Special Issue—*Political Constitutions*

A Grammar of Public Law

By Graham Gee[*] and Grégoire Webber[**]

Abstract

The dominant grammar of public law is a product of abstraction that, at times, overemphasizes certainty and simplicity in a search for systematic coherence within the constitution, even where none exists. In contrast, a concern for and with political and legal practice invites a more tentative and exacting grammar, one that necessitates further questioning, resists generalities and appeals instead to a language of "more or less" and "in one sense but not in another" as part of our public law discourse. We seek a practice-oriented grammar that encourages public lawyers to think and to speak politically about the constitution. We draw on works of prominent political constitutionalists to show how they have had varying degrees of success in nurturing a more practice-oriented grammar of public law.

A. Introduction

To open with J.A.G. Griffith's lecture on *The Political Constitution* might seem clichéd.[1] Recent years, after all, have seen several reinterpretations of this lecture that popularized the idiom "the political constitution".[2] Many of its claims about the relationships between law and politics and the proper roles of judges and 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. We begin with this lecture, however, not to retread Griffith's oft-cited critiques of judges,

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[1] J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979).

[2] Carol Harlow, *The Political Constitution Reworked, in* PUBLIC INTEREST LITIGATION: NEW ZEALAND EXPERIENCE IN INTERNATIONAL PERSPECTIVE 189 (Rick Bigwood ed., 2006); Thomas Poole, *Tilting at Windmills? Truth and Illusion in 'The Political Constitution,'* 70 MOD. L. REV. 250 (2007); and Graham Gee, *The Political Constitutionalism of J.A.G. Griffith,* 28 LEGAL STUD. 40 (2008).

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judicial review, and bills of rights, but rather to reflect on his rejection of "the language of old liberal democracies".[3]

In his lecture, Griffith rejected metaphors of "checks and balances" and "ships of state on even keels,"[4] and referred disparagingly to "descriptions of the constitution as a piece of machinery cleverly and subtly constructed".[5] Such metaphors represented "elaborate facades deliberately constructed to fool most of the people most of the time" or, at best, "out of date pieces of stage paraphernalia which someone had forgotten to clear away with the other impediments of Professor Dicey's England".[6] In a similar vein, Griffith criticized "the natural lawyers, the metaphysicians and the illusionists who gave the impression that the working of the constitution was something all done by mirrors, by sleight of hand".[7] Many will also recall his famous quip that each "right" in the European Convention on Human Rights was "a statement of a political conflict pretending to be a resolution of it".[8]

Griffith's critique was directed at abstractions and metaphors that obscure the messy and confusing reality of power and conflict in the British constitution. As Griffith saw it, the vocabulary of public law fails to capture the complexity, contingency, and haphazardness of practice; it trades instead on misleading shorthand that oversimplifies the intricate workings of the constitution. Admittedly, Griffith's own lecture contained rather cryptic turns of phrase ("the constitution is no more and no less than what happens") and exaggerated expressions as well (law is no more than "one means, one process, by which conflicts are resolved").[9] However, Griffith's basic insight remains an important one: the language used when thinking, speaking, and writing about public law not only shapes understandings of political and legal practice, but is liable to distort those understandings as well.

Too little attention has been paid to this critique of what we term *the grammar of public law*.[10] By grammar of public law, we refer to the words and phrases that public lawyers use

[3] Griffith , *supra* note 1, at 5.

[4] *Id.* at 1.

[5] *Id.* at 5.

[6] *Id.* at 5.

[7] *Id.* at 6.

[8] *Id.* at 14.

[9] *Id.* at 19, 20.

[10] An exception is Martin Loughlin's inclusion of Griffith within the "functionalist style of public law," one characteristic of which is avoiding "getting too bound up in the promotion of form (concepts) over substance (ends)." *See generally* Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. TORONTO L.J. 361, 363 (2005).

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when thinking and talking about institutions, concepts, and claims associated with a community's constitutional arrangements. To be clear, we do not appeal to a technical understanding of grammar. We use the term in a much looser sense to denote the relationships between the language invoked by public lawyers and the practices to which that language purports to relate. More particularly, we are curious about how academic public lawyers employ language to describe the complex and often confusing practices of the British constitution.[11] As we aim to demonstrate, the relationships between the constitution and the language and vocabulary of public lawyers are, at times, *structural*, in the sense that they frame and guide the way in which the constitution is understood. In this way, the words and phrases used by public lawyers lay bare not only the vocabulary of public law, but also the grammar that structures public law thought, sometimes for the better, sometimes not. Our starting premise, in this respect, is that language is a cognitive tool that academic lawyers use not only to describe, but also to comprehend constitutional practice. There is, as we see it, a crucial connection between the language of public law and knowledge of the constitution.[12] In other words, the language of public law shapes, and at times perhaps even transforms, how the constitution is understood.[13] Doubtless, language performs broadly similar roles in every academic discipline, with words and phrases rendering opaque and puzzling practices more or less comprehensible. At the same time, our suspicion is that language is especially potent in shaping how—or, for that matter, whether—academic lawyers make sense of the blurred edges of Britain's customary constitution.

It strikes us as significant that Griffith coupled his critique of the grammar of public law with an argument in favor of a political model of the constitution.[14] As we see it, there are important connections to be mapped between the two. To explain what we have in mind by this, we begin by considering some ways in which the expressions used in the study of public law can all too often have a tenuous and tendentious relationship with the practices of political and legal institutions. We suggest, more particularly, that the political model

[11] In this paper, our interest lies with the language of public law used by academics involved in the study of public law. This includes, but is not limited to, legal academics; it also embraces political scientists and political theorists who draw on public law when trying to make sense of the constitution. Hence, it is all academics involved in the study of public law that we have in mind when we refer to "public lawyers." But this should not be taken to imply that we view the language of academics as more important than, or necessarily that different from, the language used by the lawyers, judges, politicians, officials, activists, and others involved in the practice of public law.

[12] Noam Chomsky puts it thus: "A person who speaks a language has developed a certain system of knowledge, represented somehow in the mind and, ultimately in the brain in some physical configuration." NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE 3 (1987).

[13] For now, we use the singular to talk of *the language of public law*. This is for simplicity of exposition. We do not deny that academic public lawyers within different schools of thought appeal to more or less distinct a vocabulary of public law; indeed, this is a point to which we return below.

[14] On understanding the political constitution as a model, see Graham Gee & Grégoire Webber, *What is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273 (2010).

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has a special relationship with practice and its proponents a special responsibility when employing the language of public law (section B). Next, we consider some of the language employed by two prominent proponents of the political model: Adam Tomkins (section C) and Richard Bellamy (section D). In this, our goal is to follow Griffith's lead by reminding proponents of the political model that inattention to the grammar of public law risks an incomplete and distorted understanding of constitutional practice. We draw on Tomkins and Bellamy not because they best exemplify the dangers of inattention to the language of public law; indeed, their work is a reminder of the need to challenge received wisdom about political and legal practice—and, by extension, the language that helps to sustain settled understandings.[15] Rather, our engagement with Tomkins and Bellamy is motivated by a desire to develop an internal critique of political constitutionalist thought; to explore the political model on its own terms, so to speak, rather than in contrast with the model of a legal constitution.[16] Building on our contention that close and careful attention to the language of public law complements the focus on the practices of existing institutions that is the distinctive strength of the political model, we close by explaining why public lawyers, and political constitutionalists in particular, should strive to "speak politically" about public law (section E).

B. Speaking Public Law

As a method of conveying meaning and imparting ideas, a language functions, at least in some measure, unconsciously. For most of us, our relationship with language is disclosed by our use of words and phrases, rather than our critical reflections about what might be implied by this or that expression. This applies to the language of public law as it does to any mother tongue. True, public lawyers select their words with care, taking time to construct sentences in ways that minimize the risk of being misunderstood. However, the language of public law is not regularly subject to reflective and systematic study. This is not to say that public lawyers are inattentive to particular pathologies of language. Few, if any, need to be reminded that ambiguity bedevils much of the vocabulary of public law, especially when recurrent terms such as *constitutionalism*, the *separation of powers*, and the *rule of law* beget rival and opposing meanings. Nor is it to suggest that public lawyers lack strategies for responding to particular pathologies. Using adjectives to modify nouns is a fairly common and partially effective strategy for addressing ambiguity: constitutionalism

[15] On challenging the orthodox interpretations of ministerial responsibility, see ADAM TOMKINS, PUBLIC LAW (2003). On the role of law-making and legislatures more generally, especially in relation to rights, see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

[16] Developing an internal critique of the political model was the invitation made by the organizers of this symposium. See the accompanying paper by Marco Goldoni & Christopher McCorkindale, *Why We (Still) Need a Revolution*, 14 GERMAN L.J. 2185 (2013)*; see also* Marco Goldoni, *Two Internal Critiques of Political Constitutionalism*, 10 INT'L J. CONST. L. 926 (2013); Marco Goldoni, *Political Constitutionalism and the Value of Constitution Making*, RATIO JURIS (forthcoming 2013). The need to craft an internal critique was also the starting point of a previous essay that we wrote on the political model: Gee & Webber, *supra* note 14.

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is described as political or legal, the separation of powers as pure or partial, and the rule of law as formal or substantive.[17] However, a more systematic reflection on the language of public law might identify pathologies that today pass largely undetected.

One such pathology is the gap that exists between the simplicity of the language of public law and the complexity of the practices to which that language relates. There is, as we see it, a mismatch between the certainty implied by many commonplace claims made in the study of public law and the subtlety of constitutional practice. Consider, for example, the familiar claim that "the Queen appoints as Prime Minister the person who is the leader of the political party which commands an overall majority of seats in the House of Commons".[18] Many public lawyers have said something similar; to be sure, we both have. Yet, practice seems an altogether more nuanced affair, better captured by the claim that the "Prime Minister is the head of the Government and holds that position by virtue of his or her ability to command the confidence of the House of Commons".[19] As we read it, this second statement hints at a less settled picture than the first, and in this way sketches a more realistic account of constitutional practice. The appeal in the second statement to the "ability to command confidence" suggests, on our reading, a more tentative practice, one that is contingent on changing relationships and patterns of power within the Commons than that suggested by the more certain, numerically-grounded reference in the first statement to "overall majorities." To take another example, consider the claim made by many public lawyers that "any government that loses the confidence of the House [of Commons] must resign."[20] Even before the Fixed-term Parliaments Act 2011, practice in the twentieth century suggests that governments regularly sought dissolution of the Commons when they lost a vote of confidence, resigning from office only after a later defeat at the polls.[21] Only by looking to pre-twentieth-century parliamentary practice is it possible to find precedents that lend credence to the commonly cited claim.

It would be imprudent to infer too much from too few examples. That said, we have purposefully selected commonplace claims concerning arrangements at the very heart of

[17] Oakeshott made a similar point on the ambiguity of political vocabulary, perhaps exaggerating in saying that "it would be difficult to find a single word that is not double-tongued or a single conception which is not double-edged." MICHAEL OAKESHOTT, THE POLITICS OF FAITH AND THE POLITICS OF SCEPTICISM 13 (T. Fuller ed., 1996).

[18] TOMKINS, *supra* note 15, at 11; *c.f.* Tomkins's discussion of a hung Parliament in Adam Tomkins, *In Defence of the Political Constitution*, 22 OXFORD J. LEGAL STUD. 157, 170–71 (2002).

[19] CABINET OFFICE, THE CABINET MANUEL para 3.1 (1st ed. 2011). The paragraph continues to read: "The Prime Minister will *normally* be the accepted leader of a political party that commands the majority of the House of Commons." *Id.* (emphasis added).

[20] Adam Tomkins, *What's Left of the Political Constitution?*, 14 GERMAN L.J. 2275 (2013).

[21] Even this is too simple a formulation to reflect the practices anticipated in the Fixed-term Parliaments Act 2011, 2011, c. 14, (Eng.), which anticipates a 14-day period during which the Commons, after withdrawing its confidence in the Government, may express its confidence in the same or a differently constituted Government.

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the constitution between the Government and the Commons. We also draw on these two claims because we suspect that many public lawyers will have uttered versions of them in near identical terms at one time or another. We do so not to nitpick; our goal is not to draw attention to small or unimportant errors. Rather, we do so to illustrate the potential for—and also, we argue, the propensity of—the language of public law to misrepresent constitutional practice. It is true, of course, that the gap between language and practice sometimes simply reflects the fact that things once said cannot now be said with the same confidence. In other words, the ways in which public lawyers talk of the constitution may not always have evolved with the constitution itself. (The commonly cited claim on government practice following a loss of confidence is an example of this). It is also true that some degree of synthesizing and simplification is inevitable if seeking to impart an understanding of complex political and legal practices to ourselves and, perhaps especially, to our students. (Recourse to a numerical majority to explain the confidence of the Commons is an example of this). What interests us, however, is the tendency of public lawyers to abstract from the minutiae of practices by preferring general and encompassing propositions to less sweeping and more modest accounts of the constitution. Abstracting from the specific to the general and from the limited to the sweeping possibly reflects a desire to find systematic coherence within the constitution, even where there is none. In contrast, a concern for the vagaries and inconsistencies of constitutional practice invites a much more tentative and exacting vocabulary that resists generalities, appealing instead to a lexicon of "more and less," "to some degree," and "in one sense but not in another."

The gap between the simplicity of language and the complexity of practice is, we surmise, a feature of almost all public law talk. The propensity to abstract in ways that distort the nuances of practice is one to which most public lawyers succumb at times, and perhaps even much of the time. Even so, there are at least two reasons to expect better of those who favor a political reading of the constitution. First, an important part of the political constitutionalist critique concerns the *language of rights* that is associated with, and a partial product of, judicially enforceable bills of rights. Griffith argued, for example, that the mere fact that drafters of bills of rights are ingenious in crafting abstract formulations under the rubric of *rights* ought not to conceal what remain essentially contested political claims. A bill of rights does not resolve political claims; it relocates them, Griffith insisted, into legalistic disputes about the meaning of words, with those disputes ultimately falling to be resolved by judges. This offended Griffith's conviction that "political decisions should be taken by politicians".[22] Echoing this, Bellamy has drawn on the work of Mary Ann Glendon, who argues that *rights talk* is distinguished "by its starkness and simplicity, its prodigality with the rights label, its legalistic character, its exaggerated absoluteness, its hyper-individualism, its insularity, and its silence with respect to personal, civic and collective responsibilities".[23] Enveloping this within his conception of the political model,

[22] Griffith, *supra* note 1, at 16.

[23] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

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Bellamy argues that rights talk camouflages the contingency, contestation, and challenge of the construction of rights, such that it often leads not to the enlightenment of political discourse, but its impoverishment.[24] Following Griffith's and Bellamy's leads, political constitutionalists today call not for the abandonment of rights talk, but for caution when appealing to the language of rights, always recognizing that many rights-claims remain, as Griffith insisted, political claims in respect of which there is reasonable disagreement. Given this sensitivity to the potentially pernicious effects of the language of rights, it seems reasonable to expect that political constitutionalists would also be sensitive to the potentially distorting effects of the language of public law.

There is a second reason to expect political constitutionalists to be alert to the potential gap between the simplicity of language and the complexity of practice. At the very heart of political constitutionalist scholarship is an acute concern with practice, and parliamentary practice in particular. This is perhaps most evident in Griffith's studies of political institutions, where he exhibited a practical focus in discovering what existing institutions actually do and how they work,[25] always being "wary of theories that impose their simplicities on complex practices".[26] A practical focus, albeit of a different sort, is also evident in the scholarship of Bellamy and Tomkins, each of whom offers accounts of the political model that elucidates how day-to-day political activity in real world institutions contributes to the realization of core republican norms. Tomkins clarifies the normatively attractive qualities of the nitty-gritty, everyday exercise of ministerial responsibility to the Westminster Parliament. Stressing "real democracy," "real politics," and "actually existing political processes," Bellamy draws out the normative content of the political model, but not at the expense of an empirically grounded defense of competitive party politics in real world constitutions, such as Britain's.[27] As we see it, both Griffith's practical method and the efforts of Tomkins and Bellamy to render explicit the normative qualities of day-to-day politics reflect a desire to understand complex constitutional practices. Yet, while Griffith coupled his practical method with a critique of the dominant grammar of public law, Tomkins and Bellamy at times seem less alert to the gap that can often exist between the simplicity of the language of public law and the complexity of practice. With this in mind, it is to some of the language used by Tomkins and Bellamy that we turn in the next two sections.

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[24] BELLAMY, *supra* note 15, at 48–49.

[25] *See, e.g.*, J.A.G. GRIFFITH, CENTRAL DEPARTMENTS AND LOCAL AUTHORITIES (1966); J.A.G GRIFFITH, PARLIAMENTARY SCRUTINY OF GOVERNMENT BILLS (1974); J.A.G. GRIFFITH & M. RYLE, PARLIAMENT: FUNCTIONS, PRACTICES AND PROCEDURES (1989).

[26] Martin Loughlin, *John Griffith: Ave Atque Vale*, 2010 PUB. L. 643, 648. Griffith himself put it thus: "I distrust formulations which begin by developing something called 'The theory of the Constitution' and go on to describe something else called 'what actually happens.' Whatever written documents may say, the Constitution is what happens." J.A.G. Griffith, *Judicial Decision-Making in Public Law*, 1984 PUB. L. 564.

[27] BELLAMY, *supra* note 15.

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C. Tomkins on Parliament

Ten years ago, in an essay entitled "What is Parliament for?," Tomkins outlined a vision of how Parliament ought to develop in the opening years of the twenty-first century.[28] In his contribution to this collection, he explains the motivation behind his earlier essay: "I was concerned that we had so under-valued Parliament as an institution in which the Government of the day could be held effectively to constitutional account that there were many [public lawyers] who had given up on it".[29] Through Tomkins's careful study, the Houses of Parliament, their committees, and the role of political debate within them were relocated back to the heart of the Westminster constitution. In this, Tomkins's earlier essay served as a notable corrective to the many public lawyers who had concluded that the two Houses were mere supporting actors on the constitutional stage. Noting that many commonly held assumptions about Parliament bear a contingent and uncertain relationship to practice, and responding to a long-standing propensity of public lawyers to privilege Parliament's legislative functions over its constitutional responsibility to hold the government-of-the-day to account, Tomkins argued that the vision of Parliament as a legislator should be abandoned and replaced instead with a vision of it as a "scrutineer" of government. Parliament should be seen as "a regulator of government,"[30] responsible for holding the government of the day to account on administration, on the finances of the realm, and—in much the same way—on its legislative proposals. In other words, Parliament's legislative function should be understood as part of and not distinct from its scrutinizing function. It seems that, for Tomkins, the legislative role of Parliament, even when described as dominated by the government, was little more than a fiction. To be clear, Tomkins's motivation in making this argument was not to diminish the role and place of Parliament within the political and legal order, but to rehabilitate its standing as a constitutional actor.

We welcome Tomkins's analysis and the important role it has played in reminding public lawyers of the primacy of Parliament in Britain's constitutional arrangements. Without doubt, Tomkins is right to call attention to the equivocation in the claim that "Parliament legislates." To speak of Parliament legislating, without more, does not capture the special place of the government's legislative proposals within the parliamentary timetable, where

[28] Adam Tomkins, *What is Parliament For?*, *in* PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 55 (Nicholas Bamforth & Peter Leyland eds., 2003).

[29] Tomkins, *supra* note 20. At the workshop from which this symposium springs, Tomkins suggested that the title of his earlier essay should have read "What is the House of Commons For?", insisting that whilst the Commons does not legislate, the House of Lords does. The amended title and emphasis do not answer the challenge we outline here.

[30] Tomkins, *supra* note 28, at 54 (emphasis removed).

"almost all legislation is made within and by the executive of the day".[31] It is trite but true to recall that nearly all Bills are Public Bills, with the parliamentary timetable not only dominated by government legislation but also tightly controlled by government business managers. We also have no doubt that Tomkins is correct to highlight how the scrutiny function performed in each House is brought to bear on the government's legislative proposals, "from the second reading debate on the principles underpinning the measure to the line by line scrutiny of each clause in standing committee."[32] Where we disagree is with the conclusion that Tomkins ultimately draws: the understanding of Parliament as a legislator should be abandoned.[33] His argument and careful appeals to constitutional practice do not support the claim that Parliament does not legislate. Rather, we contend that in asserting it to be "a myth that Parliament is a legislator," Tomkins unfortunately replaces one over-simplification (Parliament legislates) with another (Parliament "does not make law").[34]

At this juncture, it is useful to recall Griffith's study of delegated legislation, where he insisted that "there is . . . little significance in the assertion that the Government is usurping the function of Parliament by legislating".[35] Part of Griffith's critique was that, in referring to "Parliament" and "legislating," the assertion abstracts from parliamentary practice. "Parliament" is a complex institution (and, according to some, a fiction),[36] and "legislating" a complex verb.[37] Because Parliament is a complex institution composed of many distinct parts and actors, and because legislating is an intricate activity that, to be successful, requires careful exercise of political judgment, claims that appeal to one or another term are especially liable to mislead by failing to convey the complexity of practice. In a later study of the law-making process, Griffith observed that it is true both that "Parliament makes an impact on the legislative proposals of Government" and that

[31] Tomkins, *supra* note 28, at 76. Griffith expressed a similar point this way: "What happens in Parliament is often not the most formative part of the legislative process. The most formative part is when the Department is considering and consulting with the affected interests." GRIFFITH, *supra* note 1, at 14.

[32] Tomkins, *supra* note 28, at 76.

[33] Tomkins, *supra* note 28, at 77. In addition, Tomkins qualifies the same claim with "principally a legislator" and "primarily concerned with legislation." *Id*. at 54, 58.

[34] Tomkins, *supra* note 28, at 76.

[35] J.A.G. Griffith, *Constitutional Significance of Delegated Legislation in England*, 48 MICH. L. REV. 1079, 1118 (1950).

[36] *See* IVOR JENNINGS, PARLIAMENT (2d ed. 1957). According to Jennings, "[w]e are talking in fictions or concepts even when we mention 'Parliament.'" *Id*. at 2. Jennings continued to explain that Parliament consists not of one institution, but of two Houses and, in its legislative capacity, of the Sovereign. *See also* Adam Tomkins, *'Talking in Fictions:' Jennings on Parliament*, 67 MOD. L. REV. 772 (2004).

[37] The complexities of legislating by institutions are explored in RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012).

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"Governments, with their majorities, will at the end of the day almost always have much the greater part of what they want".[38] However, for Griffith, the important truth about the governmental impact on the legislative process lay in neither one of these two truths, for in both cases "the language which is used to describe the more or less of the impact is imprecise".[39] Building on Griffith's insight, our point is that the question of Parliament's law-making function is not best put by asking *whether* Parliament legislates, but rather by asking *how* it does so, a question that invites a careful study of the various actors involved in the law-making process, no one of which can by itself be equated with "Parliament."

In our view, it is as misleading to assert without qualification that Parliament does not legislate as it is to assert that Parliament does in fact do so. Neither claim captures the complex and contingent relationships that are an essential and ever present feature of parliamentary government. As we see it, there are better ways to make use of Tomkins's close and careful study of the practices of the two Houses and their constitutional duty to hold government to account. Recognition of the roles of the Houses as "scrutineers" of government helpfully frames their relationships to the government's legislative proposals. By attending to the practices of the two Houses, as Tomkins does, we are able to acquire a better sense of the considerations that animate what government allows itself to table before the Houses, considerations that include the chances of success in passing a Bill in each House, the degree of probable opposition (in the chamber, in committee, and in the appeals made by the opposition or individual MPs to the public), the possibility of wrecking amendments in committee and delays in one or both chambers, and so forth. In short: even if we follow Tomkins in affirming that the two Houses of Parliament do not legislate absent government, we should want to add that both Houses very much shape how government legislates.

In this frame, the complexity of the various relationships of government to the Houses of Parliament in legislative matters is better captured by substituting talk of "Parliament" with the wordier, but constitutionally more descriptive "Queen-in-Parliament" or, in language that more closely captures the reality of constitutional monarchy, "Crown-in-Council-in-Parliament." In speaking in this way, we avoid the equivocation inherent in affirming that "Parliament" does or does not legislate. In positing that Parliament does not legislate but that government legislates, public lawyers inevitably equivocate in the appeal to Parliament, neglecting to emphasize how Parliament, in its legislative capacity, includes every member of government. All of this leads us to speculate whether public lawyers would be so willing to maintain that "the Crown-in-Council-in-Parliament does not legislate" with quite the same conviction that many assert that "Parliament does not legislate." If not, this would seem to be one instance where the appeals to "Parliament"

[38] J.A.G GRIFFITH, PARLIAMENTARY SCRUTINY OF GOVERNMENT BILLS 13 (1974).

[39] *Id.*

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and "legislating"—both central features of the language of public law—fail to capture the complex workings of the constitution.

D. Bellamy on the Human Rights Act 1998

For many, the Human Rights Act is further evidence that Britain's constitution is slowly but surely evolving away from the model of a political constitution towards the model of a legal constitution.[40] In a recent essay, Bellamy asks whether it is nevertheless possible to reconcile the Act with the political model.[41] He answers, counter-intuitively perhaps, that the Act may strengthen, rather than undermine, the political constitution. It bears emphasis that, in much of his scholarship, Bellamy has sought to re-appropriate the language of rights, constitutionalism, the rule of law, and the separation of powers from overly legalistic interpretations that are insufficiently attentive to the workings of real world politics. In doing so, he has paid careful attention to the practices of law-making and the different pressures that are brought to bear on those practices. It is against this rich background that his essay on the Human Rights Act strikes us as surprising. On our reading, the essay is an example of the distorting potential of appealing to shorthand when seeking to make sense of the British constitution. More particularly, it is his use of "parliamentary sovereignty" as shorthand for complex relationships within and between political and judicial institutions that troubles us most.

In suggesting that the Human Rights Act might strengthen, rather than undermine, the political constitution, Bellamy equates the political model with parliamentary sovereignty. Bellamy more or less defines the latter doctrine by reference to A.V. Dicey's summary understanding of it: Parliament "can legislate in any way or area it pleases, including if necessary amending and repealing any existing legislation"; and "no other institution may disapply parliamentary legislation".[42] From this starting point, Bellamy maintains that the critical issue when evaluating whether it is possible to reconcile the Act with the political model is to determine "where supremacy lies." "[T]he crucial test from a political constitutionalist perspective," he suggests, "is whether or not [the Human Rights Act] renders legislative supremacy redundant".[43] For Bellamy, this test has a fairly straightforward answer: the Act maintains and even enhances Parliament's role in the scrutiny of rights and section 3's interpretative duty envisages only a system of "weak" judicial review. All of this, for Bellamy, serves to safeguard "parliamentary sovereignty."

[40] Although he does not have recourse to the labels "political" and "legal" constitution, see the account in MARTIN LOUGHLIN, THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION 105–19 (2013).

[41] Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. OF CONST. L. 86 (2011).

[42] *Id.* at 94.

[43] *Id.* at 89. *See also* Tomkins, *supra* note 28, at 93 ("[P]olitical constitutionalism . . . requires legislative supremacy.")

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Acknowledging that "many commentators have found the basic position a little too simple and formal,"[44] Bellamy places significant stress on how "the constraints on Parliamentary sovereignty are political not legal".[45]

Bellamy's mistake is to appeal to the shorthand "parliamentary sovereignty" (and, what is more, to fail to keep in mind that Dicey's dated summary of the doctrine was itself an oversimplified abbreviation of otherwise intricate institutional practices). This frame of analysis abstracts from the day-to-day workings of the constitution. In light of his many careful previous studies of political practices, the mistake is uncharacteristic for Bellamy, but it is traceable to the simplifying assumption that the relationship between the political constitution and the Human Rights Act is best conceived through the lens of "legislative supremacy." Through this lens, he appeals not to the actual workings of the constitution, but to what he calls an "ideal type of political constitutionalism".[46] He explains that his objective is not "to assess if current judicial practice suggests the Act *is* compatible with a distinctly political conception of the constitution," but "to explore if it *could* be so."[47] Had his reading of the Act attended to the political practices animating law-making, we surmise that "ultimate supremacy" would have been of lesser importance. An account of the constitutional significance of the Act grounded in legal and political practice would concentrate on the relationships between different constitutional actors, including the pressures that bear on parliamentarians following a judicial declaration of incompatibility with human rights and the distorting potential of the court's interpretive mandate under the Act. His mistake, one repeated by many public lawyers, is to forget that parliamentary sovereignty is never anything more than shorthand for—that is to say, an abbreviation that stands in the place of a careful account of—the complex, contingent, and possibly changing relationships between Parliament, legislation, and the courts. The mistake, in other words, is to forget that the shorthand can never stand in substitution of a concern for, and careful study of, the institutional relationships that have given shape to Britain's constitution.

Now, Bellamy's account does not wholly neglect practice. He reports, for example, how the legal advisor to the Joint Committee on Human Rights may be "second-guessing the likely

[44] Bellamy, *supra* note 41, at 95. Among those commentators could be counted Bellamy himself, who elsewhere has argued that "[i]n practice, though, the lack of entrenchment seems to make little difference to the role or influence of judicial review *vis-à-vis* the legislature." BELLAMY, *supra* note 15, at 59.

[45] Bellamy, *supra* note 41, at 95.

[46] *Id.* at 90–93. An ideal type is distinguished by five features: reasonable disagreement about constitutional essentials, including rights; a rejection of higher order law above or beyond politics; an understanding of judicial review as politics by legal means; a prioritizing of political over legal processes for reasoning about a constitutional scheme of rights; and a priority for legislative specifications of rights over contrary judicial decisions.

[47] *Id.* at 88. For Bellamy, this is a worthwhile undertaking because "if such an account could not be given, then the political constitution would be dead—if, indeed, it had ever been alive." *Id*.

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judgments of the courts" and how, "[t]o the extent Parliament feels constrained by legalistic reasoning in its rights deliberations, this alleged advantage of political over legal constitutionalism is diminished".[48] Moreover, he also acknowledges that both legal and political constitutionalists "have argued that, in practice, there is little difference between weak and strong judicial review—indeed, that the former is a chimera."[49] His analysis of government reactions to judicial declarations of incompatibility under the Act signals a special attention to practice that, in our view, challenges his special focus on "legislative supremacy." Bellamy predicts, for example, that governments might "simply find it politically inexpedient to go against" declarations of incompatibility with human rights.[50] He explored similar concerns in his earlier scholarship, where he insisted that "[i]n practice . . . the lack of entrenchment seems to make little difference to the role or influence of judicial review *vis-à-vis* the legislature," in part because "legislators come under pressure to anticipate the court's ruling rather than to elaborate a view of their own."[51] Indeed, when faced with a judicial determination of what rights require, attempts by political actors to articulate a different understanding of rights "always risk being condemned for playing fast and loose with rights."[52] From this vantage point, concerns with "legislative supremacy" are almost beside the point, especially if "the reasoning expected of politicians is becoming increasingly judicialised" and if "ministers when introducing legislation routinely remind parliamentarians of the limits of their law-making power".[53]

Our present concern is less with the merits of Bellamy's claims, but with the manner in which he seeks to reconcile a political reading of the constitution with the Human Rights Act. As we see it, Bellamy's reading misrepresents the debate when it abstracts away from the practices of the constitution. We here recall Griffith's claim that "[w]hatever written documents may say, the constitution is what happens,"[54] a claim that forgoes concern with

[48] *Id.* at 100.

[49] *Id.* at 101. This recognition casts doubt on his claim that weak-form judicial review reserves "ultimate supremacy" to Parliament.

[50] *Id.* at 101.

[51] Bellamy, *supra* note 41, at 47–48.

[52] *Id.* at 48. As Janet Hiebert reviews in her study of political reactions to the European Court's ruling on prisoner voting, "[f]raming rights in legal language alters perceptions of institutional competence so as to conceive of responsibility for interpreting rights as a judicial rather than parliamentary responsibility," with the consequence that governments and parliamentary actors attempting to dissent from court judgments will be considered by many to "constitute an exception to rights rather than as a valid judgment about compatibility with rights." Janet Hiebert, *The HRA: Ambiguity About Parliamentary Sovereignty*, 14 GERMAN L.J. 2253 (2013).

[53] Danny Nicol, *Law and Politics After the Human Rights Act*, 2006 PUB. L. 722, 725, 735.

[54] J.A.G. Griffith, *Judicial Decision-Making in Public Law*, 1985 PUB. L. 564, 564.

"legislative supremacy" and that attends instead to the practices of constitutional actors. A political reading of the constitution cannot reduce the impact of the Human Rights Act to abstract discussion of ultimate sovereignty, but must instead explore how the relationship between the law-making process and its various actors—ministers, Joint Committee, MPs and Lords—interact with the judiciary and judicial practices under the Act's interpretive and declarative provisions. Within this frame, the very idea of ultimate sovereignty is misplaced; claims about ultimate sovereignty in a customary constitution seem too certain for the ambiguous and changing relationships between constitutional actors that Dicey attempted to summarize and simplify in his definition of parliamentary sovereignty. Dicey's systematization of constitutional practice had it merits, but it cannot be forgotten that he was summarizing and simplifying aspects of constitutional practice as he understood them. There is no reason to think that the practices of Dicey's time remain the same today and, so, no reason to appeal to his shorthand in attempting to understand the constitution after the Human Rights Act. Bellamy's study of the Act is not without concern for the changing practices of the constitution, but its method of appealing to shorthand like "parliamentary sovereignty" orients his analysis away from the very workings of the constitution that answer the question he sets out to explore.

E. Speaking Politically about Public Law

There is more to the language of public law than words and phrases. All languages serve multiple purposes. Plainly, the language of public law has an important communicative function, enabling public lawyers to exchange information and ideas. The language of public law also has a significant role in fostering identity.[55] We surmise that the language of public law cements the identity of public lawyers at two main levels. At one level, the language of public law fosters solidarity between, and shared understandings amongst, almost all public lawyers. There are words and phrases that render the language of public law more or less distinctive and which help give definition to public law as an academic discipline. At a second level, there are more or less distinct "dialects"—that is, particular forms of language associated with specific groups of public lawyers—that coexist within the larger language of public law. We suspect, for example, that there is a fairly distinctive dialect associated with and spoken by political constitutionalists that prioritizes particular words and phrases over others. Among the words and phrases that strike us as especially prominent in political readings of the constitution are "trust," "conflict," "confidence," and "relationships;" words and phrases that, in our view, draw attention to the contingency and contestability of political and legal life and which, in turn, encourage public lawyers to focus on making sense of "what happens" in the workings of Britain's constitution. Our claim, in other words, is that a practice-oriented vocabulary informs, and is given expression within, the political model.

[55] As linguists have noted, "the most important part of the social life is its connection with identity." JOHN EDWARDS, LANGUAGE AND IDENTITY 2 (Rajend Masthrie ed., 1st ed. 2009).

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This practice-oriented vocabulary encourages—or at least ought to encourage—political constitutionalists to "speak politically" about public law. We have already noted a crucial connection between language and knowledge. Hence, it should come as little surprise that before we can succeed in "speaking politically" about public law, it is necessary first to "think politically." There are four main aspects to "thinking politically".[56] First, it begins with an awareness of, and is then an exercise in attending to, underlying relationships within legal and political practice. It recognizes that these relationships are often messy, with many important elements that are difficult to discern. Here, it is important to recall that the political model can help make sense of the messiness of practice, by encouraging us not to lose sight of the imperceptible workings of the constitution, the "behind closed doors," "out of sight," and "behind the Speaker's chair" dimensions to legal and political life. We have elsewhere noted that insofar as a political constitution "lives on changing from day to day" (as Griffith noted),[57] and because, in a very real sense, "the democratic process *is* the constitution" (as Bellamy noted),[58] the political model can be, in the final analysis, difficult to identify as a phenomenon distinct from day-to-day political activity. After all, there are no final appeals to a reified constitutional text, to a bill of rights, or to grand judicial pronouncements within the political model. Rather, a political constitution works primarily, and often imperceptibly, inside the institutions of Parliament and the executive and, where visible, will often appear less dignified and more haphazard than court proceedings, as members of Parliament argue amongst each other, harangue the Prime Minister and then, for the most part, rally behind their party whips. We suggested that this relative invisibility offers a partial explanation for why support for the political model seems to be dwindling: much of the workings of a political constitution are not visible, and where they are, they often take the form of the rough and tumble of day-to-day politics that many find unattractive.[59] For present purposes, what seems significant about the political model is that in directing public lawyers to look beyond the visible and the obvious political and legal practices, it is implicitly pointing us to "think politically."

Second, thinking politically about public law cautions against making overly strong claims that conceal the tentativeness of practice and its adaptability to change. There are many examples of definitive-sounding claims that are made one year only to be quickly outpaced by events the next. Consider, for example, John P. Mackintosh's claim in 1962 that it is "almost certain that no future Prime Minister will be drawn from the Lords." One year

[56] The four aspects of "thinking politically" are drawn from Graham Gee & Grégoire Webber, *Rationalism in Public Law*, 76 MODERN L. REV. 4 (2013). The expression is indebted to Jean Blondel. JEAN BLONDEL, THINKING POLITICALLY (1976).

[57] Griffith, *supra* note 1, at 19.

[58] BELLAMY, *supra* note 15, at 5 (emphasis in original).

[59] Gee & Webber, *supra* note 14, at 286–87.

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later, Lord Home would become Prime Minister, albeit only after resigning his peerage.[60] Or consider Tom Hickman's claim in 2005 about the evolution in Britain of a new "liberal legalist" constitution that was "formally accorded a government department: the Department of Constitutional Affairs".[61] By 2007, the department had been reformed as a Ministry of Justice in the face of objections from much of the legal community, and not least the senior judiciary. As with the claim that "the Queen appoints as Prime Minister the person who is the leader of the political party which commands an overall majority of seats in the House of Commons," such claims that conceal the tentativeness and changeability of practice are liable to be upset in the fullness of time. By attending to the minutiae of practices and articulating more measured and modest accounts of the constitution, thinking politically resists general and encompassing propositions that summarize some, and only some, practices.

Third and relatedly, thinking politically cautions modesty when discussing institutions. Though it is of course possible to acquire practical knowledge of the workings of the constitution without being a member of a governing institution, it is important to test understandings against those who know those institutions best. In this regard, Griffith correctly cautioned public lawyers that "to write about an institution without having been a member of it is a dangerous business and it is essential to check both one's facts and one's feelings against the experience of another who knows it well from the inside".[62] This caution is especially good advice when discussing political institutions, like Parliament, which have a peculiar rhythm and operate under "a system of tacit understandings," even if those "understandings are not always understood".[63] For lawyers accustomed to rules, the public exchange of reasoned arguments in open court, and the special *techne* of legal reasoning, the workings of political institutions are often difficult to grasp. Tomkins's careful study of the practices of ministerial responsibility demonstrated how immodest and inattentive were the claims by some public lawyers that ministerial responsibility was at an end.[64] We surmise that the years of experience Tomkins has gained as legal adviser to the House of Lords Constitution Committee provide him with yet further insights into the workings of the constitution that would lead him to correct some of the careful and patient conclusions he reached in his study of the practices of political accountability. In short, public lawyers generally, and even any one public lawyer at different stages of his or her career, will stand in a closer or more distant relationship to the constitution being studied.

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[60] FERDINAND MOUNT, THE BRITISH CONSTITUTION NOW: RECOVERY OR DECLINE? 19 (1992) (*referencing* JOHN P. MACKINTOSH, THE BRITISH CABINET 20 (1962)).

[61] Tom R. Hickman, *In Defence of the Legal Constitution*, 55 U. TORONTO L.J. 981, 981 (2005).

[62] J.A.G GRIFFITH, PARLIAMENTARY SCRUTINY OF GOVERNMENT BILLS 9 (1974).

[63] SIDNEY LOW, THE GOVERNANCE OF ENGLAND 12 (1904).

[64] TOMKINS, *supra* note 15, at 176–208.

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Finally, thinking politically cautions that the degree of change at any point in time should not be overstated. This is especially relevant when thinking about Britain's constitution on the back of fifteen years or so of rapid and seemingly radical change. Without doubt, some recent reforms in Britain appear far-reaching, but change can be appreciated only against the constant of continuity, and thus it would be imprudent to be too quick to talk of a "new" British constitution. Consider how the Human Rights Act is regularly singled out as a "cornerstone of the new constitution".[65] There is of course reason to review the impact the Act has had on the constitution, but the "newness" of the Act would be exaggerated if it did not acknowledge the resistance by many within Parliament to the Act, the proposals to replace the Act with a British Bill of Rights, and—perhaps most of all—the stated purpose of those who designed the Act to provide for a judicial role that was broadly in keeping with the traditional role of courts in relation to legislation.[66] As Oakeshott would express the point in his study of politics, "the arrangements which are enjoyed always far exceed those which are recognized to stand in need of attention".[67]

We began this essay by pointing to a particular pathology discernible within the language of public law: the gap between the simplicity of language and the complexity of practice. Thinking politically is directed to the nuances and contingencies of practice. It regards complexity not as something to be managed or overcome in our attempt to make sense of the constitution, but as a reality to be embraced, both in how we think and how we speak about it. The challenge for public lawyers, and political constitutionalists in particular, is to translate thinking politically into speaking politically. As we see it, there are two related pieces of advice that help public lawyers speak politically about public law. First, to speak politically cautions against invoking, unreflectively, ready-made shorthand. "Principles" and "doctrines" are the ready-made shorthand of public law. Often times, public lawyers will appeal to a constellation of principles: the separation of powers, the rule of law, parliamentary sovereignty, and constitutionalism. Each principle is liable to be used as a placeholder that abstracts away from the practices of the constitution. Among those familiar with those practices, placeholder terms may well facilitate fruitful exchanges, but to others—including those attempting to learn the ways of the constitution—these terms are often false friends. So, when public lawyers speak of Parliament when they mean the Commons, or of the Commons when they mean Parliament, or of government when they mean either, they appeal to shorthand. There are doubtless occasions when such shorthand is an efficient mode of communication, but there are yet others when it is not.

[65] VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 53–88 (2009).

[66] For references to the Government's White Paper and parliamentary debates on this and related questions, see generally ALISON YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT 1–30 (2009); K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN L. REV. 79 (1999); Danny Nicol, *supra* note 53.

[67] Michael Oakeshott, *Political Education*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 45 (1991).

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To speak politically is to give special attention to the distorting potential of such shorthand. We have elsewhere argued that the unreflective use of principles culminates in a "placeholder constitution," where there is a ready supply of words that tell us nothing of real value.[68] Comprised of principles, the placeholder constitution has an air of certainty, order and precision and even dignity compared to the messy, often perplexing, and sometimes unpleasant and unattractive spectacle of political and legal practice. The risk is that public lawyers come to learn the words associated with the principles and doctrines of the placeholder constitution, but not the practices of public law that have shaped them.

The second piece of advice if public lawyers are to succeed in speaking politically about public law is to embrace a tentative lexicon of "more or less," "to some extent," and "in this way but not in that." In a study of ministerial responsibility, Geoffrey Marshall captured this neatly when cautioning that the "prerogatives of the Crown are exercised on the advice of Ministers (except in such cases as they are not)" and "Ministers speak and vote together (except when they cannot agree to do so)," amongst other telling illustrations.[69] Here, the exceptions that Marshall identifies are best viewed not as qualifying the rule, but rather as signaling the tentativeness of the attempted formulation of a general and sweeping rule unsupported by the full range of constitutional practice. In other words, to speak politically is to resist the presupposition that the practices of the constitution must yield a systematic and neat whole.[70] It is instead a way of speaking of the constitution that does not set out to favor fewer, more general and sweeping accounts of the constitution in preference to less general and more modest accounts that might, in comparison, "fail to present a comparable appearance of symmetry and 'principle.'"[71] If one is seeking an understanding of the constitution, then no presupposition is warranted. The practices of the constitution serve to guide one's understanding of the constitution.

F. Conclusion

There is more to public law than language. Our reflections in this essay on the language of public law have tried to disclose something larger about knowledge and understanding of the constitution as a whole. It would be a mistake and, given our starting point with Griffith's critique of the grammar of pubic law, ironic if we over-emphasized the language of public law in ways that concealed the realities of power and conflict in the constitution. This is not our intent. It would also be a mistake to be overly restrictive in one's approach to language, especially if this stifled new and creative insights. This is also something that

[68] Gee & Webber, *supra* note 56, at 708–34.

[69] GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 54 (1984).

[70] On the resistance to abstraction, with special reference to the separation of powers, see John Finnis, *Separation of Powers in the Australian Constitution: Some Preliminary Considerations,* 3 ADEL. L. REV. 159, 168–69 (1968).

[71] *Id.* at 168.

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we are keen to avoid. To this end, it is important to keep in mind what we are not saying. We are not saying that all of the language of public law distorts or that there is no place for language that systematizes, abstracts, simplifies, or summarizes the complex practices of the constitution. Rather, the simple idea that we have sought to share is that unreflective use of language can be dangerous, especially where the simplicity, certainty, and boldness of that language conceals the complexity, contingency, and uncertain nature of legal and political practices and so structures public law thought in ways that distance understandings of the constitution from legal and political practice. With their practice-oriented method, political constitutionalists, above all others, should strive to speak politically about public law.

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