity to improve public debate and to respond to the failure of a political process that he views as one of ‘lawmaking by powerful private groups.’¹⁹⁶ Thus, in his defence of judicial review, Sunstein writes:

There is an apparent anomaly in relying on principles of Madisonian republicanism as a basis for a vigorous judicial role. Those principles are rooted in a conception of politics which does not easily accommodate judicial intrusions. But those intrusions become defensible when they are based on constitutional and statutory provisions whose purpose and effect are to improve a political process that amounts in the circumstances to lawmaking by powerful private groups. The judicial role outlined here is hardly desirable in the abstract, and it need not be exclusive; it is justified in part by the need for some institution of government to incline politics in Madisonian directions.¹⁹⁷

¹⁹⁴ Sunstein, ‘Beyond the Republican Revival’ (n 135). For discussion, see Honohan, ‘Republicans, Rights, and Constitutions’ (n 134).

¹⁹⁵ *ibid* 1569.

¹⁹⁶ Cass Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 **Stanford Law Review** 29, 79.

¹⁹⁷ *ibid*.

Sunstein's defence of judicial review, therefore, is not enthusiastic but is one in which he sees judicial review as a necessary evil that ought to be supported for consequentialist reasons to do with the courts' capacity to realize republican ends and to move 'politics in Madisonian directions.'¹⁹⁸ His argument is for judicial review of a minimalist, rather than activist, type, and more recently he has written that courts should review cases on a 'one case at a time'¹⁹⁹ basis rather than engage in wide-ranging policymaking.

3.4B(ii) Waldron

Jeremy Waldron is one of the theorists for whom one of the principal values of republicanism is participation in self-government realized through majoritarian institutions.²⁰⁰ According to this participatory ideal, citizens 'are to participate in politics not merely as acquisitive egoists devoted to their private interests, but as statesmen, that is, as people who feel a strong responsibility for public affairs'.²⁰¹ The republican idea of the citizen is the idea of 'an ordinary full member of the society—a member of the public whose affairs are properly comprised in the *res publica*, or a member of the community whose interests are properly comprised in the idea of the "commonwealth."²⁰² Furthermore, the republican approach to suffrage is

¹⁹⁸ *ibid.*

¹⁹⁹ Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

²⁰⁰ Waldron, 'Judicial Review and Republican Government' (n 133) 159.

²⁰¹ *ibid.*

²⁰² *ibid.*

that politics ought not to be viewed as ‘the special preserve of some extraordinary subset of the members’ of society, but that we should view politics as being about ‘the public and common affairs of the citizens’, and it should be ‘conducted among the citizens on that basis.’²⁰³

The participatory ideal does not require that such participation be direct, however, as in the form of a direct democracy, for a system of representative government is deemed perfectly compatible with republicanism.²⁰⁴ In a system of representative government, ‘important decisions about public affairs—law-making, policymaking, or the great issues of state—are still made by officials and institutions in the name of the public and in a way that is responsive...to all the members of the public whose affairs these decisions ultimately are.’²⁰⁵ Thus, representative government is perfectly capable of accommodating the participatory ideal.

Republican self-government also stresses the notion of political equality. In a republican system of government, ordinary citizens have ‘as much standing to participate in politics, even professional politics, as anyone in the society’—we are, as citizens, ‘one another’s equals so far as our stake and standing in political affairs is concerned.’²⁰⁶ Although it may seem that the structures of representative government create a kind of political inequality, ‘the republican conviction is that these are both superficial (by comparison

²⁰³ *ibid.*

²⁰⁴ *ibid* 161.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

with the deeper political egalitarianism) and answerable' to the fundamental republican value of political equality.²⁰⁷

After defending that vision of republicanism, Waldron goes on to argue why he does not believe judicial review meets the demanding requirements of republicanism. He begins by responding to Ronald Dworkin's argument, made in the 1990s in support of a bill of rights for the United Kingdom—the argument that we can dispose of the republican concerns against judicial review by demonstrating that polls reveal widespread support for a British bill of rights.²⁰⁸ Waldron is not convinced that this argument of Dworkin's disposes of republican concerns against judicial review:

The fact that there is support among the citizens, even overwhelming support, for a constitutional practice does not make the practice republican. I guess that if the people want a regime of judicial review, then that is what they should have: that is what the idea of republican self-government requires, so far as constitutional practice and constitutional change are concerned. But we must not confuse the reason for carrying out a proposal with the character of the proposal itself. If the citizens voted to experiment with dictatorship, republican principles might give us a reason to allow them to do so. But it would not follow that dictatorship is a republican form of government.²⁰⁹

²⁰⁷ *ibid.*

²⁰⁸ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 365-366 ('Such polls are unreliable in various ways, but the dramatic preference for incorporation [of the European Convention] is nevertheless impressive. Britain will not have a Bill of Rights...unless it turns out, after an intense period of public debate, that the preference is genuine, that the British people do share a constitutional sense of justice. If so, and if we assume that this sense of justice will be shared by their descendants, then the argument that incorporation is undemocratic will have been defeated on its own terms.');

²⁰⁹ Ronald Dworkin, *A Bill of Rights for Britain* (Chatto and Windus 1990) 36-37, cited in Waldron, 'Judicial Review and Republican Government' (n 133).

²⁰⁹ Waldron, 'Judicial Review and Republican Government' (n 133) 165.

As Neil Walker writes about this point, '[p]rocess cannot always legitimate outcome, and certainly cannot do so indefinitely', for 'if process were unimpeachable then any manner or form of democratic abuse could be justified in the name of popular pre-commitment.'²¹⁰

A second argument Waldron responds to, again of Dworkin's, is the claim that judicial review improves public debate, which debate 'better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.'²¹¹ American citizens, according to Dworkin, 'better understand...the distinction between the question whether abortion is morally and ethically permissible, on the one hand, and the question whether government has the right to prohibit it, on the other', and 'they also better understand the more general and constitutionally crucial idea on which that distinction rests: that individuals have rights that may work against the general will or the collective interest or good.'²¹²

Waldron, again, is not convinced, arguing that he can make the same tentative empirical claims about public debate about rights in countries that do not have a constitutionalized bill of rights: '[N]ational debates about abortion are as robust, as statesmanlike, and as well informed in countries like the United Kingdom and New Zealand, where [rights] are not

²¹⁰ Neil Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2002) 134.

²¹¹ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 345, cited in Waldron, *Law and Disagreement* (n 31) 289.

²¹² *ibid*, cited in Waldron, *Law and Disagreement* (n 31) 289.

constitutionalized, as they are in the United States—more so perhaps because they are uncontaminated by quibbling about how to interpret the text of an eighteenth-century document.²¹³ Honohan notes that the question as to whether or not judicial review improves public debate is at least partially an empirical question, noting that others such as Sunstein and Michelman have argued along the same lines about this point as Dworkin.²¹⁴ Beyond that empirical point, however, Waldron argues that it is in any event a ‘travesty’ that a republican theorist ought to see it as a gain that judicial review contributes to a so-called improvement in public debate:

True republicans are interested in *practical political deliberation among the citizenry*, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision. A starstruck people may speculate about what the Supreme Court will do next on abortion or some similar issue; they may even amuse each other, as we law professors do, with stories of how *we* would decide, in the (unlikely) event that we were elevated to that eminent tribunal. The exercise of power by a few black-robed celebrities can certainly be expected to *fascinate* an articulate population. But that is hardly the essence of active citizenship. Perhaps such impotent debating is nevertheless morally improving: Dworkin may be right that “there is no necessary connection between a citizen’s political impact or influence and the ethical benefit he secures through participating in public discussion.” But independent ethical benefits of this kind are at best desirable side-effects, hardly the primary point of civic participation in republican political theory.²¹⁵

²¹³ Waldron, ‘Judicial Review and Republican Government’ (n 133) 167-168.

²¹⁴ Honohan, ‘Republicans, Rights, and Constitutions’ (n 134) 97.

²¹⁵ Waldron, ‘Judicial Review and Republican Government’ (n 133) 168-169 (citation omitted).

In other words, the benefits to republican democracy that Dworkin identifies are not the ‘essence’, according to Waldron, of the republican ideal of active citizenship but ‘at best desirable side-effects.’²¹⁶

A third argument that Waldron finds more plausible than the others considered so far is the argument that judicial review has the capacity to clear the channels of a defective political process.²¹⁷ As Waldron summarizes this argument:

[According to this argument,] republican government is a great achievement (where it exists), but it is not self-sustaining. It depends on the integrity of certain structures and processes, and on the existence and effective maintenance of certain conditions and guarantees. If these are not attended to, then republican government may wither away or self-destruct. One of the ways in which this might happen is through legislation: a legislative enactment may attack or undercut republican structures. That, then, is why we have the institution of judicial review of legislation. The special task of the courts, on this suggestion, is to underwrite and uphold the conditions that are necessary for self-government, not to pre-empt it or its outcomes.²¹⁸

Waldron finds this argument more plausible than Dworkin’s arguments presented earlier, but he believes that what John Hart Ely, the leading proponent of this representation reinforcement argument,²¹⁹ has shown in making this argument is ‘that republican self-government is *impossible* in an

²¹⁶ *ibid.*

²¹⁷ *United States v. Carolene Products* (1938) 304 US 144, 152n4; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981).

²¹⁸ Waldron, ‘Judicial Review and Republican Government’ (n 133) 171.

²¹⁹ Ely, *Democracy and Distrust* (n 217) Ch 5.

unalloyed form, not that the ideal of republican self-government involves or comprises the practice of judicial review.’²²⁰

Waldron’s argument is that republican theorists who are willing to countenance judicial review compromise some of the very values of republicanism that they are expected to promote. He argues that republicanism in its ideal form is a ‘demanding ideal’.²²¹ Although those republicans who are willing to accept or even encourage judicial review accept the demanding nature of the republican ideal, ‘they are not sure the citizenry are up to these demands.’²²² These republican theorists, Waldron argues, ‘think that some of the demands that republican government places upon us are so exacting that they must be enforced by [non-republican] institutions such as courts oriented to the imposition of final decisions about matters of great controversy in the community.’²²³ But, as Waldron argues, civic republicanism is also a demanding ideal in another way:

...[C]ivic republicanism is demanding in another way. Faith in a people’s ability to govern themselves demands that we accept certain risks—including the risk that the very system of self-government might self-destruct. As much as the faith of a parent in a young adult’s autonomy or the faith of a colonial power in the new political system of its erstwhile dependency, the theorist of republicanism advocates that we take a chance on a people’s ability to govern themselves. Sure it means that things are up for grabs, and it is not unimaginable that the newly enfranchised entity will grab at something dangerous or ill conceived. To be exercised by this possibility is only human, but to be obsessed by it, in one’s thinking about institutional design, is to turn one’s back on the republican

²²⁰ Waldron, ‘Judicial Review and Republican Government’ (n 133) 172 (emphasis added).

²²¹ *ibid* 176.

²²² *ibid*.

²²³ *ibid*.

aspiration, and to commit oneself instead to some form of paternalistic or aristocratic tutelage.²²⁴

A republican theorist, in other words, ought to have more faith in the ability of his or her fellow citizens to govern ourselves according to the ideals of republicanism. Sure, there are risks that a republic might ‘self-destruct’²²⁵ by republican means, but we ought not to be so ‘obsessed’²²⁶ by that possibility that we ‘turn [our] back[s]’²²⁷ on core republican aspirations.

For Waldron, ‘the worst form of republican apostasy is to worry that social issues that one regards (perhaps rightly) as of great importance may be settled in ways that do not depend purely on *one’s own* thinking, or *one’s own* conscience, or *one’s own* convictions about justice, and to portray *that* as the sort of danger that we need judicial review to guard against.’²²⁸ It is, in other words, a form of ‘republican apostasy’ to not accept the fact that we share the world with our fellow citizens with whose notions of justice we might reasonably disagree:

For each of us, to engage in politics is to accept that we share the world with others—millions of others—who are constituted not just as objects of our moral concern but as individual thinkers with their own view on the matters that we take so seriously. There is a danger that when one moves from a politics dominated by interest to a politics dominated by principle, people will find it harder (*morally* harder) to accept compromise or to submit to social decisions with which they do not agree. Republicanism requires this move of us—it requires us to

²²⁴ *ibid.* 176-177.

²²⁵ *ibid.* 177.

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *ibid.*

take matters of principle seriously; but because it is a political philosophy, it requires each of us as a citizen to loosen a little the connection between our own convictions and what we can expect from our polity. Though each of us reasonably regards his own moral views as tremendously important, we must also (each of us) respect the elementary condition of *being with others*, which is both the essence of republican politics and the principle of mutual recognition that lies at the heart of the idea of citizenship.

When one confronts a fellow citizen, one is not just dealing with a person entitled (on one's own favourite moral theory) to liberty, justice, sustenance, rights, and protection. One is confronting above all a particular *intelligence*—a mind and consciousness that is not one's own, that is not under one's intellectual control, that has its own view of the world and its own account of the proper basis of relations with those whom it too sees as other. The worst thing, then, about judicial review from a republican standpoint, is that it tempts us away from that recognition, and entices us into a politics that offers a more direct vindication of the power and importance of our own moral convictions.²²⁹

Waldron's argument is a powerful one, which is that a scholar who calls himself republican yet is willing to accept judicial review, compromises the faith that republicans are expected to place in their fellow citizens to govern ourselves according to the principles of republicanism. We should place our faith in democracy rather than to seek to protect democracy through counter-majoritarian means. We should resist the temptation to argue that courts should be called upon to resolve disagreements with our fellow citizens about our respective notions of justice, even if there is a danger that republicanism might, in some circumstances, self-destruct by republican means.

²²⁹ *ibid.*

3.5 THE DIVERSITY WITHIN POLITICAL CONSTITUTIONALISM— DESCRIPTION AND EVALUATION

In one of his more recent works on political constitutionalism, Tomkins casts the distinction between political constitutionalism and legal constitutionalism in the following terms:

Constitutional scholarship in the English-speaking world knows many schools of thought and accommodates a variety of methods or approaches to the subject. In recent years, one of the most significant distinctions has been that between political constitutionalism and legal constitutionalism (also known as common law constitutionalism or legal liberalism). While there are numerous differences of view within these two broad categories, it is the difference between political and legal constitutionalists that has attracted the most attention. That difference is multi-faceted, but one central aspect of it is a basic disagreement about the fundamental constitutional question of how best to hold the government to account. Political constitutionalists privilege political forms and institutions of accountability; legal constitutionalists privilege legal forms and institutions of accountability. Thus, political constitutionalists tend to think that accountability is best secured through political institutions such as Parliament, by political actors such as parliamentarians and electors, and through political means such as debate, questioning, and investigative scrutiny, both in Parliament and through the media. Legal constitutionalists tend to think that accountability is best secured through the legal institution of the courts, by judges, and through the legal means of adjudicative litigation.²³⁰

Tomkins's vision of what he takes to be political constitutionalism suggests a similarity with normative positivism insofar as he suggests in the above quote that it is important for political constitutionalists that the discretion of judges be minimized.

²³⁰ Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1.

But what Tomkins's definition of political constitutionalism ignores is the type of diversity *within* political constitutionalism to which, in this chapter, I have drawn attention. Tomkins sees political constitutionalism as a school of thought that seeks to minimize the role of the courts in the constitutional system. That makes his political constitutionalism appear to be a form of normative positivism. But it is the foundation of his understanding of the UK constitution that is so very different from that of normative positivists. Normative positivists promote the conceptual separation of law and morality for normative reasons. Tomkins, on the other hand, does not seem troubled by the idea that his personal views of what counts as a 'constitutionally entrenched'²³¹ norm ought to trump the 'liberal consensus'²³² on the meaning of the constitution.

It is that diversity within political constitutionalism that I have tried to uncover in this chapter by arguing that among those who are described in public law scholarship as political constitutionalists, Tomkins is unique in building his republican argument on an understanding of the UK constitution that is anti-positivist in character. While the political constitutionalism of Griffith, Bellamy, Campbell, and Waldron can be located within the fold of normative positivism, we cannot say the same about Tomkins. As I demonstrated above, the high level of concern for the democratic provenance of law, and for the separability of law and morality, that normative positivists express is missing from Tomkins's work to the extent that he endorses a vision of a 'constitution' as a repository of abstract principles, principles that according to him deserve respect and obedience on

²³¹ Tomkins, *Our Republican Constitution* (n 76) 40.

²³² Walker, 'Review' (n 114) 128-129.

moral grounds, when in effect the norms that Tomkins wants us to consider as ‘constitutional’ norms may easily be described as his own preferred substantive values,²³³ values whose democratic source is in no way clear. When Tomkins claims in his work that a certain republican principle is a ‘constitutional requirement’²³⁴ or is ‘constitutionally entrenched’²³⁵ or is ‘constitutionally ordained’,²³⁶ a normative positivist who endorses legal positivism for democratic reasons—i.e. a democratic positivist—would want to know why. A democratic positivist would ask hard questions about the democratic source of that norm that Tomkins wants to be regarded as a ‘constitutionally entrenched’ norm. A democratic positivist would ask Tomkins: ‘where and by whom was the decision made that *this* should be one of the norms enforced in this society?’²³⁷ A democratic positivist would ask Tomkins: ‘Who exactly participated in the decision, and on what terms and through what processes did they participate?’²³⁸ A democratic positivist would ask Tomkins these questions because she ‘has very strong views about how decisions like these should be made.’²³⁹ She believes that ‘in principle *everyone* who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be

²³³ For such a criticism of Dworkin’s legal theory, see Campbell, *Prescriptive Legal Positivism* (n 64) 113-114.

²³⁴ Tomkins, *Our Republican Constitution* (n 76) 37-41.

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ Waldron, ‘Can There Be a Democratic Jurisprudence’ (n 173) 688.

²³⁸ *ibid.*

²³⁹ *ibid.*

adopted.’²⁴⁰ She believes that ‘every society should set up political institutions that embody this principle and should seek to reform or subordinate decision-making institutions that operate on any other basis.’²⁴¹ A democratic positivist would also worry about Tomkins’s assertion that a certain republican norm is ‘constitutionally ordained’²⁴² because a democratic positivist is very sensitive to the realities of disagreement.²⁴³ A democratic positivist would feel very uncomfortable with the idea that Tomkins refuses to accept something as a ‘constitutional’²⁴⁴ norm and believes in attaching the label ‘unconstitutional’²⁴⁵ to norms with which he disagrees. These disagreements, for the democratic positivist, about our subjective sense of what constitutes a ‘good constitution’, ought to be resolved democratically, not by mere assertion.

I said in the introduction that my overall argument will have a descriptive as well as an evaluative dimension. If my descriptive argument is that Tomkins’s political constitutionalism is different from Griffith’s political constitutionalism because of the anti-positivist streak running through Tomkins’s political constitutionalism, then my evaluative argument is that I believe Bellamy, Griffith, Campbell, and Waldron present a more coherent picture than does Tomkins of the concept of political constitutionalism

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² Tomkins, *Our Republican Constitution* (n 76) 40.

²⁴³ Waldron, ‘Can There Be a Democratic Jurisprudence’ (n 173) 700.

²⁴⁴ Tomkins, *Our Republican Constitution* (n 76) 37-41.

²⁴⁵ *ibid.*

precisely because, unlike Tomkins, they are all normative positivists. If the ultimate goal of a political constitutionalist is to minimize the discretion of judges and to privilege the role of democratic institutions over judicial institutions in the constitutional system for the sake of democracy, then we might say that it is a form of democratic ‘apostasy’²⁴⁶ to presuppose the same understanding of the constitution as the understanding of legal constitutionalists—an understanding according to which the constitution is defined as a constitution-of-abstract-principles, principles whose democratic source is in no way clear,²⁴⁷ principles that are unearthed through a process of moral interpretation, which process of interpretation turns on the moral judgment of the particular judge or theorist advocating that particular interpretation of the constitution. Thus, in the political constitutionalism of Tomkins, we can identify a liberal constitutionalist streak, which makes Tomkins’s political constitutionalism very different from the political constitutionalism of Griffith, the latter of whose political constitutionalism, as I demonstrated in the previous chapter, was a form of normative positivism.

²⁴⁶ Or as Waldron would say, ‘republican apostasy’. Waldron, ‘Judicial Review and Republican Government’ (n 133) 177.

²⁴⁷ Campbell, *Prescriptive Legal Positivism* (n 64) 113-114.

THE NORMATIVE VOICE IN GRIFFITH'S POLITICAL CONSTITUTIONALISM

4.1 INTRODUCTION

This chapter argues that many of the prescriptive arguments that Griffith made in 'The Political Constitution'¹—in particular the arguments that I described in Chapter 2 as *normative positivist* arguments—are best appreciated from a particular vantage. That vantage is the vantage of the *citizen*.² We must resist the temptation, I will argue, to try make sense of Griffith's arguments from the standpoint of the judge, in particular the appeals court judge, which, as one commentator has recently complained, 'is so often the implicit vantage or viewpoint in legal writing today (and more so even in legal education today where students are fed little more than a steady diet of highest appeal court cases).'³ This complaint, of course, is not new; in a lecture delivered to an American audience in 1977, HLA Hart famously noted the concentration of American legal theorists, 'almost to the

¹ JAG Griffith, 'The Political Constitution' (1979) 42 **Modern Law Review** 1.

² In making this argument, I draw upon James Allan's recent work, in which he argues that many of the good consequences of keeping separate law and morality and many of the negative consequences of having a bill of rights are best appreciated from the vantage of what he refers to as *the concerned citizen*. See generally James Allan, *The Vantage of Law* (Ashgate 2013).

³ *ibid* 2.

point of obsession’, on the vantage of the judge—‘what courts do and should do, how judges reason and should reason in deciding particular cases.’⁴

The central argument that I hope readers will take from this chapter is that the normative positivist arguments Griffith made in ‘The Political Constitution’, discussed in detail in previous chapters, are best appreciated from the standpoint of a citizen who values ‘the virtues (or good consequences) normally emphasized in republican theories, benefits such as having an involved citizenry that is responsible for the decisions taken in its name—one where people are encouraged to participate in political life, to debate key issues, and to play an active role in the polis.’⁵ In particular, I would argue that it would be a mistake to try to view Griffith’s arguments from the vantage of the appeals court judge, which happens to be the vantage from which, for example, Ronald Dworkin builds his theory of law.⁶ Dworkin, as is well-known, builds his theory of law out of a theory of adjudication;⁷ about Dworkin’s theory of law, Joseph Raz writes that Dworkin’s *Law’s Empire*⁸ is ‘not so much an explanation of the law as a sustained argument about how courts, especially American and British courts, should decide cases.’⁹ Dworkin’s liberal theory of law is, in other

⁴ HLA Hart, ‘American Jurisprudence through English Eyes: The Nightmare and the Noble Dream’ (1977) 11 *Georgia L Rev* 969.

⁵ Allan, *The Vantage of Law* (n 2) 55.

⁶ See Chapter 3, Section 3.1 for a discussion of Dworkin’s theory of law.

⁷ Allan, *The Vantage of Law* (n 2) 13.

⁸ Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

⁹ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2010) 87.

words, presented as a theory of interpretation—how judges interpret what Dworkin believes to be principles that exist underneath the hard positive law that judges unearth through a process of legal/moral interpretation.

Griffith's arguments, on the other hand, relating to his interest in minimizing the discretion of judges, his opposition to bills of rights, and his belief in placing our faith in the democratic process rather than in judges are all arguments that are best appreciated not from the vantage of the judge but, as I shall attempt to demonstrate in this chapter, from the vantage of the *republican* citizen. It is the citizen, committed to a republican form of government, from whose perspective we will be best able to appreciate the good consequences that would flow from the type of political constitutionalism advocated in Griffith's 'The Political Constitution'.

4.2 THE IMPORTANCE OF SWITCHING STANDPOINT

We considered in Chapter 2 the question of whether or not the purely conceptual version of legal positivism, with its purely descriptive aims, is even possible, and I noted that there is debate among scholars as to whether or not purely descriptive jurisprudence of the sort defended by HLA Hart¹⁰ and Jules Coleman¹¹ is even possible.¹² How does this debate about the

¹⁰ HLA Hart, *The Concept of Law* (Penelope A. Bulloch, Leslie Green & Joseph Raz eds, 3rd edn, Oxford University Press 2012) 240.

¹¹ Jules Coleman, 'Negative and Positive Positivism' (1982) 11 *The Journal of Legal Studies* 139.

¹² See Chapter 2, Section 2.3. Prominent examples of those who deny the possibility of purely conceptual jurisprudence uninvested in moral or normative concerns are John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011) Ch 1; Ronald

possibility of value-neutral jurisprudence relate to the question of normative positivism and its desirability?

Schauer has argued that '[e]ven if it were possible to discover and describe the concept of law in a value-neutral way, it could still be worthwhile to consider whether the concept so described should be endorsed or condemned, promoted or restricted, changed or perpetuated.'¹³ He argues that normative positivism 'does not require that descriptive conceptual positivism be impossible, and normative positivism's desirability does not presuppose its inevitability.'¹⁴ If we accept that the concept of law is a socially-constructed concept that is 'non-eternal'¹⁵ in nature (contrast that view from the natural law position), then, argues Schauer, 'it is open to the theorist or citizen to consider what attitude to have—and what actions to take on the basis of that attitude—about the product of that social construction, even assuming the ability to describe what has been constructed at some moment in time.'¹⁶

Because it is the case that normative positivism is a normative position, Schauer argues that it is important to clarify the vantage from which the particular normative argument is being made.¹⁷ 'No particular voice, or

Dworkin, *Justice in Robes* (Harvard University Press 2006) Ch 6. Others willing to allow this possibility include Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001); Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 *Oxford Journal of Legal Studies* 683.

¹³ Frederick Schauer, 'Positivism Before Hart' in Michael Freeman and Patricia Mindus (eds), *The Legacy of John Austin's Jurisprudence* (Springer 2013) 281.

¹⁴ *ibid* 281.

¹⁵ *ibid*.

¹⁶ *ibid* (citation omitted).

¹⁷ *ibid* 282.

standpoint,' argues Schauer, 'is necessarily superior to any other, but it is difficult to understand any normative position, including...normatively-focused positivisms..., without comprehending the source, the target, and the subject of the prescriptions being discussed.'¹⁸ In discussions of normative positivism, it is not always clear, he argues, what vantage it is from which a particular normative argument is being made:

[A]lthough the normative is the domain of the "ought" rather than the "is," the question arises about who it is who ought to do what. Waldron, for example, is not entirely explicit about whether in urging normative positivism *he* is urging that law be understood in a positivist way, or urging other legal theorists to understand law in a positivist way, or describing the fact that legal theorists understanding law in a positivist way have good reasons for that understanding, or whether he is describing or joining those who believe that it would be better for society to understand law in a positivist way. Each of these positions is possible, but it is important to understand the nature of the normative claims that are being advanced.¹⁹

Schauer's argument about the importance of situating the normative voice of the various positions within normative positivism is an important one, but it is of course not a novel argument in the broader context of jurisprudence in general (i.e. not just in the context of a normative positivist jurisprudence). William Twining once wrote that 'in jurisprudence, it is essential to take clarification of standpoint seriously.'²⁰ Legal scholarship often invites the reader to adopt one or more standpoints from which the author's argument would be best understood, e.g. Oliver Wendell Holmes's famous argument that '[i]f you want to know the law and nothing else, you must look at it as a

¹⁸ *ibid.*

¹⁹ *ibid* 281.

²⁰ William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000) 133.

bad man, who cares only for the material consequences which such knowledge enables him to predict'.²¹

Twining has long campaigned for the need to study law from a variety of standpoints²² and has written extensively on Holmes's 'bad man'.²³ In one account of the 'bad man', he writes about the significance of changing the way we generally look at law and shifting our vantage away from the 'top down' perspective of judges and legislators and towards the 'bottom up' perspective of the citizen and others who are subject to the law:

[T]he bad man is a good example of the significance of switching standpoint. In particular, he reminds us of the significance of bottom-up perspectives. Even if broadly interpreted as a metaphor, he cannot be taken as fully representative of all legal subjects, such as victims, users, women, and the oppressed. But he does draw attention to the idea of law as other people's power and in the process too much that tends to be omitted from theories that are exclusively top-down. How law is perceived and used by subjects is as significant for the purpose of understanding as the motives, aims, and decisions of those who control a legal system.²⁴

In other words, there is value, argues Twining, in switching standpoints for a better understanding of law, and in particular switching our vantage away from top-down perspectives (such as the judicial vantage) and towards

²¹ Oliver Wendell Holmes, 'The Path of Law' (1897) 10 **Harvard Law Review** 457, 459 (emphasis added).

²² William Twining, 'The Bad Man Revisited' (1973) 58 **Cornell Law Review** 275; Twining, **Globalisation and Legal Theory** (n 20); William Twining and David Miers, **How to Do Things with Rules: A Primer of Interpretation** (4th ed., Cambridge University Press 1999) 67-76.

²³ E.g. Twining, 'The Bad Man Revisited' (n 22); Twining, **Globalisation and Legal Theory** (n 20) 134.

²⁴ Twining, **Globalisation and Legal Theory** (n 20) 134.

bottom-up perspectives (such as the vantage of the citizen) in order to appreciate the impact of law on those who are not directly authors of the law but instead are subject to the law that legislators have enacted and judges have interpreted.

4.3 HOW IS THE VANTAGE OF THE CITIZEN DIFFERENT FROM THE VANTAGE OF THE JUDGE?

What is crucial to understanding the difference between the vantage of the judge versus the vantage of the citizen is that the citizen has no power to designate what the law is.²⁵ One may immediately object against this claim and say that the citizen's vantage need not be understood exclusively as a bottom-up perspective, and that would, indeed, be a valid objection. The citizen's role in constitutional authorship through the increasing use in the UK of the constitutional referendum has meant that the citizen does play a vital role in British constitutional authorship,²⁶ and, therefore, the citizen's vantage may also be understood as a top-down perspective. Nevertheless, outside the context of such 'constitutional moments',²⁷ the citizen does not have the same power as does a legislator or a judge to say what the law is. The citizen has a vote that determines who the lawmakers will be, but she does not have a direct role in designating what the law is.²⁸ This distinction—between the powers of legislators and judges, on the one hand,

²⁵ Allan, *The Vantage of Law* (n 2) 15.

²⁶ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012).

²⁷ Bruce Ackerman, *We the People: Foundations v. 1* (Harvard University Press 1991).

²⁸ Allan, *The Vantage of Law* (n 2) 16.

to designate what the law is, and the citizen, on the other hand, who is subject to the law and has the power only to choose who gets to designate the law, or to influence through litigation the judges who get to designate the law—will be crucial for the purposes of understanding the arguments that follow.

Let us, then, compare and contrast the vantages of the citizen and the judge.

The Citizen. HLA Hart and Lon Fuller famously debated the issue of whether or not law and morality should be kept separate in the context of citizen disobedience to iniquitous law.²⁹ This was a debate that took place on consequentialist grounds; their debate was whether a positivist understanding of law would facilitate such disobedience (the Hartian position) or whether we need to stop iniquitous law from being designated 'law' in the first place, for otherwise citizens would obey government directives that achieved the status of 'law' (the Fullerian position).³⁰ The question before Hart and Fuller was this:

[W]hat will be most likely to engender an outlook that at least considers the possibility of not obeying evil government directives....Will it be to insist on having a separate moral platform or grounding on which to assess the demands of these directives or laws? Or will it be to deny these directives the designation 'law'?³¹

²⁹ HLA Hart, 'Positivism and the Separation of Law and Morals' 71 **Harvard Law Review** 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 **Harvard Law Review** 630.

³⁰ For discussion, see Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25 **Oxford Journal of Legal Studies** 493.

³¹ Allan, *The Vantage of Law* (n 2) 15.

The key to answering this question is to note, first, as noted above, that the citizen has no direct power to designate what the law is, and second that when Hart and Fuller debated this issue, they were discussing the issue in the context of the Nazi regime, which is to say that they were debating this question in the context of a 'Wicked Legal System',³² not a reasonably well-functioning, rights-respecting democracy.

In a wicked legal system, the citizen generally will have no power to designate what the law is but, more importantly, the citizen is also, in a wicked legal system, not likely to have the power to exercise other tools available to citizens in a reasonably well-functioning democracy.³³ In that scenario, separating law as it is from law as it ought to be provides the citizen the tools necessary 'to rebel against the diktats of the occupying Nazis, or the Soviets in Poland, or the Sudanese in Darfur.'³⁴ As Allan observes, the 'fact that the authorities designated something as law did not prevent the building up of resistance throughout Europe during World War II or the forming of Solidarity unions in Gdansk or the creation of rebel armies in parts of Sudan.'³⁵ The governments in wicked legal systems will already have labelled these evil directives as law, so it seems that for the citizen, it is crucial to keep separate law and morality in order to have a separate platform to assess whether or not a particular evil directive that the government has called law ought to be rejected or rebelled against.³⁶

³² *ibid.*

³³ *ibid* 15-18.

³⁴ *ibid* 15.

³⁵ *ibid* 15-16.

³⁶ *ibid* 16.

From the Fullerian perspective of denying the label law to evil directives, it seems that the only option available to the citizen is to argue that what the government has designated law does not ‘count as law, or [is] not wholly law or fully law or law in anything other than a half-dead sense.’³⁷ But by doing so, Allan argues, ‘all the difficult and tricky moral calculations and consequentialist weightings, including when and how to disobey, get collapsed into the one single issue of whether what the regime calls and labels a law is sufficiently moral to retain that label.’³⁸ The Fullerian anti-separation argument (by ‘anti-separation’, I mean the argument *against* the positivist insistence on keeping law and morality separate) is that if we label something as law, citizens will obey it, and therefore, we should attempt to prevent evil directives from achieving the status of ‘law’ in the first place. This seems to be an empirical question, and although Allan recognizes the empirical nature of this question, and although he notes that neither Hart nor Fuller offered any empirical data to buttress their respective arguments, he still concludes that in his view Hart was right, which is that the citizen ‘will be better placed to decide whether to flee or to engage in civil disobedience or to take up arms and fight by keeping [law and morality] separate rather than blending them together.’³⁹

The Judge. When we turn our attention away from the citizen and towards the judge, what does the Fullerian anti-separation argument look like? In this case, the Fullerian position seems to be a strong one if we think about

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

this position in the context *not* of wicked legal systems but in the context of a well-functioning democracy. In the context of a well-functioning democracy, the Fullerian anti-separation case is stronger ‘than in any other sort of legal system, because there is more scope [in a well-functioning democracy] to ensure that what gets officially designated as ‘law’ will be morally good, or at least will not be egregiously immoral.’⁴⁰ That is because a reasonably well-functioning democracy has ‘all sorts of institutional and legislative checks and balances and avenues for grievances.’⁴¹ If we accept that citizens in a well-functioning democracy are likely, in most cases, to obey what gets designated as law, then the Fullerian anti-separation argument seems to be a strong one: ‘the best way to deal with wicked, evil, egregious, odious laws’⁴² is to prevent them from becoming law in the first place.

Notice, however, that this argument implicitly assumes the vantage of someone in the legal system, such as the judge, who has the power to *designate* what the law is; it does not assume the vantage of the citizen because the citizen is in no position to prevent such designations. The good consequences of the anti-separation position are most visible from the perspective of those, such as the judge, who are in the authoritative position to designate what the law is in the legal system. The judge, using his powers of designating what the law is and of denying the label ‘law’ to government directives, can deny that label to those laws that he takes to be morally iniquitous.

⁴⁰ *ibid* 17.

⁴¹ *ibid*.

⁴² *ibid*.

The Fullerian anti-separation argument may be one that is preferred not just by judges but also by citizens. The citizen may prefer a legal system in which judges have the power to declare as invalid those laws or government directives that the judge and citizen both take to be wicked or morally depraved. The danger, however, for the citizen committed to a republican form of government is that once we allow judges to have that power, they—the judges—*retain* that power even in those instances in which the citizen may think that the law in question is *not* wicked. In other words, ‘the same tools that allow the Judge, and only the Judge, what [an external observer to the legal system] would characterize as rewriting or nullifying certain laws, laws seen to be particularly odious,’⁴³ are tools that are *also* at the judge’s disposal in those cases where some, or even most, people would not deem the law to be odious.⁴⁴ In those cases in which we might say that there is, in a Waldronian sense, reasonable disagreement about issues of justice and rights,⁴⁵ giving judges that power to deny the label ‘law’ to particular laws when reasonable people would say that the law in question is not wicked may appear from the perspective of the citizen invested in republican values to be an unattractive proposition:

[T]he more one is inclined...to see the world in Waldronian terms, where reasonable, smart, well-informed, even nice people simply disagree on all sorts of (if not all) moral issues...—where dissensus and disagreement over where to draw the whole array of lines that need drawing in society when it comes to abortion, immigration, how to balance criminal procedural entitlements against the need to lessen drunk driving, euthanasia, what limits to put on speech and religious practices and so much more is simply to be expected and is not a sign

⁴³ *ibid* 25.

⁴⁴ *ibid*.

⁴⁵ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

of pathology—the more one will worry about handing too much power to unelected judges.⁴⁶

For the citizen, with a concern and an interest in promoting the republican values that I noted above,⁴⁷ in other words, there will be a ‘trade-off—the ‘more scope judges, and only judges, have to instil or infuse their own moral views into law when the latter is egregiously bad (at least according to them), the more scope they are likely to have to do so as well when the latter is good or okay or not too bad (at least according to plenty of non-judges).⁴⁸ Does our citizen feel comfortable handing over such power to judges even in those cases where the law is not egregiously bad and about whose merit or demerit reasonable people can disagree? It seems to me, and here I am in agreement with Allan,⁴⁹ that for the citizen invested in the republican values of participation in self-government through representative institutions, handing over judges these powers at the expense of democracy is an unattractive proposition.

Let us now turn our attention away from the Hart-Fuller debate and towards the Hart-Dworkin debate and consider how the question of vantage pertains to that debate.

Let us take, first, the Hartian legal positivist understanding of law as a system of rules. According to the Hartian understanding, there will be instances where the judge is left with discretion to make law in what we

⁴⁶ Allan, *The Vantage of Law* (n 2) 25.

⁴⁷ See text to (n 5).

⁴⁸ Allan, *The Vantage of Law* (n 2) 26.

⁴⁹ *ibid.*

might describe as a ‘penumbral’ case—a case in which, owing to the indeterminate nature of language, a given rule will not clearly apply.⁵⁰ In this situation, the judge is in the unique position of having the ability to *designate* what the law is according to *his or her own morality*. For the judge, his or her view ‘of what is moral, because of her position as authoritative resolver of disputes, can become law’,⁵¹ and in this instance, it may be that the judge has a difficult time separating what the law *is* from what the law *ought* to be.

We can acknowledge that these cases are only the ones that rarely reach the highest court in the legal system; we can concede that most legal disputes in a reasonably well-functioning democracy will not reach the courts, much less the highest court. But, nevertheless, the fact remains that from the vantage of the judge, ‘when deciding one of these exceptional cases that has wound its way up to the jurisdiction’s highest court, law and morality seem closely intertwined’ and are ‘difficult to separate.’⁵² In one of these penumbral cases, what ‘the outcome should be, according to the [judge’s] own moral sense, can become or translate into what the law is.’⁵³

That is not to deny that judges cannot keep the two assessments separate. Judges, at least in lower courts, are constrained by *stare decisis* and are expected to follow precedents of higher courts. In those instances, it may

⁵⁰ Hart, *The Concept of Law* (n 10) 12 ([A]ll rules have a penumbra of uncertainty where the judge must choose between alternatives.’).

⁵¹ Allan, *The Vantage of Law* (n 2) 20.

⁵² *ibid.*

⁵³ *ibid.* 20.

well be the case that a judge finds a binding precedent morally questionable but is bound nevertheless to apply it, and in those instances, the judge may well be able to keep separate law and morality. As Allan notes, there ‘is no doubt that for the honest or non-prevaricating judge the common law can sometimes produce a body of rules as determinate as any statutory rule....And those rules need not in every case align with what some particular person thinks is morally good or morally tolerable, even if that person is a judge.’⁵⁴

This ability to separate law and morality is also evident in those instances at the highest appellate court level where the judge finds herself in the dissenting minority, for in this case, such a dissenting judge ‘can quite easily distinguish between what the majority just said the law is, and what she said it should be.’⁵⁵

Having acknowledged the judge’s ability to distinguish between what the law is and what it ought to be, it is still true that in a Hartian penumbral case, the judge, unlike the citizen, ‘is at times in the authoritative position to be able to elide her ‘oughts’ and the legal system’s ‘ises’.’⁵⁶

How do things change if we adopt not a Hartian legal positivist understanding of law but instead a Dworkinian anti-positivist understanding? Here, would it be easy for the judge to elide law and morality? Allan believes that this would be the case *even more so* than in the

⁵⁴ *ibid* 21.

⁵⁵ *ibid*.

⁵⁶ *ibid* 22.

case of a Hartian understanding. On a Dworkinian understanding, the judge ‘finds herself obliged regularly and routinely to blend together law and morality’,⁵⁷ and so the possibility, Allan argues, for a judge to separate law and morality becomes more difficult on a Dworkinian understanding of law than on a Hartian understanding. Why?

I discussed the Dworkinian notion of law in Chapter 3, from which discussion it may be recalled that in what Dworkin termed ‘hard cases’, in which existing rules do not clearly apply, judges construct a background fit theory that justifies the existing rules of the legal system; underneath the rules, as Dworkin argued, the legal system has committed itself to certain important principles.⁵⁸ For Dworkin that background fit theory is, as Allan explains, one ‘that best explains and justifies that jurisdiction’s constitutional provisions and statutes and precedents and conventions.’⁵⁹ We can say, therefore, that a Dworkinian judge is not necessarily free to rule without constraint. The Dworkinian judge is, arguably, constrained the way a chain novelist is in Dworkin’s chain novel metaphor; that is to say that the Dworkinian judge is constrained ‘by these existing materials, not unlike the way a chain novelist asked to write the tenth chapter of a book is constrained by the preceding nine chapters written by others.’⁶⁰ In terms of that ‘direct or first-order sense’,⁶¹ a Dworkinian judge is constrained by the

⁵⁷ *ibid.*

⁵⁸ See Chapter 3, Section 3.2A.

⁵⁹ Allan, *The Vantage of Law* (n 2) 23.

⁶⁰ *ibid.*

⁶¹ *ibid.*

existing materials—the right answers that Dworkin believes require to be unearthed.

On the other hand, ‘at the second-order or meta level’,⁶² the Dworkinian judge is not truly constrained in coming up with that background fit theory. That background theory needs to be constructed on the basis of that Dworkinian judge’s own moral views. The Dworkinian judge’s views on what this background fit theory might be implicates her own moral views. As Allan argues, the Dworkinian judge’s ‘own moral view of what that best background fit should be, because of her unique authoritative position, becomes or turns into what it is in fact (assuming, for the moment, that our Judge is in the majority and not dissenting).’⁶³ The result of this Dworkinian understanding of law is that a Dworkinian judge is often found to be blending his or her views of what the law ought to be into what the law is:

In stark terms, the Dworkinian judge is regularly and routinely blending together her ‘oughts’ and ‘ises’, or transmogrifying the former into the latter. True, she is not simply substituting her own first-order moral preferences or judgments for the laid-down legal rules. But in a [reasonably well-functioning democracy] there is certainly scope, because of the general benevolence of the materials with which the Judge is working, to shape her all-encompassing best justifying theory, to achieve much of what she might like, had she been free simply to substitute her ‘ought’ for the imposed ‘is’.⁶⁴

Allan’s point is that since a Dworkinian judge takes her job to be ‘to make the best she can of the materials before her—to write the very best chapter

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.* 23.

ten that she can'⁶⁵ [referring to Dworkin's chain novel metaphor], it raises the question as to just how constrained a Dworkinian judge really is:

On a Dworkinian understanding of law, in the search for those deep legal principles that are nowhere laid down in a recognized, source-based rule, it would appear to be even easier for the Judge to elide law and morality than on a Hartian understanding of law. And this claim is further buttressed to the extent one suspects, with me, that for Dworkinians *all* cases that reach a judge are in fact potential Hard Cases—that the only way to decide if the clear rules apply (or should apply) or not is to first build this best background fit that infuses 'how things should be' into 'how they are'. Even rules that at first sight appear clearly and unambiguously to apply to the case at hand—as in [*Riggs v. Palmer*]⁶⁶—might be held not to apply on a Dworkinian understanding. Every case, in other words, is potentially a Hard Case. And the Dworkinian judge can only know for sure by first constructing her all-encompassing best background fit that elides the 'ought' and the 'is'.⁶⁶

Thus, the fact that a Dworkinian judge 'can override even the clearest of laid-down rules...prompts one to wonder what the difference is...between deciding a case retrospectively and deciding it based on rights that the parties were unaware existed.'⁶⁷

4.4 THE NORMATIVE VOICE IN GRIFFITH'S POLITICAL CONSTITUTIONALISM

We looked in detail in Chapter 2 at Griffith's normative positivist arguments. These arguments included Griffith's insistence, for normative reasons, on the positivist separation of law and morality, his interest in minimizing the discretion of judges, his interest in privileging the role of

⁶⁵ *ibid.*

⁶⁶ *ibid* 23-24.

⁶⁷ *ibid* 24.

democratic institutions over the role of judges in the legal system, his opposition to bills of rights, and his opposition to the liberal, anti-positivist understandings of law that were being advanced by his contemporaries.

My argument in this chapter, which will be used as a foundation for arguments made in Chapter 5 below, is that Griffith's political constitutionalism (which as I argued in Chapter 2 is a form of normative positivism) is best appreciated from the perspective of a citizen within the legal system; a citizen invested in the republican values associated with participation in self-government. Indeed, most other normative positivist arguments of the sort that Griffith advanced in his lecture are also those that are best appreciated from the vantage of the citizen. Consider, for example, Waldron's discussion of the normative positivism advanced by Hobbes, Bentham, and Hume:

[For the normative decisional positivist,] putative cases of moral decision-making in law...are unsatisfactory aspects of the law to be condemned and minimized. The legal system should be reformed so that moral decision-making, by judges or officials, is eliminated as far as possible.

Why? The reason in Hobbes's, Hume's, and Bentham's jurisprudence had to do with the desirability of certainty, security of expectation, and knowledge of what legally empowered officials were likely to require. If the decisions of an official turned on the exercise of his moral judgment, there would be no telling what he might come up with. From the point of view of the citizen trying to organize his life, the official's decisions would be *arbitrary*.⁶⁸

As Waldron notes in the above quotation, Hobbes, Hume, and Bentham all advocated a form of normative positivism that promoted minimizing the discretion of judges and separating law and morality for the good

⁶⁸ Waldron, *Law and Disagreement* (n 45) 167.

consequences that would result from *'the point of view of the citizen trying to organize his life'*.⁶⁹

Recall, also, that when Waldron was arguing in the early 1990s against the adoption of a Bill of Rights in the United Kingdom, he ended his famous article in the *Oxford Journal of Legal Studies* with an invitation to the reader to adopt the vantage of a *citizen* invested in the republican ideal of participation in self-government through representative institutions:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some public-spirited citizen who wishes to launch a campaign or lobby her MP on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But—like her suffragette forebears—she wants a vote; she wants her voice and her activity to count on matters of high political importance.

In defending a Bill of Rights, we have to imagine ourselves saying to her: 'You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' view. When their votes differ from yours, theirs are the votes that will prevail.' It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.⁷⁰

⁶⁹ *ibid* (emphasis added).

⁷⁰ Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 **Oxford Journal of Legal Studies** 18, 50-51.

Griffith, like Waldron and other normative positivists, and unlike Dworkin, was not interested in building a theory of adjudication—he was not interested in instructing judges on how they should or should not decide particular cases, except to the extent that he was interested in *minimizing* as far as possible the discretion enjoyed by those judges. Too often, in legal scholarship, as Twining has observed, we tend to adopt the vantage of the judge, and we tend to think of law from top-down perspectives.⁷¹ To adopt the vantage of the judge in an attempt to appreciate Griffith’s arguments, however, would be a mistake. Griffith’s arguments, like the normative positivist arguments of Hobbes, Hume, Bentham, and Waldron noted above, are best appreciated from the perspective of the citizen—a citizen who values the republican ideal of participation in self-government and who believes in placing her faith in democracy and in taking disagreement among her fellow citizens seriously, rather than someone who believes in promoting a system of government in which we are comfortable with handing over to unelected judges the power to protect certain substantive values about which values there is bound to be reasonable disagreement among citizens and judges alike.

The argument to be taken away, then, from this chapter is that the normative voice in Griffith’s political constitutionalism is the voice of the republican citizen. In Chapter 5 below, the reader will be asked, in the context of a different debate, to remember this argument, as we shift our vantage in that chapter, in the context of a different debate, away from the judge and, again, make the citizen the focus of our attention.

⁷¹ Twining, *Globalisation and Legal Theory* (n 20) 134.

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GRIFFITH'S CONTRIBUTIONS TO THE NARRATIVES OF DEVOLUTION

5.1 INTRODUCTION

In this final chapter, I want to ask what contribution Griffith's normative positivism, discussed in detail in previous chapters, can make to what I refer to in this chapter as the 'narratives of devolution'. The narratives of devolution are the different ways in which the existing scholarship has attempted to explain the meaning of the UK constitution in light of the Scottish devolutionary settlement, and Section 5.2 below looks in detail at these narratives of devolution. Section 5.3 explains what is missing from these dominant narratives and how these narratives can benefit from the normative positivist arguments that Griffith advanced in his Chorley lecture. Drawing on arguments made in Chapter 4 above, this section will argue that the dominant narratives of devolution have too often attempted to make sense of Scottish devolution from the vantage of the judge rather than that of the citizen, and that once we switch our vantage towards the citizen, we are better able to appreciate the costs associated with subjecting Acts of the Scottish Parliament to rights-based judicial review. Section 5.4 looks at contemporary debates surrounding parliamentary sovereignty, and the purpose of this section is to set the stage for Section 5.5, in which the chapter will look at the consequences of the parliamentary sovereignty debates for Scottish devolution. In this section, that is Section 5.5, the chapter turns to the argument that preserving parliamentary sovereignty as a constitutional design feature in a manner that gives 'subordinate' status to

the Scottish Parliament and other devolved legislatures is an undemocratic feature of our constitutional arrangements. In order to remedy this undemocratic feature, the chapter closes with a look at three possible models, which, if followed, could secure more of a Griffith style of political constitutionalism at the devolved level.

Let us begin by considering what the narratives of devolution are.

5.2 THE NARRATIVES OF DEVOLUTION

On 18 September 2014, voters in Scotland responded to the question, ‘Should Scotland be an independent country?’¹ The majority of those who voted in this referendum answered ‘No’ to this question and voted in favour of maintaining Scotland’s union with the United Kingdom.² I mention at the beginning of this section the Scottish independence referendum not to discuss the ‘lively, if sometimes bad-tempered, debate about the implications, and advantages and disadvantages, of independence’³ that the referendum generated. Rather, my interest for present purposes is in what came to be known during the debates surrounding the Scottish independence

¹ Scottish Independence Referendum Act 2013, s 1(2) and (4).

² See Stephen Tierney, ‘And the Winner is...the Referendum’: Scottish Independence and the Deliberative Participation of Citizens’ (September 29, 2014). Available at **Scottish Constitutional Futures Forum**: <<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4329/Stephen-Tierney-And-the-Winner-is-the-Referendum-Scottish-Independence-and-the-Deliberative-Participation-of-Citizens.aspx>> (visited 23 February 2015).

³ Aileen McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (April 17, 2014). Available at **SSRN**: <<http://ssrn.com/abstract=2431050>> (visited 21 February 2015) 1.

referendum as *the narratives of devolution*⁴—that is, the ways in which the Union of the various kingdoms of the UK, and attempts to change that Union, should be conceived politically and legally.⁵

What are the narratives of devolution? It became necessary to address this question early on in the referendum debates because it was thought at that time that a legal challenge might arise at some point during the referendum process, namely a challenge to an independence referendum-enabling statute to be enacted by the Scottish Parliament.⁶ The Scottish Government argued that the Scottish Parliament enjoyed the competence to enact such a statute unilaterally and without need for amendment of the Scotland Act;⁷ the UK Government disagreed,⁸ as did the House of Lords Select Committee on the Constitution.⁹ The significance, as a matter of both law and politics, of this disagreement between the two governments was, at the time, difficult to overstate. As one commentator observed:

⁴ This phrase is borrowed from McHarg, *ibid.* See also Gavin Anderson and others, 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate' (January 31, 2012) **UKCLA Blog**. Available at <<http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>> (visited 23 February 2015).

⁵ My thanks to Professor Christine Bell for the phrasing of this definition.

⁶ McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 2-3.

⁷ Scottish Government, *Your Scotland, Your Referendum* (2012) Edinburgh: **The Scottish Government**. Available at <<http://www.gov.scot/Publications/2012/01/1006>> (visited 1 October 2015) 5.

⁸ See Select Committee on the Constitution, *Report on Referendum on Scottish Independence* (2012), **HL Paper 263**. Available at <<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/263/263.pdf>> (visited 1 October 2015) 6.

⁹ *ibid* 12-13.

[T]he location of this authority [to authorize the referendum] has not only shaped the capacity of each government to influence the political agenda surrounding the referendum, but it also says something profound about the distribution of power that presently exists between the United Kingdom and Scotland. Nothing less than “sovereignty” is at stake in at least two senses: the traditional legal sovereignty of the UK Parliament, and the recently asserted political sovereignty of the people of Scotland. The location of the authority to call a referendum on Scottish independence is accordingly one of the most potent indicators of the current state of UK devolution that might be imagined. For the question is not only about what the United Kingdom might become, but also about what it already is.¹⁰

Views on this highly significant question—whether or not the Scottish Parliament enjoyed the power to enact an independence referendum-enabling statute unilaterally and without modification of the Scotland Act—differed not only between the two governments but also within the academic community, with some denying that the Scottish Parliament enjoyed this power¹¹ while others suggesting that the matter was less clear.¹² It was in the argument advanced by the latter group of scholars, that is those

¹⁰ Nicholas Aroney, ‘Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence’ [2014] **Public Law** 422, 423 (citation omitted).

¹¹ E.g. Aroney, ‘Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence’ (n 10); Adam Tomkins, ‘The Referendum on Separation for Scotland’, Written Evidence to the House of Commons, **Scottish Affairs Committee** (2011). Available at <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cm Scotaf/writev/referendum/rs04.htm>> (visited 1 October 2015); Adam Tomkins, ‘The Scottish Parliament and the Independence Referendum’ (January 12, 2012). **UKCLA Blog**. Available at <<http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>> (visited 1 October 2015); Aidan O’Neill QC, Written Evidence to the House of Commons, **Scottish Affairs Committee** (2012). Available at <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cm Scotaf/1608/1608we16.htm>> (visited 1 October 2015); Aidan O’Neill, ‘We Need to Talk About the Referendum....’ (November 4, 2011). Available at **UKSC Blog** <<http://uksblog.com/we-need-to-talk-about-the-referendum/>> (visited 23 February 2015).

¹² Anderson and others, ‘The Independence Referendum, Legality and the Contested Constitution’ (n 4).

suggesting that the matter was less clear, that the question ‘What are the policy and objects of devolution?’ was addressed, and it is in their argument that we will be able to locate the narratives of devolution.

This latter group of scholars published a piece in early 2012 in which (responding to the UK Government’s argument that the Scottish Parliament lacked the authority to unilaterally authorize an independence referendum) they argued that ‘the legality of a referendum Bill passed under the Scotland Act as it currently stands is a more open question than has been generally acknowledged.’¹³ This group of commentators believed ‘that a plausible case can be made that such a Bill would be lawful’¹⁴ and that the case for the legality of such a bill ‘rests on a particular reading both of the purposes of a referendum Bill, and of the purposes of the Scotland Act.’¹⁵ It was, in their view, important to address the question ‘What is the purpose of the Scotland Act?’ because a purposive interpretation of the Scotland Act—an interpretive approach previously endorsed by the House of Lords in the context of devolution statutes¹⁶—would require the courts to address this very question.¹⁷

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32.

¹⁷ Anderson and others, ‘The Independence Referendum, Legality and the Contested Constitution’ (n 4).

What, then, did this group of scholars, that is Gavin Anderson and others, determine to be the purpose of the Scotland Act? There are three possible ways, they argued, of answering this question:

There are at least three possibilities. One is to regard devolution as a mere delegation of authority from the UK Parliament. On this view, the Scottish Parliament is politically and legally subordinate to Westminster, and the latter remains the sole [front] of sovereign authority within the state (**the unitary state narrative**). The second possibility is that devolution represents a move towards a quasi-federal constitution. On this view, the Scottish Parliament is the political equal of Westminster, within its sphere of competence, but it is bound by the norms of the UK constitution as a whole (**the federalist narrative**). The third view sees devolution as a renegotiation of the terms of Union on the part of the sovereign Scottish people, and hence sees the Scottish Parliament as a legitimate representative of the Scottish people in the course of any further renegotiation in which the interests of the Union as a whole and of its various parts are put at issue (**the union state narrative**).¹⁸

These three possibilities of understanding the purpose of Scottish devolution—the three possible ways of reading the UK constitution in the light of the Scottish devolutionary settlement—these are what I have been referring to as the narratives of devolution. These narratives of devolution, as Aileen McHarg puts it, are ‘three potential understandings of the territorial nature of the British constitution [that] can be found within contemporary legal debates.’¹⁹

¹⁸ *ibid.*

¹⁹ McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (n 3) 12.

5.2A The Unitary State Narrative

The first of these, that is the unitary state narrative, we may say, represents the ‘official view’²⁰ of devolution. The sovereign Westminster Parliament may choose, as it does in the case of various other public bodies, to delegate its authority to devolved legislatures, the devolved legislatures may only exercise the powers that they have been authorized to exercise in the devolution statute, and the legislative supremacy of the UK Parliament remains unaffected.²¹ The Scotland Act expressly preserves the sovereignty of the Westminster Parliament,²² and included in that sovereign ability is the ability, unilaterally, to amend the devolution statutes or bring an end to the devolution project.²³

The official view of devolution though it may well be, McHarg argues that ‘the unitary version of the territorial constitution does not do justice to the significance of devolution, particularly in Scotland.’²⁴ It does not do justice to the meaning of devolution in Scotland in particular because it ‘fails to take account of [Scottish devolution’s] political origins in the 1988 *Claim of Right*, the Scottish Constitutional Convention, and the 1997 referendum, which were premised on the assertion of a distinct Scottish national identity, and the corresponding right of the Scottish people to determine their own

²⁰ *ibid* 13.

²¹ *ibid*.

²² Scotland Act 1998, s 28(7).

²³ McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (n 3) 13. As McHarg reminds us, the Westminster Parliament abolished the Northern Irish legislature in 1973 and repeatedly suspended the Northern Ireland Assembly between 2000 and 2007.

²⁴ *ibid*.

constitutional future.’²⁵ About this *Claim of Right* document, Stephen Tierney writes:

What is notable about this paper and others which subsequently emerged through this process [i.e. the process of constitutional change that began with a campaign for a Scottish Assembly in 1985], is the extent to which they would draw upon the notion of ‘union’ as the fundamental constitutional principle of the UK. This had three implications. First, the *Claim of Right* asserted the distinctive national identity and cultural and institutional specificity of Scotland (each of which had to some extent been recognized in the Acts of Union 1707), and argued for the on-going constitutional relevance of this ‘multinational’ conception of the United Kingdom. Secondly, the document aired the grievance that the ‘union state’ pact stemming from 1707 had been undermined by subsequent UK constitutional practice. Thirdly, the *Claim of Right* declared an entitlement to Scottish self-government based upon the notion that a distinctive national identity carries with it a legitimate, indeed inherent, political right of self-determination.²⁶

Thus, the unitary state narrative to a great extent ignores the historical and political circumstances from which the devolutionary settlement, and the present calls for an independence referendum, resulted and, accordingly, does not do justice to the meaning of devolution from a Scottish perspective.²⁷

Furthermore, while the unitary state narrative may have the positive law on its side—positive law that asserts the continuing sovereignty of the UK

²⁵ *ibid.*

²⁶ Stephen Tierney, ‘The Three Hundred and Seven Year Itch’: Scotland and the 2014 Independence Referendum’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing 2013) 145 (citation omitted).

²⁷ For more on the process of devolution and the independence referendum in a historical context, see Tierney, *ibid* 143-146.

Parliament²⁸—this narrative is contradicted by the Sewel Convention, which, ‘as a matter of political morality rather than constitutional law’,²⁹ requires the UK Parliament to seek the Scottish Parliament’s consent before the former may legislate in devolved areas or amend the Scotland Act.³⁰

The unitary state narrative is also to some extent undermined by judicial pronouncements in recent years that have elevated the status of the Scottish Parliament, from a status of being considered ‘like any other body set up by law’³¹ to having the status, as a democratically elected parliament, of a body whose statutes should only be struck down at common law in the most exceptional of circumstances.³² There has, furthermore, been an indication from the courts that the Scotland Act, as a ‘constitutional statute’, may be protected from implied repeal,³³ but recently this ‘constitutional’ status has been held to be irrelevant to the question of how the Scotland Act ought to be interpreted;³⁴ thus, although the courts have given mixed messages on the

²⁸ Scotland Act 1998, s 28(7).

²⁹ McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (n 3) 13.

³⁰ On the Sewel convention, see Chris Himsworth and CM O’Neill, *Scotland’s Constitution: Law and Practice* (2nd ed, Bloomsbury Professional 2009) 140-142.

³¹ Whaley v. Watson 2000 SC 340 at 348 (Lord President Roger).

³² AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46.

³³ Thoburn v. Sunderland City Council [2002] 3 WLR 247; BH v The Lord Advocate (Scotland) [2012] UKSC 24.

³⁴ Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61.

status of the Scottish Parliament and the Scotland Act, ‘the door is clearly open to alternative readings of the territorial constitution.’³⁵

5.2B The Union State Narrative

The union state narrative is a second possible reading of the UK constitution, according to which reading ‘the origins of the UK in the 1707 Union between Scotland and England is not merely an historical fact, but has continuing constitutional relevance in explaining and justifying the asymmetrical nature of governance within the state.’³⁶ The union state narrative contradicts the unitary state narrative because according to the former, sovereignty lies in ‘the people of the UK’s constituent nations, who retain the right to exercise their constituent power to redefine the terms of Union.’³⁷ The union state narrative ‘has considerable political resonance in Scotland, and has been given added impetus by the background to and existence of the Scottish Parliament, which provides the Scottish people with a clear political voice.’³⁸

This reading of the UK constitution, however, is ‘primarily a political rather than a legal’³⁹ reading, notwithstanding Lord President Cooper’s famous description of parliamentary sovereignty as a ‘distinctively English principle

³⁵ McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (n 3) 14.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid* (citation omitted).

³⁹ *ibid* 15.

that has no counterpart in Scottish Constitutional Law'.⁴⁰ As McHarg notes, even if Lord Cooper 'accepted that the Treaty of Union was, in principle, binding on the UK Parliament...the Union is almost irrelevant as a contemporary source of legal rights and obligations.'⁴¹ That is so because the courts have never struck down a statute for breaching a provision of the Treaty of Union and the Scottish courts have 'in all other respects accepted the orthodox doctrine of Parliamentary sovereignty'.⁴²

The union state narrative still has the capacity, however, to operate 'on the symbolic plane to influence the development of the legal constitution',⁴³ as was evident in its invocation by commentators who argued that the Scotland Act ought to be read in its constitutional context, purposively and not literally.⁴⁴ This constitutional context was thought to be one in which 'as the legitimate representatives of the Scottish people, the Scottish Parliament should be regarded as having the right to ascertain their views by organising an advisory referendum on independence'.⁴⁵

⁴⁰ *MacCormick v. Lord Advocate* 1953 SC 396, cited in McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 15.

⁴¹ McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 15.

⁴² *ibid.* See also Adam Tomkins, 'The Constitutional Law in *MacCormick v Lord Advocate*' (2004) **Juridical Review** 213, cited in McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 15.

⁴³ McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 15.

⁴⁴ Anderson and others, 'The Independence Referendum, Legality and the Contested Constitution' (n 4).

⁴⁵ McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 15.

5.2C The Federalist Narrative

Days before the Scottish independence referendum, and with polls indicating a close result, the three unionist parties issued what came to be known as ‘The Vow’, which promised a further increase in the powers of the Scottish Parliament in the event of a ‘No’ vote.⁴⁶ The Smith Commission had been set up for deliberation on how such constitutional change ought to be brought about, which deliberations took place in November 2014, and the Commission’s recommendations were published on 27 November 2014.⁴⁷ If implemented, these recommendations, which will be debated in Parliament beginning in early 2015, may result in a further shift of the UK constitution towards a quasi-federal arrangement.

My words ‘further shift’ in the previous paragraph, of course, suggest that the UK constitution is already best understood as a quasi-federal arrangement, and, indeed, it has been argued in recent years that ‘the territorial constitution is *already* best interpreted as being quasi-federal.’⁴⁸ What justifies the prefix ‘quasi’ is the ‘asymmetrical and incomplete’⁴⁹ nature of the arrangement: ‘asymmetrical because of the different

⁴⁶ See Stephen Tierney, ‘Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament’ (31st October 2014). Available at **UKCLA Blog**: <<http://ukconstitutionallaw.org/2014/10/31/stephen-tierney-solomon-grundy-does-constitutional-change-the-smith-commission-timetable-to-transform-the-scottish-parliament/>> (visited 23 February 2015).

⁴⁷ See Report of the Smith Commission for further devolution of powers to the Scottish Parliament (27 November 2014). Available at <https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf> (visited 23 February 2015).

⁴⁸ McHarg, ‘The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change’ (n 3) 16.

⁴⁹ *ibid.*

devolution arrangements in Scotland, Wales and Northern Ireland, and their complete absence in England; and incomplete because devolution has not been accompanied by any substantial reconfiguration of Westminster's powers, or by arrangements for territorial representation at the centre.⁵⁰ The current quasi-federal structure of course has several problems that could be addressed by a move towards a federated system. As Tierney notes, the Scottish devolution statute 'has little to say about...intra-state federalism, with a lack of detail on how institutions that coordinate policy for the UK as a whole would be set up, far less about how these should be designed or how they should operate.'⁵¹ The result of this arrangement, Tierney continues, is that 'there is not a formalised, and legally protected, set of mechanisms in place for occasions where serious competence disputes arise. Instead, institutions operate largely at the behest of the centre, and therefore depend upon the goodwill of the central Government and Parliament for their continuation.'⁵²

McHarg argues that the federalist narrative is 'the least well-developed'⁵³ of the three readings of the UK territorial constitution, but is by no means an insignificant account of the constitution:

The significance of the [federalist narrative] is that it regards sovereignty as resting neither with Westminster nor in Scotland. Rather, it sees Scottish identity as nested within British identity, neither of which trumps the other, and hence sovereignty as being shared between Scotland and the UK. Moreover, both territorial levels

⁵⁰ *ibid.*

⁵¹ Tierney, "The Three Hundred and Seven Year Itch" (n 26) 151.

⁵² *ibid* 151-152 (citation omitted).

⁵³ McHarg, 'The Independence Referendum, the Contested Constitution and the Authorship of Constitutional Change' (n 3) 16.

are located within an overarching constitutional framework, the amendment and redefinition of which must be a shared endeavour.⁵⁴

Each of the three narratives discussed above, then, are plausible accounts or readings of the UK constitution in the light of the Scottish devolutionary settlement. The plausibility of each is affected by several different factors, as outlined above, and which reading we find more compelling depends to a large extent on whether or not we approach the question from a strictly legal or a historical/political standpoint; from a literal interpretation of the devolution statute, or from a more purposive interpretation that takes account of the historical/political context of devolution.

5.3 GRIFFITH'S CONTRIBUTIONS TO THE NARRATIVES OF DEVOLUTION

Notice that in conceptualizing the *legal* dimension of devolution—in thinking about what devolution means as a matter of law—we implicitly adopt the vantage of the judge. That is to say, in constructing the narratives of devolution, the narrator in our story seems more often than not to have assumed the standpoint of the judge narrating to us the story of the legal dimension of the devolutionary project. Thus, when we consider the plausibility of the union state narrative, we qualify our enthusiasm for that narrative with the acknowledgment that that reading of the constitution is ‘primarily a political rather than a legal’⁵⁵ understanding of the constitution; we turn to Lord President Cooper’s *obiter dicta* in *MacCormick* to determine whether or not the union state narrative has any plausibility as a *legal* understanding of the constitution. Similarly, when we consider the ways in

⁵⁴ *ibid.*

⁵⁵ *ibid* 15.

which the unitary state narrative is undermined to any extent as a matter of law by the ‘constitutional’ status of the Scottish Parliament and the Scotland Act, we turn to the courts for consideration of that question.

In the context of the Scottish independence referendum debates, it is perfectly understandable that the narratives of devolution have often been constructed from the vantage of the judge; it is understandable because, in the context of the referendum debates, this adoption of the judge’s vantage was, in a sense, forced upon us by the demands of the dominant debates at the time. The dominant debates at the time were about how a court would rule on the legality of the Scottish Parliament’s referendum legislation, and so the question ‘What is the best way to conceptualize Scottish devolution’ was being framed differently; it was being framed as the question ‘How would a court rule on the legality of the Scottish Parliament’s independence referendum-enabling legislation?’ In other words, the framing of the question in that manner meant that the only vantage that we could adopt during those debates was the vantage of the judge.

I also want to make clear that what I am *not* saying is that the narratives of devolution have completely neglected other vantages that are relevant to conceptualizing devolution. The union state narrative, for example, does not adopt the judge’s vantage when it says that the devolutionary settlement is best conceptualized as a ‘renegotiation of the terms of Union on the part of the sovereign Scottish people’.⁵⁶ Rather, that narrative is one that conceptualizes devolution from the perspective of the Scottish *people*. So, it is

⁵⁶ Anderson and others, ‘The Independence Referendum, Legality and the Contested Constitution’ (n 4).

certainly not my argument that the vantage of the judge has been the sole perspective from which the narratives of devolution have been told.

My claim, instead, is that the *legal* dimension of devolution—that is, devolution as a matter of law—has too often been conceptualized from the vantage of the judge at the expense of neglecting other vantages that are important for us to consider when conceptualizing the legal dimension of the devolutionary project.

As I argued in Chapter 4, and as many others have argued in the past, there is value in thinking about law from perspectives other than the perspective of the judge. As William Twining has argued about the significance of switching our standpoint away from the top-down perspective of the judge and towards the bottom-up perspective of the citizen: ‘How law is perceived and used by [those subject to the law] is as significant for the purpose of understanding [law] as the motives, aims, and decisions of those who control a legal system.’⁵⁷

What contribution, then, can Griffith make to the narratives of devolution? One answer is that the arguments that Griffith made in his Chorley Lecture ought to encourage us to think about some aspects of the legal dimension of devolution that may escape the judge but are very visible to the *citizen* (who, as I argued in the previous chapter, embodies the normative voice in Griffith’s normative positivism). Recall from Chapter 4 that I said that the arguments Griffith made in ‘The Political Constitution’ are arguments that are best appreciated from the vantage of the citizen who values the

⁵⁷ William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000) 134.

republican ideal of participation in self-government through representative institutions.⁵⁸ For that citizen, there is a sense in which the law of devolution, as it stands, has an unsatisfactory element, which is that the existing law of devolution allows unelected judges to subject legislation enacted by the democratically-elected Scottish Parliament to rights-based judicial review. The existing law of devolution, as it stands, empowers unelected judges, who 'have no greater expertise, no superior moral perspicacity, no better pipeline to God than the rest of us non-judges, otherwise known as voters',⁵⁹ to review, and strike-down if necessary, on rights-based grounds, legislation enacted by the democratically elected Scottish Parliament.

There are available in the existing scholarship a few instances of the complaint that I have just made in the previous paragraph. In a report of the Joint Committee on Human Rights published in 2008 entitled *A Bill of Rights for the UK?*, it was observed: 'We are not in favour of a Bill of Rights which confers a power on the courts to strike down legislation. We consider this to be fundamentally at odds with this country's tradition of parliamentary democracy.'⁶⁰ To this, Chris Himsworth responded in a contribution published in a collection of essays on human rights scepticism:

What is, of course, so interesting from a Scottish perspective about these expressions of opinion [contained in the Committee Report] is that they, perhaps unconsciously, rub salt into the wound of the differential treatment of the UK and Scottish Parliaments under the

⁵⁸ See Chapter 4, esp. text to (n) 5.

⁵⁹ James Allan, 'The Idea of Human Rights' (2014) 25 **Bond Law Review** 1, 1.

⁶⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008). Available at <<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>> (visited 1 October 2015) para [218].

HRA regime. Not for the *Scottish* Parliament is the sensitive avoidance of a Bill of Rights which ‘confers a power on the courts to strike down legislation.’ There has been no problem treating the *Scottish* Parliament in a way which is ‘fundamentally at odds with this country’s tradition of parliamentary democracy.’⁶¹

Although democratic concerns against rights-based judicial review of Acts of the Scottish Parliaments have been expressed by a few scholars, including Professor Himsworth⁶² and Keith Ewing,⁶³ there has in large part been an absence among those who have engaged with Griffith’s work to ask whether or not the same type of democratic concerns that Griffith expressed against bills of rights—concerns that we looked at in detail in Chapter 2—are applicable with the same or similar force when the parliament whose legislation is being subjected to rights-based judicial review is not the Westminster Parliament but the *Scottish* Parliament. Griffith himself did not say much about this at all in his famous essay published following the enactment of the Human Rights Act and the Scotland Act.⁶⁴ What *would* Griffith say about it?

May be the reason Griffith did not say much about this topic is that the Scottish Parliament is, in important ways, different from the Westminster

⁶¹ Chris Himsworth, ‘Human Rights at the Interface of State and Sub-state: The Case of Scotland’ in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 82.

⁶² See also Chris Himsworth, ‘Rights versus Devolution’ in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001).

⁶³ Keith Ewing, ‘The Parliamentary Protection of Human Rights’ in Katja Ziegler, Denis Baranger, and Anthony W Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart Publishing 2007) 267.

⁶⁴ JAG Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 *The Modern Law Review* 159.

Parliament. The Scottish Parliament is the creation of a statute enacted by a sovereign law-making body; that sovereign body has delegated authority to the Scottish Parliament in much the same way that it delegates authority to other administrative bodies. Delegation of the sort that has occurred under the Scotland Act, from the Westminster Parliament to the Scottish Parliament, may be deemed perfectly compatible with democracy if we take the view that the Scottish Parliament is like any other statutory body set up by law. As Jeffrey Goldsworthy has written, there are various types of delegations of authority by a sovereign legislature to delegated bodies that may be deemed perfectly compatible with democracy:

There is clearly a difference between relinquishing or disabling one's power to make certain kinds of decisions, and declining—even routinely—to exercise it. For example, in constitutional law there is a crucial difference between, on the one hand, a legislature irrevocably transferring its powers to another body, and on the other, its delegating those powers while retaining its ability at any time to override its delegate or even cancel the delegation. It is possible to distinguish between many different arrangements, including: (1) the permanent surrender of power; (2) the indefinite surrender of power, subject to the possibility of reclaiming it by onerous means such as a constitutional amendment; (3) the temporary surrender of power to a delegate for a fixed period, followed by its resumption or fresh delegation to the same or some other delegate; and (4) the delegation of power, whether indefinite or temporary, subject to the retention of power at any time to override the delegate and/or cancel the delegation by non-onerous means.

Democracy is surely compatible with arrangements (3) and (4), even if this is doubtful in the case of (2). Indeed, modern representative democracies resemble (3): The electorate confers legislative power on elected officials for more or less fixed periods, retaining only the power occasionally to decide whether to extend their terms or replace them. We do not generally regard this as undemocratic. Nor do we regard as undemocratic the delegation of extensive law-making power to unelected officials, provided that elected officials retain the power to override them. Much modern law-making consists of regulations made by executive governments, which elected legislatures can scrutinize before they come into operation, and disallow if they see fit. Even if it were the case that legislatures

seldom disallow such regulations, that would not in itself demonstrate a diminution of democracy.⁶⁵

HLA Hart, in his *Postscript to The Concept of Law*, also wrote along similar lines. Hart's comments were made in response to Ronald Dworkin's charge that Hart's theory of law is undemocratic because it tolerates judicial lawmaking, and in response, Hart equated the exercise of discretion by judges under his theory as a form of delegated lawmaking that is 'a no greater menace to democracy' than lawmaking by executive officials:

[T]he delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy. In both forms of delegation an elected legislature will normally have residual control and may repeal or amend any subordinate laws which it finds unacceptable.⁶⁶

However, the argument that rights-based judicial review of legislation of the Scottish Parliament is unproblematic from a democratic perspective because of the 'delegated' character of the Scottish Parliament and its enactments—is itself a problematic argument. The argument is problematic because it equates a democratically elected legislature to other executive/administrative bodies, which is a problematic equation. The Scottish Parliament is different from other delegated bodies because it is a body whose lawmaking is a form of *representative lawmaking*, which, as Jeremy Waldron has argued, is distinguishable in important ways from lawmaking by judicial and executive/administrative bodies: not only are legislatures democratically elected and accountable bodies, but legislatures

⁶⁵ Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38 *Wake Forest Law Review* 451, 458-459.

⁶⁶ HLA Hart, *The Concept of Law* (Penelope A. Bulloch, Leslie Green & Joseph Raz eds, 3rd edn, Oxford University Press 2012) 275.

also have other distinctive features, including the fact that they are institutions ‘*publicly dedicated to making and changing law*’,⁶⁷ as well as the fact that their membership is generally several orders of magnitude higher than the membership of courts (at least in common law systems), the membership of the executive branch, and the membership of administrative agencies, which difference in size bolsters the representative credentials of legislatures.⁶⁸ Legislatures, in short, are ‘not just *democratic* institutions, not just *transparent* institutions, not just *large* assemblies, but large *representative* assemblies’⁶⁹—and all of these characteristics give the final product of their lawmaking activity—i.e. legislation—a democratic gloss that is missing from the final product of judicial, executive, and administrative lawmaking.

Once we accept that the Scottish Parliament, even if it is the creation of a statute enacted by a democratically elected Parliament, is more like a legislature and less like any other delegated body, it becomes easier to see why there is reason for the normative positivist, such as Griffith—who opposes bills of rights because of the high degree of discretion that such instruments grant to unelected judges⁷⁰—to oppose rights-based judicial review of legislation *even if* the legislation that is being subjected to rights-based judicial review is enacted by a legislature such as the Scottish Parliament.

⁶⁷ Jeremy Waldron, ‘Representative Lawmaking’ (2009) 89 **Boston University Law Review** 335, 336.

⁶⁸ *ibid* 340.

⁶⁹ *ibid* 345 (final italics in original; first three italics and all underlines added).

⁷⁰ See Chapter 2, Section 2.2 (especially the discussion of normative decisional positivism).

However, beyond simply defending the claim that the Scottish Parliament is more like a legislature, and less like any other public body, we can say more in order to argue that rights-based judicial review of Acts of the Scottish Parliament is undemocratic. We can also argue that the question of the democratic legitimacy of judicial review is not insensitive to the *grounds* on which judicial review is exercised, which is to say that ‘someone who ponders the legitimacy of judicial review and decides on balance that it *is* legitimate may find himself wavering from that position when he considers the way in which judges exercise this power.’⁷¹ For example, ‘if citizens thought judges were simply relying on their substantive moral views or their party-political affiliations, then those who had initially been inclined to favor judicial review might rethink their position. They might say something like, “Strong judicial review is okay in principle, but not when it is exercised like this.”’⁷² In other words, it matters not in some instances whether or not a democratically elected legislature retains residual power to overturn a judicial decision; if a source of law, say a bill of rights, gives too much interpretive discretion to judges, then the democratic concern is not whether or not the legislature retains the final word and can overturn a judicial decision; no, the democratic concern is that the courts have the interpretive discretion ‘to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage).’⁷³

⁷¹ Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press 2012) 148.

⁷² *ibid.*

⁷³ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, 1354.

The argument, in other words, is that regardless of whether judges exercise rights-based judicial review in the context of an Act of the Scottish Parliament or an Act of the Westminster Parliament, the same concerns that a normative positivist has to oppose the discretion at the ‘point-of-application’ that judges enjoy in the interpretation of a bill of rights⁷⁴—concerns that Griffith expressed in his lecture and were detailed in Chapter 2—apply equally to judicial review of Acts of both the Westminster and the Scottish Parliaments. In both cases, the normative positivist concern is that a bill of rights requires unelected judges to ‘embark on the happy and fruitful exercise of interpreting woolly principles and even woollier exceptions’,⁷⁵ which interpretive exercise, turning as it does on the moral judgment of judges, appears from ‘the point of view of the citizen trying to organize his life’ to be ‘*arbitrary*’.⁷⁶

Perhaps the reason that there is a dearth of scholarship on the question of the democratic legitimacy of rights-based judicial review of Acts of the

⁷⁴ Allan, ‘The Idea of Human Rights’ (n 59) 1 (arguing that bills of rights, whether American-style or HRA-style, ‘unduly enhance the point-of-application power of unelected judges on a host of issues that are in effect moral and political ones—ones over which judges (committees of ex-lawyers as Jeremy Waldron continually reminds us) have no greater expertise, no superior moral perspicacity, no better pipeline to God than the rest of us non-judges, otherwise known as voters.’).

⁷⁵ JAG Griffith, ‘The Political Constitution’ (1979) 42 **Modern Law Review** 1, 14.

⁷⁶ Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 167 (‘[For the normative decisional positivist,] putative cases of moral decision-making in law...are unsatisfactory aspects of the law to be condemned and minimized. The legal system should be reformed so that moral decision-making, by judges or officials, is eliminated as far as possible. Why? The reason in Hobbes’s, Hume’s, and Bentham’s jurisprudence had to do with the desirability of certainty, security of expectation, and knowledge of what legally empowered officials were likely to require. If the decisions of an official turned on the exercise of his moral judgment, there would be no telling what he might come up with. From the point of view of the citizen trying to organize his life, the official’s decisions would be *arbitrary*.’).

Scottish Parliament is that much of the existing scholarship on Scottish devolution has been concerned, as I observed in the discussion of the narratives of devolution, in trying to make sense of the legal dimension of devolution from the vantage of the judge. But what Ewing and Himsworth are saying in their arguments against rights-based judicial review of ASPs quoted above are *normative* arguments about what they believe the law *ought* to be; they believe that the Scottish Parliament *ought not* to be subjected to strong judicial review for democratic reasons, and that is a criticism of the law *as it currently exists*. Many of the dominant debates about Scottish devolution have, however, been concerned with descriptive analysis of the case law—e.g. what judges have said about the constitutional status of the Scottish Parliament and about the reviewability of Acts of the Scottish Parliament at common law.⁷⁷

But, of course, as Griffith and every other normative positivist would remind us, the fact that a court has said that something is the best interpretation of the existing positive law (and, for the Dworkinian judge, the best possible interpretation of the law in the light of existing principles) does not mean it is not open to the citizen to question the desirability of that existing law. In order to appreciate Himsworth's and Ewing's arguments, we need, in other words, to switch our vantage away from the judge interpreting the existing law of devolution and towards the citizen, to whom (unlike the judge who is entrusted with the task of deciding a case according to the law as it stands) it is open to *question* the desirability of the law as it currently stands, and as it has been interpreted by judges; it is open to the citizen to argue that the existing law as it stands, and as has been interpreted by judges, is undemocratic or is otherwise morally deficient, and it is open to our citizen

⁷⁷ AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46.

to argue for its reform. We need, as Bentham the normative positivist argued, to separate law *as it is* from law *as it ought to be* in order to facilitate law reform.⁷⁸ We need to separate the question of devolution *as it is* from devolution as we think it *ought to be*, and the way to do that is to conceptualize devolution from a vantage other than the vantage of a judge interpreting the meaning of the British constitution in the light of devolution. Too often, however, the dominant narratives of Scottish devolution have been about how best to interpret the UK constitution in the light of devolution, which exercise implicitly asks us to adopt the vantage of a judge interpreting the law of devolution as it currently stands.

I asked at the start of this chapter the question of what Griffith's contributions might be to the narratives of devolution. The answer to our question is that Griffith's arguments in 'The Political Constitution' encourage us to think about the law of devolution from a vantage other than the vantage of the judge; Griffith's arguments encourage us to think about law from the citizen invested in the republican values of participation in self-government. Griffith's arguments encourage us to remember that it is open to the citizen to question the desirability of certain aspects of the law of devolution that our citizen deems to be morally deficient and to argue for its reform; in particular, Griffith reminds us that the democratic arguments that normative positivists present for minimizing the discretion of judges at the point-of-application under a bill of rights are not concerns that go away when the legislation that is being subjected to rights-based judicial review is enacted by a legislature of the so-called 'delegated' or 'subordinate' character of the Scottish Parliament. Griffith, perhaps most importantly, reminds us

⁷⁸ See Chapter 2, esp. Section 2.4.

that we need to distinguish, when thinking about devolution, between normative argument on the one hand and descriptive analysis on the other.

This need to distinguish between normative argument on the one hand and descriptive analysis on the other is also important in the context of another set of debates that I want to consider in the next section of this chapter, namely the debates surrounding the legislative supremacy of the Westminster Parliament. The relevance of these debates to the present discussion is that the normative arguments that are often made in defence of parliamentary sovereignty, from a political constitutionalist perspective, require re-evaluation in the light of the current constitutional arrangements brought about by devolution. It is often thought to be the case that parliamentary sovereignty is ‘a crucial element of political constitutionalism’.⁷⁹ Parliamentary sovereignty, on this view, is a constitutional design feature that best secures the values associated with political constitutionalism.⁸⁰ In the following section, following discussion of the dominant debates surrounding parliamentary sovereignty (some of which debates involve descriptive analysis, others of which involve normative argument), I will demonstrate why I think, from the perspective of the citizen who embodies the normative voice in Griffith’s lecture, there is reason for the political constitutionalist to *oppose* the manner in which the HRA attempts to protect parliamentary sovereignty as a constitutional design feature in a multi-level system of government.

⁷⁹ Jeffrey Goldsworthy, ‘Parliamentary Sovereignty and Constitutional Change in the United Kingdom’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 55.

⁸⁰ For what these values are, see Chapter 1, esp. text to (n 56) – (n 62).

5.4 PARLIAMENTARY SOVEREIGNTY: DESCRIPTIVE ANALYSIS VERSUS NORMATIVE ARGUMENT

Is Parliament sovereign? Should Parliament be sovereign? These are two different questions. The first is a question that requires descriptive analysis and operates on the 'is' plane; the second is a question that requires us to make a normative argument and operates on the plane of the 'ought'. Over the course of the latter half of the twentieth century, the dominant debates on parliamentary sovereignty were largely concerned with the first of these two questions, as the discussion that follows will demonstrate.

5.4A The Diceyan Account

The starting point of discussion for modern accounts of parliamentary sovereignty is AV Dicey's *Introduction to the Study of the Law of the Constitution*, first published in 1885.⁸¹ Although the doctrine was recognized as a constitutional fundamental by English⁸² lawyers well before Dicey's time,⁸³ Dicey's definition of parliamentary sovereignty, stated in the following terms, continues to be the starting point of discussion:

⁸¹ AV Dicey, *Introduction to the Study of the Law of the Constitution: The Oxford Edition of Dicey v. 1* (JWF Allison ed., Oxford University Press 2013).

⁸² The use of the word 'English' is deliberate because it accepts that there is disagreement as to whether the pre-1707 Parliament of Scotland was a sovereign parliament in the legal sense. Contrast the dicta of Lord Cooper in *MacCormick v. Lord Advocate* (1953) SC 396 (cited in Goldsworthy) and the dicta of Lord Hope in *Jackson v. Attorney General* [2005] UKHL 56 (referring to 'the *English* principle of the absolute legislative sovereignty of Parliament') para [104] (emphasis added) with Goldsworthy's own position that Lord Cooper's argument in *MacCormick* 'rests on a dubious premise....' Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press 1999) 166.

⁸³ See Goldsworthy, *The Sovereignty of Parliament* (n 82) 236 ('The historical evidence demonstrates that for several centuries, at least, all three branches of government in Britain have accepted the doctrine that Parliament has sovereign law-making authority.').

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament...has...the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.⁸⁴

This definition makes two points: firstly, that there is no restriction, substantive or procedural, on Parliament's ability to enact legislation, and secondly, that no person or body, judicial or non-judicial, has the power to invalidate an Act of Parliament. In his discussion of parliamentary sovereignty, Dicey was in agreement with Alexis de Tocqueville, who, as Dicey quotes him, described the Westminster Parliament as being simultaneously a 'legislative' and a 'constituent' assembly; as a legislative assembly, Parliament can enact ordinary legislation, and as a constituent assembly, 'it can make laws which shift the basis of the constitution.'⁸⁵ For Dicey, these two traits of the Westminster Parliament necessarily lead to three conclusions. Firstly, changes to fundamental laws under the British constitution are brought about by Parliament acting in its ordinary legislative capacity.⁸⁶ Secondly, there is 'no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional.'⁸⁷ And thirdly, there is no 'person or body of persons, executive, legislative or judicial, which can pronounce void' an

⁸⁴ Dicey, *The Law of the Constitution* (n 81) 27.

⁸⁵ *ibid* 51.

⁸⁶ *ibid*.

⁸⁷ *ibid* 52.

Act of the Westminster Parliament on any ground unless the statutory provision is repealed by Parliament.⁸⁸

For Dicey, the sovereignty of Parliament was from ‘a *legal* point of view...the dominant characteristic of our political institutions.’⁸⁹ The emphasis on the word ‘legal’ is significant because the term sovereignty is often used to carry both legal and political significance, a distinction to which Dicey drew attention in the following terms:

[T]he word ‘sovereignty’ is sometimes employed in a political rather than a strictly legal sense. ...In [the political] sense of the word the electors of Great Britain may be said to be...the body in which sovereign power is vested. ...But this is a political not a legal fact. ...The political sense of the word ‘sovereignty’ is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different....⁹⁰

That is not to suggest, however, that Dicey’s account of sovereignty was an account that included purely descriptive analysis about sovereignty as a legal fact. As Paul Craig has observed, Dicey understood full well the need to complement his empirical analysis with normative argument: ‘Times had changed and Dicey fashioned a normative argument based on the nature of democracy as he saw it at the end of the nineteenth century.’⁹¹ What was the nature of Dicey’s normative argument? As Craig reports:

[The] empirical side [of Dicey’s] analysis was...complemented by a normative argument, which was designed to show that it was sound,

⁸⁸ *ibid* 53.

⁸⁹ *ibid* 27 (emphasis added).

⁹⁰ *ibid* 43.

⁹¹ Paul Craig, ‘Public Law, Legal Theory, and Political Theory’ [2000] **Public Law** 211, 220-221 (citation omitted).

in terms of principle, for Parliament to have this unlimited power. Dicey realised, at the very least, that the empirical argument could not, by itself, provide a wholly secure foundation for Parliamentary sovereignty. He realised also that even though he had quoted from Blackstone, he could not simply draw on the species of normative argument used by the latter, since it would not have been applicable, without substantial modifications, to the changed conditions of the nineteenth century in which Dicey was writing. Dicey, therefore, set about constructing his own normative argument to justify the Parliamentary sovereignty which he had empirically described. It must also be acknowledged that Dicey cast this argument in terms of political sovereignty as opposed to legal sovereignty, or as political fact as opposed to legal fact. ...

The essence of the argument was that a Parliament, duly elected on the extended franchise, represented the most authoritative expression of the will of the nation. The Parliament thereby elected should therefore be able to carry out any action. Moreover, Dicey believed that the Parliament would control the executive and that the members of Parliament would not pass legislation...which was contrary to the interests of those who elected them. Constitutional protections against the exercise of parliamentary power were not therefore required, since, in the words of Dicey, “the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of English people usually desire”.⁹²

Dicey’s normative argument in support of parliamentary sovereignty, in other words, was a democratic defence, which was an argument that Craig summarizes as follows:

Our system of democracy was founded upon a channel of authority flowing from the bottom upwards. The expanded electorate chose representatives. The Parliament thus chosen had legitimacy because of the extended franchise and should therefore have all embracing powers. The elected MPs articulated the views of those who had chosen them, and they controlled the executive. Legislation which was constitutionally questionable would not, therefore, be passed, or would be repealed expeditiously. A central objective of the Diceyan thesis

⁹² ibid 221-221 (citations omitted).

was therefore to show that the existence of Parliamentary sovereignty would not place the rights of individual citizens in jeopardy.⁹³

Craig argues that Dicey's normative justification is problematic because the British system of democracy 'probably never operated in this self-correcting way'⁹⁴ and argues that Dicey's vision of the relationship between Parliament, the Executive, and the electorate 'certainly does not accord with present reality',⁹⁵ which reality is that 'Parliament is controlled by the executive, rather than vice versa, [a situation] in which it is perfectly possible for a government, elected on what might be a minority of the votes cast, to promulgate legislation which is deleterious to the rights or interests of certain sections of the population....'⁹⁶

5.4B The Modern Debate

In the course of the twentieth century, Diceyan orthodoxy was challenged by a number of constitutional scholars, whose views have come to represent the 'new view'⁹⁷ on parliamentary sovereignty. The modern debate is generally thought to be a debate that takes place between those who represent the new view on the one hand, and Sir William Wade, who represents Diceyan orthodoxy, on the other hand.

⁹³ *ibid* 222.

⁹⁴ *ibid*. See also Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press 1990) Ch 2.

⁹⁵ Craig, 'Public Law, Political Theory, and Legal Theory' (n 91) 222 (citation omitted).

⁹⁶ Craig, 'Public Law, Political Theory, and Legal Theory' (n 91) 222n54.

⁹⁷ RFV Heuston, *Essays in Constitutional Law* (2nd ed., Stevens 1964) 6. For discussion, see CR Munro, *Studies in Constitutional Law* (2nd ed., Oxford University Press 2003) 155.

Let us take Wade's position first. For an 'orthodox English lawyer,' Wade argued, parliamentary sovereignty means that no Act enacted by the Queen-in-Parliament can be invalidated by a court, that the Queen-in-Parliament may always repeal prior legislation, and that, therefore, 'no Parliament could bind its successors.'⁹⁸ For the 'orthodox English lawyer,' Wade continued, the doctrine of implied repeal is 'an invariable rule' of the constitution.⁹⁹ Would it be possible for Parliament to entrench legislation, in that such legislation could only be repealed by processes specified by a previous Parliament? The orthodox English lawyer, according to Wade, would respond that such 'special safeguards [against implied repeal] would be legally futile.'¹⁰⁰ In Wade's account of parliamentary sovereignty, 'there is one, and only one, limit to Parliament's legal power: *it cannot detract from its own continuing sovereignty*.'¹⁰¹

In contrast to Wade's position, proponents of the new view on parliamentary sovereignty challenged the orthodox view that Parliament may not 'detract from its own continuing sovereignty.'¹⁰² This group of scholars argued that Parliament may place what are known as 'manner and form' limitations on the legislative powers of a future Parliament. What are these manner and form limitations?

⁹⁸ HWR Wade, 'The Basis of Legal Sovereignty' [1955] **Cambridge Law Journal** 172, 174.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.* (emphasis added).

¹⁰² *ibid.*

Consider the following provisions of the recently enacted European Union Act 2011 (“EU Act”):

§2(1): A treaty which amends or replaces TEU or TFEU is not to be ratified unless—

(c) [A] referendum condition...is met.

§2(2): The referendum condition is that—

(a) the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty also affects Gibraltar, throughout the United Kingdom and Gibraltar,

(b) the referendum has been held, and

(c) the majority of those voting in the referendum are in favour of the ratification of the treaty.¹⁰³

The above provisions together represent what is commonly known as a ‘referendum lock’. The provisions stipulate that the United Kingdom shall not ratify treaties making changes in certain areas of EU law absent approval of those measures in a national referendum. Proponents of the ‘new view’ on parliamentary sovereignty would argue that such a referendum lock places a ‘manner and form’ limitation on a future Parliament—the referendum lock allows a former Parliament to bind a future Parliament by specifying in law the legislative procedure to which the future Parliament must adhere.

Sir Ivor Jennings presented the ‘manner and form’ challenge to the orthodox view on sovereignty in *The Law and the Constitution*.¹⁰⁴ In this work, Jennings distinguished between two types of authority enjoyed by a prince. If the prince ‘grants a constitution, binding himself not to make laws except

¹⁰³ European Union Act 2011, s. 2.

¹⁰⁴ Sir Ivor Jennings, *The Law and the Constitution* (5th ed., University of London Press 1963).

with the consent of an elected legislature, he has power immediately afterwards to abolish the legislature without its consent and to continue legislating by his personal decree.¹⁰⁵ This type of power enjoyed by the prince (and, by analogy, Parliament) is, Jennings argued, of a continuing nature. On the other hand, 'if the prince has not supreme power, but the rule is that the courts accept as law that which is made in the proper legal form,'¹⁰⁶ then the prince must follow the procedure stipulated by the constitution. If he fails to do so, he has not enacted the rule 'according to the manner and form required by the law for the time being', and 'the courts will not admit as law any rule which is not made in that form.'¹⁰⁷ Jennings argued that it is unclear which type of the two powers noted above is enjoyed by the Westminster Parliament, although as Colin Munro notes, Jennings seems to support the second alternative, for 'his example predisposes all good democrats to prefer the second hypothesis.'¹⁰⁸

The manner and form argument received further elaboration and support from a number of constitutional lawyers, including RFV Heuston¹⁰⁹ and Geoffrey Marshall,¹¹⁰ and writing in 1976, George Winterton described the new view as being supported by 'the great majority of modern constitutional

¹⁰⁵ *ibid* 152. For discussion, see Munro, *Studies in Constitutional Law* (n 97) 154-155.

¹⁰⁶ *ibid.*, cited (as a prior edition) in Munro, *Studies in Constitutional Law* (n 97) 154.

¹⁰⁷ *ibid.*, cited (as a prior edition) in Munro, *Studies in Constitutional Law* (n 97) 154-155.

¹⁰⁸ Munro, *Studies in Constitutional Law* (n 97) 155n2.

¹⁰⁹ Heuston, *Essays in Constitutional Law* (n 97), cited in Munro, *Studies in Constitutional Law* (n 97) 155.

¹¹⁰ Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1971), cited in Munro, *Studies in Constitutional Law* (n 97) 155.

lawyers'.¹¹¹ But if, as Jennings conceded, the alternative between the two types of sovereignty was unclear because of a paucity of case law on the matter, what evidence *is* available to the manner-and-form camp in support of their argument?

A case often cited by the manner-and-form group in support of their argument is the Privy Council decision of *Attorney General for New South Wales v. Trethowan*.¹¹² The case involved the New South Wales (NSW) legislature, which was subject to the following provision of the Colonial Laws Validity Act 1865:

[E]very representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the Constitution, Power and Procedure of such legislature; provided that such laws shall have been passed in such *manner and form* as may from time to time be required by an Act of Parliament, Letters Patent, Order in Council, or Colonial law for the time being in force in the said colony.¹¹³

In 1929, the NSW legislature passed the Constitution (Legislative Council) Amendment Act 1929, which amended NSW's Constitution Act by providing that the NSW Legislative Council (the Upper House of the NSW legislature) 'shall not be abolished nor...shall its constitution or powers be altered except in the manner provided in this section.'¹¹⁴ The 'manner' provided in this

¹¹¹ George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *Law Quarterly Review* 591, 606, cited in Munro, *Studies in Constitutional Law* (n 97) 155

¹¹² [1932] AC 526, cited in Munro, *Studies in Constitutional Law* (n 97) 157.

¹¹³ Colonial Laws Validity Act 1865 §5, cited in Munro, *Studies in Constitutional Law* (n 97) 157-158.

¹¹⁴ Constitution Act 1902 §7A, cited in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 144-147.

amendment was for such a bill to be approved in a referendum before it could be submitted for Royal Assent, and, crucially, the amendment was 'double-entrenched', in that a bill proposing to repeal the referendum lock would also have to be approved in a referendum.¹¹⁵

The position of the Legislative Council was secured in this manner for political reasons by the party in power at the time because the opposition party had signalled its intention to abolish the upper house.¹¹⁶ When the opposition party returned to power, it attempted to achieve exactly that. The new Government introduced two bills: the first to repeal the referendum lock, and the second to abolish the upper house. Neither bill was put to a referendum, and two members of the upper house sought an injunction to prevent the bills from being submitted for Royal Assent on the grounds that the bills failed to meet their respective referendum requirements. The injunction sought was granted by the NSW Supreme Court and affirmed by both the High Court of Australia and the Judicial Committee of the Privy Council.¹¹⁷

The manner and form school would argue that the *Trethowan* case lays down a common law rule that applies just as much to the Westminster Parliament as it does to the NSW legislature. However, the manner and form school may *also* attempt to rely on a landmark case that actually involves the

¹¹⁵ A detailed account of the political and legal significance of this case is found in Goldsworthy, *Parliamentary Sovereignty* (n 114) Ch 6.

¹¹⁶ *ibid.*

¹¹⁷ For discussion, see Munro, *Studies in Constitutional Law* (n 97) 157-159.

Westminster Parliament. That decision is the decision of nine members of the House of Lords in *Jackson v. Attorney General*.¹¹⁸

The manner and form requirement to which the House of Lords' decision in *Jackson* relates is found in two statutes of the Westminster Parliament, namely the Parliament Act 1911 and the Parliament Act 1949. The Parliament Act 1911 establishes a legislative procedure according to which bills that have been approved by the Commons may become law by receiving Royal Assent without the consent of the House of Lords. Under this procedure, with certain exceptions, a bill that has repeatedly been rejected by the Lords may nonetheless be enacted as law after two years have elapsed. The Parliament Act 1949, which was enacted under the Parliament Act 1911 procedure, reduced this limit from two years to one.¹¹⁹

In *Jackson*, the appellants, who had an interest in fox hunting, sought to challenge the validity of the Hunting Act 2004 ("Hunting Act"), which makes an offence the hunting of wild mammals with dogs except in limited circumstances. The appellants argued that legislation enacted under the Parliament Act 1911 procedure is 'delegated'¹²⁰ rather than primary and that such legislation is, therefore, subject to common law principles of statutory interpretation. Among these principles of statutory interpretation is the principle that 'powers conferred on a body by an enabling Act may not be enlarged or modified by that body unless there are express words

¹¹⁸ [2005] UKHL 56.

¹¹⁹ For discussion, see Nick W Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 **International Journal of Constitutional Law** 144, 146-147.

¹²⁰ See Aileen McHarg, 'What is Delegated Legislation?' [2006] **Public Law** 539.

authorising such enlargement or modification.’¹²¹ Applying this principle, the appellants argued that the Parliament Act 1911 does not permit the Commons to use the 1911 procedure to reduce the delaying power of the House of Lords from two years to one, and, therefore, that the Parliament Act 1949 is an invalid statute. Because the Hunting Act was passed under the allegedly invalid 1949 procedure, the Hunting Act was argued to be an invalid Act of Parliament.

The question that the House of Lords was being asked was, in essence, whether or not an Act of Parliament was a properly enacted statute. Traditionally, when faced with such a question, the courts would rely on the enrolled bill rule and refuse to conduct such an investigation.¹²² However, their Lordships distinguished the circumstances in *Jackson* from the traditional case law on the enrolled bill rule on the grounds that the inquiry in *Jackson* was one of statutory interpretation of the Parliament Act 1911 rather than an investigation into ‘the internal workings and procedures of Parliament...’¹²³

The House of Lords rejected the argument that legislation enacted under the 1911 procedure is delegated legislation. Lord Bingham noted that the Parliament Act 1911 provides that an Act enacted under the 1911 procedure

¹²¹ The appellants’ arguments were summarized by Lord Bingham in *Jackson* (n 118) para [7].

¹²² *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710; *Pickin v British Railways Board* [1974] AC 765. These well-known authorities for what is commonly known as the ‘enrolled bill’ rule are cited in *Jackson* (n 118) para [27].

¹²³ *Jackson* (n 118) para [27].

shall 'become an Act of Parliament.'¹²⁴ The meaning of an 'Act of Parliament' was, for his Lordship, 'as clear and well understood as any expression in the lexicon of the law. It is used, and used only, to denote primary legislation.'¹²⁵ His Lordship further held that the 'overall object of the 1911 Act was *not* to delegate power: it was to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a majority of the Commons....'¹²⁶ The argument that the Commons could not enlarge its own powers without the consent of the Lords was also rejected on three grounds: firstly, because the Parliament Act 1911, as noted above, did not involve a delegation of authority; secondly, the case law relied upon by the appellants related to a colonial or a Dominion legislature so 'as to render analogies drawn from [those cases] of little if any value [in *Jackson*]'; and thirdly, the question in this case was 'one of construction', and there was no suggestion in the language of the Parliament Act 1911 'to preclude use of the procedure laid down by the Act to amend the Act.'¹²⁷

A number of their Lordships made remarks, *obiter*, that specifically addressed the question of manner and form limitations on parliamentary sovereignty. Lord Steyn said the following of the manner and form question:

The law and custom of Parliament regulates what the constituent elements must do to legislate: all three must signify consent to the measure. But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds

¹²⁴ *ibid* [24].

¹²⁵ *ibid*.

¹²⁶ *ibid* [25] (emphasis added).

¹²⁷ *ibid* [36].

majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.¹²⁸

Rather than taking the traditional view that parliamentary sovereignty is of a continuing nature, Lord Steyn in the above supports what has come to be regarded as the 'self-embracing'¹²⁹ conception of sovereignty. Baroness Hale, as well, made remarks that suggest endorsement of the self-embracing view:

[I]f Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters, nor is it permitted to remove or relax those requirements by passing legislation in the ordinary way. If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular Parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed.¹³⁰

Lord Hope, on the other hand, supported the continuing sovereignty thesis, clearly rejecting the self-embracing theory in the following terms:

[I]t is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means by whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact

¹²⁸ *ibid* [81] (Lord Steyn).

¹²⁹ Hart, *The Concept of Law* (n 66) 149 ('The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is, after all, only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the exercise of which can only be enjoyed once.').

¹³⁰ *Jackson* (n 118) [163] (citations omitted) (Baroness Hale).

something which a subsequent statute dealing with the same subject matter cannot repeal.¹³¹

What if a future Act of Parliament ignores the referendum requirement in Section 2 of the EU Act? Would a court hold that the 2011 statute has placed a manner and form limitation on a future Parliament, or would it hold that sovereignty is of a continuing nature?

Proponents of the new view may argue on the authority of *Trethowan* that the Westminster Parliament is equally as limited by manner and form limitations as the NSW legislature. However, the contrasting view is that the *Trethowan* decision bears little relevance to the questions posed in the preceding paragraph because, unlike the NSW legislature, the United Kingdom Parliament is not a subordinate legislature. As Professor Munro has argued:

What the *Trethowan* case shows is merely that some legislatures are limited with respect to the procedure by which they may legislate. But Dicey, who devoted two chapters of his book to non-sovereign legislatures and legislatures in federal countries, would certainly not have denied this. Of course, it is a logical possibility that any particular legislature may be of that sort, but what we wish to know is whether the British Parliament is, and *Trethowan* seems to advance us no further than Jennings's tale of the two princes. Other cases in the same vein, relied on by Heuston, are open to the same objection.¹³²

It may well be that the best evidence that proponents of the new view can present for their case is the *logical* distinction between continuing and self-

¹³¹ *ibid* [113] (Lord Hope).

¹³² Munro, *Studies in Constitutional Law* (n 97) 159 (citations omitted).

embracing sovereignty offered by Hart.¹³³ But for the manner and form school's argument to be more convincing they would have to rely on something more. What might support their argument would be judicial decisions that hold that the Westminster Parliament is expressly subject to such manner and form limitations. The conflicting *obiter dicta* in *Jackson* on this question hardly signal a clear rule as to how a future court might decide this issue.

Alison Young has suggested that *Jackson is*, in fact, a case in which the Westminster Parliament has been subjected to manner and form restrictions.¹³⁴ This argument is based on what the House of Lords had to say about express prohibitions on the use of the Parliament Act 1911 procedure contained in the Parliament Act 1911. The Parliament Act 1911 expressly states, for example, that a bill extending the life of Parliament beyond five years may not be passed using the 1911 procedure. The House of Lords not only confirmed that if an Act extending the life of Parliament was enacted using the 1911 procedure, the courts would decline to apply it, but a majority of their Lordships also stated that this provision is impliedly double-entrenched.¹³⁵ What this means is that the 1911 procedure cannot be used to remove the express prohibitions contained in the Parliament Act 1911. Young suggests that Section 2(1) of the Parliament Act 1911 'binds

¹³³ *ibid.* See also Barber, 'The Afterlife of Parliamentary Sovereignty' (n 119) 147 (arguing that Hart's discussion of self-embracing sovereignty was only meant to present 'a possible type of legislative power' and not meant to advocate such an interpretation of the British constitution).

¹³⁴ Alison L Young, 'Hunting Sovereignty: *Jackson v Her Majesty's Attorney General*' [2006] **Public Law** 187.

¹³⁵ On double-entrenchment generally, see Goldsworthy, *Parliamentary Sovereignty* (n 114) 144.

future Parliaments. Parliaments wishing to overturn its provisions can only do so by adopting a specific manner and form—legislation that has the consent of the House of Lords as opposed to legislation passed without its consent.’¹³⁶

Young’s argument is subject to the response that it neglects the distinction between alternative and restrictive legislative procedures.¹³⁷ The Parliament Acts procedure is best viewed as an alternative, and less restrictive, procedure because it makes passing legislation *easier* rather than difficult, whereas a referendum lock may be viewed as a restrictive procedure because it partially takes away power from Parliament and vests such power in the electorate, making passage of legislation in the latter case more difficult. That Parliament must use the ordinary legislative procedure to repeal Section 2(1) of the Parliament Act 1911 does not necessarily mean that the 1911 Parliament has succeeded in binding a future Parliament. The ordinary legislative procedure remains available to a future Parliament if it wishes to repeal Section 2(1) of the Parliament Act 1911.¹³⁸ Because the end product of the 1911 procedure was declared in *Jackson* to be subject to the limitations contained in the Parliament Act 1911, the impression left by *Jackson* is that Dicey’s assertion that ‘parliament can make or unmake any law’ has been qualified.¹³⁹ However, a different reading of *Jackson* is that the ‘binding’ that has occurred is not of future Parliaments but of all future

¹³⁶ Young, ‘Hunting Sovereignty’ (n 134) 194.

¹³⁷ Goldsworthy, *Parliamentary Sovereignty* (n 114) 178.

¹³⁸ Munro, *Studies in Constitutional Law* (n 97) 164; Goldsworthy, *Parliamentary Sovereignty* (n 114) 178.

¹³⁹ AW Bradley, ‘The Sovereignty of Parliament—Form or Substance?’ in Jowell and Oliver (eds), *The Changing Constitution* (7th ed, Oxford University Press 2011) 46.

House of Commons who wish to use ‘a less demanding or easier alternative’ to the ordinary law-making procedure.¹⁴⁰ Baroness Hale’s suggestion in *Jackson*, that alternative, less restrictive, law-making procedures have the same impact on Parliament’s power as more restrictive law-making procedures¹⁴¹ is, therefore, arguably inaccurate. For, as James Allan observes, ‘[t]he latter involves some amount of taking certain questions off the normal democratic agenda...[whereas] [t]he former does not.’¹⁴²

Whether or not the inclusion of a referendum requirement in the EU Act has bound future parliaments remains to be seen. Jennings, in his prince’s tale,¹⁴³ explicitly defined the manner and form view as dependent on the rule that ‘the courts accept as law that which is made in the proper legal form...’¹⁴⁴ Neither *Trethowan* nor *Jackson* offer a definitive argument in favour of the view that the Westminster Parliament has been subjected by the courts to such limitations.

5.4C The Modern Debate’s Focus on Descriptive Accuracy Rather Than Normative Argument

Notice that this debate between Wade and those representing the new view is concerned primarily, if not exclusively, with descriptive accuracy rather

¹⁴⁰ James Allan, ‘The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?’ (2007) 18 *King’s Law Journal* 1, 12-14.

¹⁴¹ *Jackson* (n 118) [163].

¹⁴² Allan, ‘The Paradox of Sovereignty’ (n 140) 14 (citation omitted).

¹⁴³ See Munro, *Studies in Constitutional Law* (n 97) 154-159.

¹⁴⁴ Jennings, *The Law and the Constitution* (n 104) 152, cited (as a prior edition) in Munro, *Studies in Constitutional Law* (n 97) 154.

than normative argument. As Craig observes, both Wade and proponents of the new view conduct the debate in a manner that is apparently uninvested in providing any normative justification for parliamentary sovereignty:

[T]he sovereignty thesis articulated by Sir William Wade by-passes discussion of the justification for the sovereign, unlimited, power of Parliament. This was, as we have seen, central to earlier discussions of the topic. The ...[question] as to why Parliament should be regarded as legally omnipotent, is not addressed. The issue is conceived of in terms of the content of the ultimate legal principle or rule of recognition, which might be said to exist within society at any one point in time. While it is recognised that there might be a different top rule from that which we are presently said to have, there is no argument put as to whether the current rule is normatively justifiable. This absence of any principled justification for the status quo is mirrored by the way in which the courts are said to go about their task as interpreters of the content of the top rule. The courts will make a political choice at the point where the law “stops”. There is no need for the courts to engage in a principled discourse as to the answer to this question at any particular point in time, since the issue is never perceived in these terms. Academic constitutional lawyers, as commentators on judicial decisions, are likewise absolved of responsibility in this regard. If the courts are essentially making political choices at the point where the law stops, then the academic can abnegate responsibility for evaluating whether the particular choice was correct, by arguing that the evaluation of such options is the preserve of those operating within a different discipline.

On the other hand, the way in which the argument is presented by Sir William Wade has influenced the counter-argument advanced by the advocates of the new view. Their counter-arguments are presented in a manner which minimises the import of any normative arguments for the limitation of sovereign power. They might, or might not, favour rights-based limits on governmental power, but this is never the focus of their response. Their argument is confined to the manner and form issue. The battle between the traditionalist-Wade view, and the new view of sovereignty, is fought on terrain marked out by the former. It is a battle in which the former has demarcated the terms of the engagement. The very labels used to describe the two sides connote an acceptance that the Wade view has the more ancient pedigree, and an

implicit acceptance also that the ground on which the issue is fought is of centrality to the topic as a whole.¹⁴⁵

While the earlier discourse on parliamentary sovereignty, at the time of Dicey and well before him, took place on both the 'is' and the 'ought' planes and revealed 'an awareness of the need for principled justifications for the existence of sovereign power',¹⁴⁶ that type of normative argument, argues Craig, 'has been largely forgotten'¹⁴⁷ in the modern debate between Wade and proponents of the new view.

5.4D Contemporary Challenges: A Blend of Descriptive and Normative Claims

Beyond the debate between the new view and the orthodox camp on the issue of manner and form limitations, there are three additional potential challenges to the question of whether or not Parliament may still be described as a sovereign lawmaking body. As the following discussion will illustrate, these debates tend to combine both normative and descriptive arguments, and it is important to try to keep separate the normative and descriptive dimensions of these various debates as we work through these debates.

5.4D(i) Challenges to Parliamentary Sovereignty from EU Membership

The first of these contemporary challenges to parliamentary sovereignty is the challenge posed to parliamentary sovereignty by the United Kingdom's

¹⁴⁵ Craig, 'Public Law, Legal Theory, and Political Theory' (n 91) 224.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

membership of the European Union. In *Factortame (No. 2)*, the House of Lords famously held that in areas governed by the law of the European Community (the precursor to the European Union), an interim injunction against the Crown would be available—a decision of tremendous significance because of its impact on parliamentary sovereignty. As Lord Bridge said in that case:

If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty...it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.¹⁴⁸

For Lord Bridge, there was ‘nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply’.¹⁴⁹ Any limitations placed on the supremacy of Parliament by EC law, argued Lord Bridge, were the result of a conscious acceptance of those limits by Parliament when it enacted the European Communities Act 1972.

In the light of the *Factortame* decision, commentators have offered at least three ways of thinking about the impact of this case on parliamentary sovereignty.¹⁵⁰

¹⁴⁸ R v. Secretary of State for Transport ex parte Factortame Ltd (No. 2) [1991] 1 AC 603, 658-659 (citation omitted).

¹⁴⁹ *ibid* 659.

¹⁵⁰ For a helpful discussion of these three ways, see Paul Craig, ‘Britain in the European Union’, in Jeffrey Jowell & Dawn Oliver (eds), *The Changing Constitution* (7th ed, Oxford University Press 2011) 119-121.

The first is to regard what the courts have done as establishing a new rule of statutory construction, according to which EU law will always prevail over national law unless Parliament has expressed in clear and unambiguous language that it wishes to derogate from the EU norm in question.¹⁵¹ Craig suggests that express language of derogation may not save conflicting national law from being disapplied unless Britain formally withdraws from the EU because the courts would likely rule that the Government and Parliament ‘cannot simply pick and choose which [EU] norms to accept’.¹⁵² Goldsworthy disagrees, arguing that it ‘is the business of the government and Parliament, not the courts, to decide whether or not Britain should abide by its treaty commitments’ and that ‘the duty of courts is to accept their decision, even if they regard it as undesirable on policy grounds.’¹⁵³ In either event, the effect of the statutory construction view is that the traditional doctrine of implied repeal appears to have been modified. However, it is worth remembering that even before *Factortame* there were exceptions to the general rule of implied repeal, which, as Munro observes, ‘were not regarded as damaging to parliamentary sovereignty.’¹⁵⁴ It is, therefore, ‘arguably just as appropriate to regard this wider exception in the rules of implied repeal [created by cases like *Factortame*] as a matter of statutory interpretation rather than as affecting parliamentary sovereignty’.¹⁵⁵ There is, after all, a meaningful distinction between implied

¹⁵¹ *ibid* 119.

¹⁵² Paul Craig, ‘Report on the United Kingdom’ in Slaughter, Stone Sweet and Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing 1997) 204.

¹⁵³ Goldsworthy, *Parliamentary Sovereignty* (n 114) 287.

¹⁵⁴ Munro, *Studies in Constitutional Law* (n 97) 207.

¹⁵⁵ *ibid*.

and express repeal, and judicial departure from express repeal would be far more damaging to sovereignty than a departure from the doctrine of implied repeal.¹⁵⁶

A second way to conceptualize the impact of *Factortame* is to regard its impact, as Professor Wade did, as a ‘revolution’.¹⁵⁷ For Wade, Lord Bridge’s judgment in *Factortame* amounts to something far more serious than a rule of construction because incorporating provisions of the EC Act into the later enacted MS Act ‘is merely another way of saying that the Parliament of 1972 has imposed a restriction upon the Parliament of 1988’, something ‘the classical doctrine of sovereignty will not permit.’¹⁵⁸ Furthermore, Wade argued, that even if a later statute expressly violated a Community norm, the statute would be ruled by the ECJ to be in violation of Community law, and the ECJ’s ruling would form part of the ‘Community law to which by the Act of 1972 [the later Act] is held to be subject’.¹⁵⁹ For Wade, therefore, the impact of EU membership has caused a revolution, which has amounted to a change in the rule of recognition, defined by Wade as ‘a political fact which the judges themselves are able to change when they are confronted with a new situation which so demands.’¹⁶⁰

¹⁵⁶ *ibid.*

¹⁵⁷ Sir William Wade, ‘Sovereignty—Revolution or Evolution?’ (1996) 112 **Law Quarterly Review** 568.

¹⁵⁸ *ibid* 570.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid* 574.

Finally, Craig's position is that Lord Bridge's judgment in *Factortame* can be defended on normative grounds. According to Craig:

[Lord Bridge] did not approach the matter as if the courts were making an unconstrained political choice at the point where the law stopped. His reasoning is more accurately represented as being based on *principle*, in the sense of working through the principled consequences of the UK's membership of the European Union. The contractarian and functional arguments used by Lord Bridge exemplify this style of judicial discourse. They provide sound normative arguments as to why the UK should be bound by EU law while it remains within the European Union.¹⁶¹

Craig's argument is one that, unlike that of Wade, requires offering normative justification as to whether or not Parliament should be sovereign. In the context of the challenges to sovereignty posed by British membership of the EU, he argues that the best way to conceptualize the jurisprudence of British courts in cases such as *Factortame* is 'to regard decisions about supremacy as being based on *normative arguments of legal principle the content of which can and will vary across time*.'¹⁶² On this view, Craig continues:

[T]here is no *a priori* inexorable reason why Parliament, merely because of its very existence, must be regarded as legally omnipotent. The existence of such power, like all power, must be justified by arguments of principle that are normatively convincing. Possible constraints on Parliamentary omnipotence must similarly be reasoned through and defended on normative grounds. ...It may be that those who disagree with the courts' decisions in *Factortame*...believe that they can counter the normative arguments presented by Lord Bridge. They should then present such arguments since the discourse must be conducted at this level. Debates on such issues are of value.¹⁶³

¹⁶¹ Craig, 'Britain in the European in Union' (n 150) 121.

¹⁶² *ibid* 120.

¹⁶³ *ibid* 121 (citation omitted).

Craig invites those who continue to defend parliamentary sovereignty to present normative arguments that support that defence. He acknowledges, for example, that express parliamentary derogation from an EU norm, even when Britain remains a member of the EU, may be justified on normative grounds, but says that '[t]he nature of this argument would...have to be explicated clearly and it is by no means self-evidently correct.'¹⁶⁴

5.4D(ii) Challenges to Parliamentary Sovereignty from the Human Rights Act

The Human Rights Act 1998 ("HRA") presents another contemporary challenge to the traditional understanding of parliamentary sovereignty. The HRA incorporates into domestic law most of the rights contained in the European Convention on Human Rights ("ECHR"). Whereas the substance of these rights resembles most bills of rights around the world, the manner in which these rights are incorporated into domestic law represents a novel attempt to preserve the sovereignty of Parliament while authorizing a form of judicial review that entails interpretive powers that go beyond ordinary statutory interpretation.¹⁶⁵

This manner of incorporation is reflected in two sections of the HRA, namely Sections 3 and 4, and it is the impact of these two sections on the sovereignty of Parliament that has caused much discussion. Section 3 of the HRA provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is

¹⁶⁴ *ibid* 121n98.

¹⁶⁵ See generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (2001) 49 *American Journal of Comparative Law* 707.

compatible with the Convention rights.¹⁶⁶ If a court believes that a statutory provision may not be read down, Section 4 authorizes the courts to make a ‘declaration of incompatibility’, which, importantly from the perspective of parliamentary sovereignty, ‘does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given’ and ‘is not binding on the parties to the proceedings in which it is made.’¹⁶⁷ Each of these two sections has the potential to impact parliamentary sovereignty in different ways. Reliance on Section 3 has the potential to change the meaning and effect of a statute in contradiction to legislative intent, whereas a Section 4 declaration of incompatibility, although not legally the equivalent of a judicial ‘strike-down’ power, has the capacity ‘to deliver a wound to Parliament’s handiwork that is likely to prove fatal, even though life support for it must be switched off by the government or by Parliament, not by the courts.’¹⁶⁸

In relying on the Section 3 interpretive powers, the courts have fashioned a number of important principles. Among these principles is that the use of Section 3 is mandatory upon the courts. The section is not an ‘optional canon of construction’, and its use is not ‘dependent on the existence of ambiguity.’¹⁶⁹ In *R v Secretary of State for the Home Department ex parte Anderson*, Lord Bingham famously stressed the importance of drawing a line between ‘judicial interpretation’ and ‘judicial vandalism’, the latter of which was described as being the equivalent of giving a statutory provision ‘an

¹⁶⁶ Human Rights Act 1998, § 3.

¹⁶⁷ Human Rights Act 1998, § 4.

¹⁶⁸ Bradley, ‘The Sovereignty of Parliament—Form or Substance?’ (n 139) 65.

¹⁶⁹ *Re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, para [37].

effect quite different from that which Parliament intended and would [be going] well beyond any interpretive process sanctioned by section 3 of the 1998 Act'.¹⁷⁰

Among the more controversial uses of the Section 3 interpretive powers was made in *Ghaidan v. Godin-Mendoza*.¹⁷¹ In *Ghaidan*, the leading case on Section 3, Lord Nicholls said:

Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.¹⁷²

What is striking about the *Ghaidan* decision is that it overruled a previous House of Lords decision, *Fitzpatrick v. Sterling Housing Association*,¹⁷³ which involved interpretation of the *same* statutory provision but in the latter case before the coming into force of the HRA and, therefore, without

¹⁷⁰ R v Secretary of State for the Home Department ex parte Anderson [2002] UKHL 46, para [30] (citation omitted).

¹⁷¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹⁷² *ibid* para [30] (Lord Nicholls). For discussion, see James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake it All About—Doin' the Sankey Hanky Panky' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP Oxford 2011).

¹⁷³ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, cited in *Ghaidan* (n 171) para [1].

the benefit of the Section 3 interpretive mandate.¹⁷⁴ Nevertheless, Lord Nicholls clarified the limits of Section 3 in *Ghaidan* as follows:

Parliament, however, cannot have intended that in the discharge of this extended interpretive function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.¹⁷⁵

The impact of Section 3 of the HRA on parliamentary sovereignty has been that courts are now able to modify the effect of legislation in ways that Parliament arguably did not intend; therefore, regardless of whether or not Parliament retains the last word on a judicial decision that makes use of the Section 3 power, the interpretive mandate contained in the HRA, Section 3, grants courts strong interpretive powers—powers about which there is agreement from both sides of the divide in the debate on rights and democracy¹⁷⁶ that these powers are too strong to sustain the argument that parliamentary sovereignty retains the strength that it once had before the HRA was enacted.

¹⁷⁴ For a discussion of the contrasting interpretive approaches of the judges in these two cases, see Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 108.

¹⁷⁵ *Ghaidan* (n 171) para [33] (Lord Nicholls).

¹⁷⁶ Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 174). (For Kavanagh's defence of rights-based judicial review, see Aileen Kavanagh, 'Constitutional Review, the Courts, and Democratic Scepticism' (2009) 62 *Current Legal Problems* 102). From a sceptical perspective, see Allan, 'Statutory Bills of Rights' (n 172).

5.4D(iii) Challenges to Parliamentary Sovereignty from Common Law Constitutionalism

The United Kingdom Supreme Court's decision in *Axa General Insurance v. Lord Advocate*¹⁷⁷ is of major constitutional importance for a number of reasons, some of which are discussed elsewhere. The most important aspect of the *Axa* case for present purposes is part of Lord Hope's judgment in which His Lordship said that 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.'¹⁷⁸ As authority for these remarks, Lord Hope cited his own opinion in *Jackson*. In recent years, the message conveyed by these remarks, along with the remarks of Lord Steyn and Baroness Hale in *Jackson*, have collectively come to represent a challenge to the traditional understanding of parliamentary sovereignty. This challenge is the challenge of 'common law constitutionalism'.

Proponents of the theory of 'common law constitutionalism', which not only has received judicial endorsement in *Jackson* but has also received support from the academy, assert, as I noted in Chapter 3, that the common law constitution represents a higher-order law that 'both constitutes the political community and contains the fundamental principles that ought to guide its political and legal decision-making.'¹⁷⁹ The sovereignty of Parliament, according to this theory, is itself a creation of the common law. TRS Allan has written that 'the common law is prior to legislative supremacy, which it

¹⁷⁷ [2011] UKSC 46.

¹⁷⁸ *ibid* [51].

¹⁷⁹ Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435, 453.

defines and regulates'.¹⁸⁰ Common law constitutionalism, according to one critic of the theory, 'inverts the [traditionally understood] relationship' between courts and Parliament by according the common law a position superior to statute.¹⁸¹

Jackson represents the first important case in which senior judges acting in their judicial capacity expressed support for common law constitutionalism, although it is important to remember that these remarks were made *obiter*. These judges were Baroness Hale, Lord Hope, and Lord Steyn, who have together been identified as the 'Jackson Three'.¹⁸² Lord Steyn endorsed common law constitutionalism in the following *obiter* remarks in *Jackson*:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.¹⁸³

Baroness Hale's endorsement of common law constitutionalism is found in the following passage:

¹⁸⁰ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003) 271.

¹⁸¹ Goldsworthy, *Parliamentary Sovereignty* (n 114) 14-15.

¹⁸² Keith D Ewing, *The Bonfire of the Liberties* (Oxford University Press 2010) 281.

¹⁸³ *Jackson* (n 118) [102].

The concept of Parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century (I appreciate that Scotland may have taken a different view) means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.¹⁸⁴

Finally, Lord Hope's opinion, to which he made a return in *Axa*, on the matter was is as follows:

Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. ...It is no longer right to say that [Parliament's] freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. ...Nor should we overlook the fact that one of the guiding principles that were identified by Dicey...was the universal rule or supremacy throughout the constitution of ordinary law. ...In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.¹⁸⁵

The preceding views of the *Jackson Three* have been variously described as 'extravagant',¹⁸⁶ 'heretical',¹⁸⁷ and representative of a kind of 'common law

¹⁸⁴ *ibid* [159].

¹⁸⁵ *ibid* [104] – [107] (citations omitted).

¹⁸⁶ Tom Mullen, 'Reflections on Jackson v. Attorney General: Questioning Sovereignty' (2007) 27 *Legal Studies* 1, 14.

¹⁸⁷ *ibid*.

radicalism'.¹⁸⁸ But why are these dicta regarded as an expression of heresy? The answer to this question requires attempting to make sense of parliamentary sovereignty from the rival legal theories of Hart and Dworkin that have been the subject of previous chapters of this thesis.¹⁸⁹

As noted previously in the thesis, in *The Concept of Law*, Hart, in contrast to the legal theory of John Austin, who had argued that a sovereign makes all of the rules in a legal system, argued instead that '*the rules make the sovereign*.'¹⁹⁰ The most important of these rules, according to Hart, was the ultimate 'rule of recognition'¹⁹¹—the fundamental rule that establishes the criteria necessary for all other rules in the legal system to be accepted as law. Unlike other rules in the legal system, the ultimate rule of recognition is authoritative not because a legal rule declares it as such but because the ultimate rule of recognition is accepted by a majority of the officials in the legal system. For Hart, parliamentary sovereignty, which is the 'ultimate rule of recognition' of the British constitution, is a 'an external statement of fact':

¹⁸⁸ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th ed., Cambridge University Press 2011) 86.

¹⁸⁹ For a discussion of the Hart-Dworkin debate in the context of a discussion specifically of the Jackson case, see Mullen 'Reflections on Jackson v Attorney General (n 186) 16-19.

¹⁹⁰ Scott Shapiro attributes such a description of Hart's work to Jeremy Waldron. Scott J. Shapiro, 'What is the Rule of Recognition (And Does it Exist?)' (2009) **Yale Law School, Public Law & Legal Theory Research Paper Series**, Research Paper No. 181. Available at <http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_Rule_of_Regulation.pdf> (visited 26 February 2015).

¹⁹¹ Hart, *The Concept of Law* (n 66) Ch 6. See generally for a helpful summary of Hart's various arguments, including a discussion of the ultimate rule of recognition, Leslie Green's *Introduction to Hart, The Concept of Law* (n 66). For a discussion of the rule of recognition in the context of the Jackson case, see Mullen (n 186) 16-17.

When we move from saying that a particular enactment is valid, because it satisfies the rule that what the Queen in Parliament enacts is law, to say that in England this last rule is used by courts, officials, and private persons as the ultimate rule of recognition, we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it.¹⁹²

Building on Hart's theory, Goldsworthy offers a critique of common law constitutionalism.¹⁹³ Goldsworthy argues that 'the central claims of "common law constitutionalism" are false....Most senior legal officials, including judges, [in the United Kingdom] still accept the doctrine of parliamentary sovereignty.'¹⁹⁴ He argues that while Hart's ultimate rule of recognition requires acceptance by *judicial* officials within the legal system, judicial acceptance alone is not sufficient for the existence of such a rule.¹⁹⁵ The acceptance of the political branches of government is also necessary.¹⁹⁶

However, Goldsworthy's critique of common law constitutionalism is not simply concerned with accurately describing the current status of parliamentary sovereignty in the British constitution. As the following excerpt makes clear, Goldsworthy presents a normative argument in favour of maintaining the sovereignty of Parliament as the ultimate rule of recognition of the British constitution:

¹⁹² Hart, *The Concept of Law* (n 66) 107-108.

¹⁹³ Goldsworthy, *Parliamentary Sovereignty* (n 114) Ch 2.

¹⁹⁴ *ibid* 6.

¹⁹⁵ *ibid* 54-55.

¹⁹⁶ *ibid* 55.

Describing the unwritten constitution as a matter of common law...is likely to breed confusion. The vast bulk of the common law consists of substantive rules and principles, governing property, contracts, torts and so on, that are not constituted by a consensus of legal officialdom in general, and are therefore able to be changed without such a consensus having to change. Judges are now recognized as having authority unilaterally to change these rules and principles, or to declare that they have changed. They are best conceptualized as judicially posited rules, judicial customs, or Dworkinian principles. *To apply the same label, 'common law', to the most fundamental norms of the unwritten constitution, is likely to produce confusion, erroneous assumptions about the authority of judges to change them, and conflict between the branches of government.*¹⁹⁷

In the italicized text, we find Goldsworthy's normative argument against unilateral modification by a minority of judges of the rule of recognition.

In contrast to Hart's positivist explanation of parliamentary sovereignty, Dworkin's theory of 'law as integrity', discussed in detail in Chapter 3, uses different means to explain the meaning of parliamentary sovereignty in the British constitution.¹⁹⁸ According to Dworkin's theory of 'law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.'¹⁹⁹ For Dworkin, when hard cases require judges to engage in interpretation of the law, the judge under this theory 'must choose between eligible interpretations by asking which shows the community's structure of

¹⁹⁷ *ibid* 55 (emphasis added) (citation omitted).

¹⁹⁸ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986). For a discussion of Dworkin's theory in the context of the Jackson case and common law constitutionalism, see Mullen, 'Reflections on Jackson v Attorney General' (n 186) 18.

¹⁹⁹ Dworkin, *Law's Empire* (n 198) 225.

institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality.’²⁰⁰

Drawing on Dworkin’s theory of law as integrity, Craig has argued that the ‘traditional’ conception of sovereignty, as developed by Sir William Wade, is ‘simply a statement about the exercise of power.’²⁰¹ The traditional conception, according to Craig, does not pass the test of ‘justification’ in the Dworkinian sense.²⁰² He argues that parliamentary sovereignty, like all other forms of power, requires normative justification, and says that ‘the greater the alleged scope of power the more convincing must be the justification.’²⁰³ He notes that defenders of unlimited parliamentary sovereignty may present as a normative justification the argument ‘that constitutional review is anti-democratic, or that it is inconsistent with democracy for there to be any checks on what the current parliamentary majority can achieve.’²⁰⁴ Craig believes that the view that does meet the Dworkinian test of justification is the view that ‘Parliament has sovereign power, provided that there is the requisite normative justification for that power.’²⁰⁵ He is keen, however, to make clear what adopting this view does not necessarily mean:

Adoption of this view does not necessarily lead to the conclusion that there should be constitutional review of statutes policed by the courts.

²⁰⁰ *ibid* 256.

²⁰¹ Craig, ‘Public Law, Political Theory, and Legal Theory’ (n 91) 230.

²⁰² *ibid* 229-230.

²⁰³ *ibid* 230.

²⁰⁴ *ibid*.

²⁰⁵ *ibid*.

It does firmly deny the charge that those who advocate legal limitations on Parliament's power are somehow guilty of constitutional heresy, or of contravening some *a priori* constitutional logic which denies that this would be possible.²⁰⁶

Returning to the remarks made by the *Jackson Three*, as Bradley notes, '[i]t must not be assumed from these statements in *Jackson* that today's judges are anxiously waiting to impose judicial supremacy upon the UK, but they indicate a willingness not merely to address the content of parliamentary sovereignty, but also to examine the link between that doctrine, the principle of democracy, and the Rule of Law.'²⁰⁷ By taking this approach, rather than regarding these remarks as an expression of heresy, we can openly debate the merits and demerits of parliamentary sovereignty.

Keith Ewing has made a powerful argument in defence of parliamentary sovereignty that responds to Craig's invitation to defend parliamentary sovereignty for normative reasons. Ewing has argued that parliamentary sovereignty is a principle that, although established before the universal franchise, may be regarded as 'the most democratic of all constitutional principles':

[I]t is in the principle of parliamentary sovereignty that the principles of democracy and constitutional law converge. This is because in the democratic era, parliamentary sovereignty is the legal and constitutional device which best gives effect to the political principle of popular sovereignty, whereby the people in a self-governing community are empowered—without restraint—to make the rules by which they are to be governed through the medium of elected, representative and accountable officials.²⁰⁸

²⁰⁶ *ibid.*

²⁰⁷ AW Bradley, 'The Sovereignty of Parliament—Form or Substance?' (n 139) 68.

²⁰⁸ Keith Ewing, 'Just Words and Social Justice' (1999) 5 **Review of Constitutional Studies** 53, 55.

We can debate whether attempts by the judges to unilaterally modify the rule of recognition pose a sufficient enough threat to the integrity of the legal system so as to normatively justify unlimited parliamentary sovereignty. We can debate whether judicial review of legislation is justified in those instances in which the link between legislative supremacy and popular self-government is severed. There are arguments on both sides of this debate, and the future of parliamentary sovereignty, as Craig rightly argues, ought to be debated on this normative plane.

5.5 DELIVERING GRIFFITH-STYLE POLITICAL CONSTITUTIONALISM AT THE DEVOLVED LEVEL

I argued above that although parliamentary sovereignty is usually thought to be the constitutional design feature that best secures the values associated with political constitutionalism, from the perspective of the citizen who embodies the normative voice in Griffith's lecture, there is reason for the political constitutionalist to *oppose* the manner in which the HRA attempts to protect parliamentary sovereignty in a multi-level system of government.²⁰⁹ To appreciate this argument, let us go back to a quote from Jeremy Waldron discussed in Chapter 4 from an article in which Waldron was arguing against the adoption of a bill of rights in the UK in the early 1990s:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some public-spirited citizen who wishes to launch a campaign or lobby her MP on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a

²⁰⁹ See final paragraph of Section 5.3 above.

dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But—like her suffragette forebears—she wants a vote; she wants her voice and her activity to count on matters of high political importance.

In defending a Bill of Rights, we have to imagine ourselves saying to her: ‘You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges’ view. When their votes differ from yours, theirs are the votes that will prevail.’ It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.²¹⁰

Now, let us imagine that the citizen in Waldron’s hypothetical above is a *Scottish* citizen. This public-spirited citizen ‘wishes to launch a campaign or lobby her [MSP] on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view.’²¹¹ When the courts have the authority to strike-down an Act of the Scottish Parliament (ASP), we have to imagine saying to this citizen something similar to what Waldron asks us to imagine saying to the public-spirited citizen in his hypothetical, which may look something like this:

You may write to the newspaper and get up a petition and organize a pressure group to lobby [the Scottish] Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the

²¹⁰ Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 **Oxford Journal of Legal Studies** 18, 50-51.

²¹¹ *ibid.*

judges' view. When their votes differ from yours, theirs are the votes that will prevail.²¹²

To that public-spirited citizen, in whose name the Scottish Parliament has wide-ranging powers to enact legislation, it seems that the preservation of parliamentary sovereignty (of the Westminster Parliament) does not actually appear to be an attractive way of securing the principles of democracy. That is so because although it may be the case that in a single political community, 'parliamentary sovereignty is the legal and constitutional device which best gives effect to the political principle of popular sovereignty, whereby the people in a self-governing community are empowered—without restraint—to make the rules by which they are to be governed through the medium of elected, representative and accountable officials',²¹³ when we have in a state multiple political communities, as we now do in the United Kingdom, then the manner in which our current constitutional arrangements under the HRA and the Scotland Act preserve parliamentary sovereignty is, from the perspective of the public-spirited Scottish citizen, rather than being a *democratic* feature of our constitutional arrangements, an *undemocratic* one.

In what ways, then, can we reform our current constitutional arrangements in order to deliver more of a Griffith-style political constitutionalism at the devolved level? There are at least three possibilities.

²¹² *ibid.*

²¹³ Ewing, 'Just Words and Social Justice' (n 208) 55.

5.5A The Australian Model

Constitutional arrangements in Australia offer one example of how a multi-level system of government can have a division of power among the various levels of government while practicing a form of political constitutionalism with respect to human rights. The Australian Constitution of 1900 divides power among the state and federal parliaments and grants courts the power to police these boundaries. Yet, Australia also remains one of the rare jurisdictions whose written constitution does not have a judicially enforceable bill of rights.²¹⁴

We must, of course, be cognizant of the fact that, while Australia is a federated system of government, the United Kingdom (at least formally) is not. Notwithstanding that important difference, it is possible to imagine a devolution statute that, like the Australian Constitution, does not have a bill of rights. This devolution statute can, in ways similar to the Australian Constitution, divide powers between the Westminster and devolved parliaments and grant courts the power to police those boundaries of power. The Griffith-style political constitutionalist element of these arrangements would lie in the fact that courts would not have the power to strike down legislation enacted by a democratically elected sub-state legislature on rights-related grounds. The Scotland Act 1978, a devolution statute that attempted to establish a Scottish Assembly but never came into force

²¹⁴ See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013) 204.

because its referendum requirement was not met,²¹⁵ also provides an example of such an arrangement.²¹⁶

5.5B The Canadian Model

Section 33 of the Canadian Charter of Rights and Freedoms (“the Charter”) offers an example of how a bill of rights can deviate, at least in theory, from the American model of constitutionalism by protecting legislation from being struck down by the courts on rights-related grounds. Section 33 of the Charter does so by offering legislatures (at both the national and provincial level) the power to protect a statute from rights-based judicial review by invoking what is known as the “notwithstanding” clause. Section 33 of the Charter reads:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.²¹⁷

Invoking the notwithstanding mechanism, thus, insulates a statute from being subject to rights-based judicial review.

Much has been written about the notwithstanding mechanism’s ability, in practice, to distinguish itself in a meaningful way from the American model

²¹⁵ On the Scotland Act 1978, see Chris Himsworth and Christine O’Neill, *Scotland’s Constitution: Law and Practice* (3rd ed, Bloomsbury, 2015) 62.

²¹⁶ My thanks to Prof. Keith Ewing for this point.

²¹⁷ Canadian Charter of Rights and Freedoms, Section 33(1) – (2).

of constitutionalism.²¹⁸ Indeed, Waldron argues that the notwithstanding mechanism is not meaningfully distinguishable from the American model because the mechanism is rarely invoked by the Canadian legislatures.²¹⁹ A major problem with the notwithstanding mechanism is that the manner in which it is worded 'requires the legislature to misrepresent its position on rights. To legislate notwithstanding the Charter is a way of saying that you do not think Charter rights have the importance that the Charter says they have.'²²⁰ Thus, the notwithstanding clause paints a picture of one group of people (judges) that cares about rights and another group (legislators) that does not, whereas what the political constitutionalist believes is that in a reasonably well-functioning democratic system, both groups think rights are important but they '*disagree* about how the relevant rights are to be *interpreted*.'²²¹

Thus, although in theory the Canadian arrangements offer an appealing alternative to the American model of constitutionalism for the political constitutionalist, there are practical concerns associated with the Canadian model that suggest that its adoption would not necessarily alleviate Griffith-style political constitutionalist concerns.

²¹⁸ For a discussion of this literature, see Gardbaum, *The New Commonwealth Model of Constitutionalism* (n 214) Ch 5.

²¹⁹ Waldron, 'The Core of the Case Against Judicial Review' (n 73) 1356-57.

²²⁰ *ibid* 1357n34.

²²¹ *ibid* (emphasis added).

5.5C The HRA Model—Declarations of Incompatibility

A final possibility is the replication at the devolved level of the Section 4 ‘declaration of incompatibility’ mechanism contained in the HRA. Chris Himsworth argued along these lines in an essay published shortly after the enactment of the HRA:

[T]he Scottish Parliament (and the Northern Ireland Assembly) should, in principle, have been treated not like a parish council, quango, or minister but in a manner much more closely resembling that granted by the UK Parliament to itself. The [declaration of] incompatibility principle and procedure have been conceived narrowly as a protection for parliamentary sovereignty and, therefore, applicable only to UK Acts. More positively, they may be seen as readily and appropriately extendable to any parliament and any form of parliamentary legislation. The reason why the Scottish Parliament should be protected from the summary nullification of its Acts is not because of any claim to sovereignty but because there should be an opportunity for any parliament to reflect, to consider options, without the pressure of immediate chaos and to produce a viable solution. These are conditions reasonably claimed by a parliament, whether devolved or not.²²²

The argument being made here is that just as the HRA avoids giving judges the power to strike down legislation enacted by the *Westminster* Parliament (by giving them instead the power only to declare such Acts as being incompatible with human rights²²³), such an incompatibility procedure ought also to be introduced to protect from nullification Acts of the *Scottish* Parliament and other democratically elected devolved legislatures.

As is the case with the Canadian ‘notwithstanding’ mechanism discussed above, some political constitutionalists express doubts as to whether the

²²² Himsworth, ‘Rights versus Devolution’ (n 62) 162.

²²³ Human Rights Act 1998, § 4.

incompatibility procedure makes the HRA meaningfully different from the American model of constitutionalism.²²⁴ One reason for these concerns is that although the HRA allows Parliament to preserve its own interpretation of a statute even after a judicial declaration of incompatibility, there has so far only been one occasion on which Parliament has chosen *not* to amend legislation that has been declared incompatible with the ECHR by the courts.²²⁵ It is thought that there are political costs associated with routinely ignoring a judicial declaration, and, therefore, that a declaration of incompatibility is at least in some ways like a strike-down power. As Anthony Bradley puts it, a declaration of incompatibility, though not the same as a strike-down power, does offer the courts the power to ‘deliver a wound to Parliament’s handiwork that is likely to prove fatal, even though life support for it must be switched off by the government or by Parliament, not by the courts.’²²⁶

Another reason that the HRA arrangements are thought not to deviate too far from the American model of constitutionalism is that the interpretive powers that courts enjoy under Section 3 mean that courts can significantly modify the effect of a statute, even in ways in which Parliament arguably did not intend. This was most clearly evident in the well-known *Ghaidan* decision discussed above.²²⁷ Thus, Aileen Kavanagh has argued that the

²²⁴ For a discussion of these doubts, see generally Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011); see also Gardbaum, *The New Commonwealth Model of Constitutionalism* (n 214) Ch 7.

²²⁵ The reference here is to the well-known prisoner voting controversy. See Gardbaum, *The New Commonwealth Model of Constitutionalism* (n 214) 177.

²²⁶ Bradley, ‘The Sovereignty of Parliament—Form or Substance?’ (n 139) 65.

²²⁷ See Section 5.4D(ii) above.

HRA ‘*seem[s]* to give Parliament the last word, whilst nonetheless giving the courts powers of constitutional review, not hugely dissimilar from those possessed by the US Supreme Court.’²²⁸

We discussed at length in Chapter 2 of this thesis the reasons that Griffith and other normative positivists would oppose giving judges such strong powers of interpretation as those enjoyed by judges under Section 3 of the HRA.²²⁹ Thus, although formally the HRA may be seen as an instantiation of Griffith-style political constitutionalism, in practice, like the Canadian arrangements, the HRA ‘declaration of incompatibility’ mechanism, if replicated at the devolved level, would not entirely alleviate the concerns of political constitutionalists if the incompatibility mechanism is accompanied by Section 3-style strong interpretive powers.²³⁰

Out of the three models discussed in this section, the Australian model offers the possibility of being most attractive in terms of delivering more of a Griffith style of political constitutionalism at the devolved level. The other two models, while offering attractive alternatives in theory, both have practical difficulties. It is an empirical question as to whether those practical difficulties would manifest themselves if these models were adopted at the devolved level in the United Kingdom.

²²⁸ Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 174) 418.

²²⁹ See, especially, the discussion on ‘normative decisional positivism’ in Chapter 2, Section 2.2C.

²³⁰ See Allan, ‘Statutory Bills of Rights’ (n 172).

5.6 CONCLUSION

This chapter has sought to describe the contributions that Griffith's normative positivism, discussed at length in previous chapters, can make to the narratives of devolution, that is, the different ways of conceiving the policy and objects of the Scottish devolutionary settlement. In answering that question, I have argued that while the dominant narratives of devolution have too often attempted to make sense of devolution from the standpoint of the judge, Griffith's normative positivism encourages us to think about devolution from the standpoint of the citizen. When we turn our vantage away from the judge and towards the citizen, we are better able to appreciate the democratic concerns associated with subjecting Acts of the Scottish Parliament to rights-based judicial review. I have argued that preserving parliamentary sovereignty in the way that the Human Rights Act does, by according subordinate status to the Scottish Parliament and by subjecting Acts of the Scottish Parliament to rights-based judicial review, has undemocratic consequences. I have, in conclusion to the chapter, followed that argument by describing three possible models of constitutionalism, which, if followed, could better deliver more of a Griffith style of political constitutionalism at the devolved level than the current Human Rights Act model manages to achieve.

CONCLUSION

The Argument. The principal argument that I have presented in this thesis is that J.A.G. Griffith was a normative positivist. He argued in his famous lecture ‘The Political Constitution’¹ for the positivist separation of law and morality for normative reasons. As I argued in Chapter 2, unlike the purely *conceptual* positivist, who urges the positivist separation of law and morality for the purposes of accurately describing the nature of a legal system and accurately describing the concept of law,² Griffith was a *normative* positivist who urged the separation of law and morality for normative reasons.³ These normative concerns running through Griffith’s lecture were the same as those of Hobbes, Hume, Bentham, and other ‘normative decisional positivists’,⁴ namely an interest in minimizing the discretion enjoyed by judges in order to avoid the arbitrariness that would result if legal decisions turned on the moral judgment of judges and other officials entrusted with the task of interpreting and applying the law. His normative decisional positivist views were evident in his opposition to bills of rights, which instruments he opposed owing to the strong interpretive powers that they grant to unelected judges.⁵

¹ JAG Griffith, ‘The Political Constitution’ (1979) 42 **Modern Law Review** 1.

² See Chapter 2, esp. Section 2.2A.

³ See Chapter 2, esp. Sections 2.5 and 2.6.

⁴ See Chapter 2, Section 2.2C.

⁵ See Chapter 2, Sections 2.5 and 2.6.

I argued in Chapter 2 that Griffith's famous definition of the UK constitution as being 'no more and no less than what happens'⁶ is explained by his commitment to democracy, as well as by his commitment to the meta-ethical theory known as moral anti-realism.⁷ In order to do so, I drew a connection between democracy and legal positivism on the one hand, and moral anti-realism and legal positivism on the other, and in both cases, I presented reasons why legal positivism would be an attractive theory for someone committed, as Griffith was, to both democracy and moral anti-realism. Griffith's definition of the UK constitution as 'no more and no less than what happens' was a normative positivist attempt to counter the anti-positivist notions of the UK constitution that were being advanced by his contemporaries.

The reader might wonder why it is important to identify Griffith as a normative positivist. What turns on my discovery? Am I the first to do so? In these concluding remarks, I want to provide the reader answers to these questions and a sense of why it is that I chose this subject matter and how it is that my journey in identifying a particular gap in the literature has played out.

I am certainly not the first one to identify Griffith as a normative positivist. Among contemporary scholars who have carefully assessed Griffith's work, Thomas Poole makes brief mention of Griffith's connection to normative positivism:

[T]he positivist position [Griffith] espouses has an explicit political point. He defends positivism as the best method for uncovering the

⁶ Griffith, 'The Political Constitution' (n 1) 19.

⁷ See Chapter 2, Section 2.6.

reality beneath the layers of illusion and rhetoric. A ‘solid, positivist, unmetaphysical, non-natural foundation for analytical jurisprudence’, he insists, was essential for peering beneath the ‘elaborate façades’ and ‘out of date pieces of stage paraphernalia’ in order to find the levers of power, and the identity of those who manipulated those levers. Intellectual honesty, then, has a moral and political purpose. In this, Griffith shares H.L.A. Hart’s conviction that only positivism could make ‘men clear sighted in confronting the official abuse of power’, was most likely ‘to lead to a stiffening of resistance to evil’.⁸

We find in the above quotation a connection that Poole draws between Griffith’s positivism and the positivism of HLA Hart (I addressed in Chapter 2 the question of whether or not Hart may appropriately be described as a normative positivist⁹).

However, although Poole does briefly draw attention to Griffith’s normative positivism in the article quoted above, there is a need to provide a more detailed account of Griffith’s commitment to normative positivism than Poole’s account manages. By providing a more thorough account (as I have attempted to do in this thesis) of Griffith’s normative positivism, we clarify a set of debates surrounding Griffith’s lecture that still remain, to this day, in need of clarification.

The Descriptivism Debate. One debate surrounding Griffith’s lecture that remains in need of clarification is what I referred to in the introductory chapter of the thesis as ‘the descriptivism debate’.¹⁰ This debate relates to the use of the word ‘descriptive’ that has surfaced in recent years to describe

⁸ Thomas Poole, “Tilting at Windmills? Truth and Illusion in “The Political Constitution” (2007) 70 **Modern Law Review** 250, 257 (citations omitted).

⁹ See Chapter 2, Section 2.4B.

¹⁰ See Chapter 1.

Griffith's vision of the UK constitution as expressed in 'The Political Constitution' and relates to the suggestion by some scholars that Griffith's arguments are irrelevant to normative constitutional theory. Dawn Oliver, for example, has written that Griffith 'argued from and for a highly positivist interpretation of the Constitution, with no 'oughts' or moral content';¹¹ JWF Allison has written that Griffith's 'notion of the constitution [was] purely descriptive—neither legally prescriptive nor morally normative';¹² and Adam Tomkins has written that '[w]hen it came to discussing constitutional questions, Griffith only ever described—he never prescribed.'¹³ Together, Oliver, Allison and Tomkins represent one side of the descriptivism debate; for ease of reference, let us refer to these three scholars as belonging to *Group A* for the purposes of this debate.

The other side of the descriptivism debate are those who come to Griffith's defence by suggesting that what scholars belonging to Group A are suggesting in the above quotes is wrong because, they argue, Group A neglects Griffith's normative arguments in 'The Political Constitution'. For ease of reference, let us refer to those who come to Griffith's defence in this manner as *Group B*. Martin Loughlin, one member of Group B, has recently argued in response to Tomkins's claim quoted in the previous paragraph that 'it is easy—but wrong—to state that Griffith's work is purely descriptive'.¹⁴ Similarly, Poole has written in response to Tomkins's

¹¹ Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 380.

¹² JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007) 34.

¹³ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 37.

¹⁴ Martin Loughlin, 'Modernism in British Public Law: 1919-79' [2014] *Public Law* 56, 66.

argument that Tomkins's description of Griffith's analysis as wholly descriptive 'underestimates the polemical dimension of Griffith's work.'¹⁵ 'We misunderstand Griffith', argues Poole, 'if we see him as simply presenting a descriptive analysis.'¹⁶ And Graham Gee welcomes this clarification by Poole of what Gee takes to be 'a familiar mischaracterisation'¹⁷ of Griffith's work.

What I offered in Chapter 3 was a response to Group A that is different from the type of responses to Group A that Group B has hitherto provided. I argued in Chapter 3 that although scholars in Group B are correct to come to Griffith's defence, they do so in a manner that actually misunderstands Group A. Whereas Group B believes that what Group A is saying is that Griffith's work or that his analysis was completely devoid of normative argument, what I sought to show is that Group A actually *expressly recognizes* the normative dimension of Griffith's work. The better way to defend Griffith against the criticism of Group A, I argued, is not to suggest that Group A completely neglects the normative arguments present in Griffith's lecture (which members of Group A do not) but rather the more appropriate response to scholars belonging to Group A is to expose the Dworkinian anti-positivist bias that is present in their critique of Griffith. It is a mistake, I argued, to arrive at Griffith's lecture carrying, as Group A does, Dworkinian anti-positivist presuppositions; rather, the better way to appreciate Griffith's arguments is to look at them through a normative

¹⁵ Poole, 'Tilting at Windmills? Truth and Illusion in "The Political Constitution"' (n 8) 253.

¹⁶ *ibid.*

¹⁷ Graham Gee, 'The Political Constitutionalism of J.A.G. Griffith' (2008) 28 **Legal Studies** 20, 32.

positivist lens. Doing so, I argued, is fairer to Griffith and provides a more accurate assessment of Griffith's work.¹⁸

The Political Constitutionalism Debate. Identifying Griffith as a normative positivist also helps to clarify our understanding of the concept that has come to be known in recent years in public law scholarship as 'political constitutionalism'. I analysed in Chapter 3 the account of 'political constitutionalism' presented by Tomkins, one of Griffith's critics, and I drew attention to a key difference between Tomkins's and Griffith's political constitutionalism that is not brought out in the scholarship. That difference is that whereas Tomkins's version of political constitutionalism is based on an anti-positivist understanding of the UK constitution, Griffith's political constitutionalism is best understood as a form of normative positivism. I argued that those who enlist Griffith as an ally of the political constitutionalist school of thought must bear in mind the diversity that exists within the concept of political constitutionalism and argued that Griffith's political constitutionalism is best understood as a form of normative positivism—a form of political constitutionalism that, unlike the modern defence of political constitutionalism provided by Tomkins, is not built upon Dworkinian anti-positivist foundations.¹⁹ I further argued that by building his republican programme on a Dworkinian anti-positivist foundation, Tomkins's modern defence of political constitutionalism has lost the affinity that is normally thought to exist between republicanism and normative positivism.²⁰

¹⁸ See Chapter 3, esp. Section 3.3

¹⁹ See Chapter 3, esp. Sections 3.3B and 3.5.

²⁰ See Chapter 3, esp. Sections 3.3B, 3.4, and 3.5.

Motivation. Why was I drawn to Griffith's lecture for the purposes of this project? Apart from my motivation to clarify the various debates just noted, which I came across in the course of my research, I also believed, and continue to do so, that a better understanding of Griffith's lecture can help us make better sense of the big constitutional questions of the age, such as those relating to bills of rights and devolution. I asked the question of what contribution, if any, Griffith's normative positivism can make to what I referred to, borrowing a phrase from Aileen McHarg, as 'the narratives of devolution'.²¹ I argued that among the things that Griffith can teach us about the narratives of devolution is that in conceptualizing the legal dimension of Scottish devolution—that is, in thinking about what devolution means as a matter of law—there is value in switching our standpoint away from the judge and towards the citizen.²² I argued that the arguments Griffith made in 'The Political Constitution' can encourage us to think about the fact that no matter what judges say is the best interpretation of the law of devolution as it currently exists, it will always be open to our citizen to question the desirability of the law as it currently stands; it will always be open to our citizen to argue that the law as it currently stands is morally deficient and ought to be reformed.²³ In particular, I argued that the normative positivist concerns that Griffith expressed against bills of rights—his argument that these instruments grant judges the power to interpret

²¹ See Chapter 5.

²² See, on the value of switching standpoint and on the normative voice in Griffith's normative positivism, Chapter 4.

²³ See Chapter 5, esp. Section 5.3.

‘woolly principles and even woollier exceptions’²⁴—do not go away when the parliament whose legislation is being subjected to review by the courts is the *Scottish* Parliament. It is easy to miss this point, I demonstrated, when we think about devolution, as we so often have, far too much from the vantage of the judge and less so from the vantage of the citizen.²⁵ For the citizen, the most obvious characteristic of the Scottish Parliament is that it is a body engaged in *representative lawmaking*,²⁶ and it matters not so much to the citizen whether that representative lawmaking body is, in the eyes of a court, more like a parliament or like a delegated body.

The constitutional questions of the age—should we withdraw from the European Convention on Human Rights and adopt a British bill of rights? How should a bill of rights apply across the various jurisdictions within the UK? How should the law of devolution be reformed?—are all questions about which Griffith’s lecture encourages us to think differently. Griffith’s lecture reminds us of the dangers of granting unelected judges the power to interpret vague provisions of a bill of rights, about whose interpretation reasonable people may disagree. Griffith’s lecture, as I argued in Chapters 4 and 5, encourages us to think about bills of rights and about devolution less so from the standpoint of the judge and more so from the standpoint of the *citizen*.

²⁴ Griffith, ‘The Political Constitution’ (n 1) 14.

²⁵ See Chapter 5, esp. Section 5.3.

²⁶ Jeremy Waldron, ‘Representative Lawmaking’ (2009) 89 **Boston University Law Review** 335.

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