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The Political Constitution and the Political Right

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I. INTRODUCTION

For many public lawyers in the UK, 'political constitutionalism'[1] is associated with the political left. Of course, few claim that there is a necessary and inevitable association. After all, not everyone on the left subscribes to the theory of political constitutionalism and nor do all of that theory's adherents align to the left of the ideological spectrum. Nevertheless, a special affinity is commonly assumed to exist between the two.[2] At one level, this is perhaps unsurprising, since there are clear connections between political constitutionalism and the left within both the academic and policy realms. Within the academic realm, many prominent political constitutionalists have been situated on the left—including John Griffith, Keith Ewing and Richard Bellamy. Within the policy realm, the Labour Party's constitutional programme for most of the twentieth century found strong echoes within political constitutionalist thought, insofar as its confidence in a legally unlimited legislature to secure social and economic gains for the working classes was married with a deep-seated and longstanding scepticism of judicial power in general and justiciable bills of rights in particular.[3] At another level, however, this assumed special affinity with the left obscures the theory's appeal to and connections with the right. In this essay I aim to remedy this by tracing the broad contours of a conservative tradition of political constitutionalism associated with the right in the UK before explaining how this association casts light on certain currents in contemporary public law.

For these purposes I take political constitutionalism to be, in very rudimentary terms, a theory that suggests that a constitution privileging legislative supremacy, responsible

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[1] For the classic and foundational statement of political constitutionalist thought, see JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

[2] See e.g. Richard Bellamy, 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 193, 194-195.

[3] See generally Peter Dorey, *The Labour Party and the Constitutional Reform: A History of Constitutional Conservatism* (Palgrave 2008); and Mark Evans, *Constitution-Making and the Labour Party* (Palgrave 2003).

government and mechanisms of political accountability is capable of channeling the exercise of political power towards the common good.[4] This theory posits that, over the long haul, a system of constitutional self-government reliant primarily on political processes to check political power can, in the right conditions, secure constitutional goods—such as political equality, the rule of law and human rights. Courts, under this theory, perform an important function by resolving disputes impartially and according to law—but, conceived in this way, that function is narrow, eschewing judicial review of legislation, with review of executive action limited to grounds that avoid the second-guessing of policy choices.[5] Much of the scholarship expounding this theory thus tends to combine robust defences of legislative politics with uncompromising, and at times relentless, critiques of judicial review. This theory has been especially influential in the UK as a way of making sense of the customary constitution, albeit some criticize it for lacking descriptive accuracy (i.e. it no longer expresses the main characteristics of the changing constitution),[6] normative appeal (i.e. it does not furnish an attractive vision of a 'good' constitution),[7] and analytic utility (i.e. it distorts how law, politics and constitutions are understood, not least by encouraging polarized views about how best to allocate authority between courts and legislatures).[8] Nevertheless, today, many public lawyers craft analyses in terms of and by reference to this theory, and even amongst many of those who do not subscribe to its claims, there is broad recognition that this theory expresses something significant about how many in the UK conceive of the very idea of a constitution.[9]

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[4] Adam Tomkins, *Our Republican Constitution* (Hart 2003); and Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

[5] This conception of the judicial role is outlined in Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 *University of Queensland Law Journal* 375, 375-378.

[6] See e.g. Tom R Hickman, 'In Defence of the Legal Constitution' (2006) 55 *University of Toronto Law Journal* 981.

[7] See e.g. Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72; and Sir John Law, 'The Constitution: Morals and Rights' [1996] *Public Law* 622.

[8] See TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 57; Jeff King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30 *Constitutional Commentary* 101l; and Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 28 *King's Law Journal* __. C.f. Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273.

[9] See e.g. Andrew Le Sueur, Maurice Sunkin and Jo Eric Murkins, *Public Law: Text, Cases and Materials* (Oxford: OUP, 3nd edn 2016); Roger Masterman and Colin Murray, *Exploring Constitutional and Administrative Law* (Harlow: Pearson, 2013) and Mark Elliott and Robert Thomas, *Public Law* (OUP, 3rd edn 2017).

Of late political constitutionalist scholarship has taken a 'reflexive'[10] turn, with a focus less on contesting the expansion of judicial power and the rise of rights adjudication, and more on identifying the political conditions and social forces most conducive to the development and maintenance of the sort of constitutional order associated with political constitutionalism.[11] This is a welcome development that will help us to better understand what a political constitution presupposes about, amongst other things, the political culture and the ideas and movements that help to shape it. Noticeably absent to date from the reflexive turn, however, is an exploration of the possible relationships between political constitutionalism, political ideology, and the left and the right. This is regrettable, not least since one explanation for the relative popularity of political constitutionalism in the UK is its cross-ideological appeal to large sections of both the left and the right. To be sure, not only are 'left' and 'right' notoriously slippery terms with various social and economic implications, but there are other dimensions to keep in mind when striving to ascertain patterns of support for this or that constitutional theory. Other dynamics increasingly cut across both the left and the right,[12] perhaps most obviously support for and identification with 'Leave' and 'Remain'.[13] Yet, the ideological patterns captured in the distinction between left and right remain relevant when thinking about the conditions that help or hinder the development of different types of constitutional orders.

My premise, then, is that the ideological dimensions to political constitutionalism have been largely neglected, with this theory's connections with and appeal to both the left and the right remaining underexplored within public law scholarship. I begin in Part II by reflecting on the relative neglect of these ideological dimensions. In Part III, I explore one set of those dimensions by charting the broad contours of a conservative tradition of political constitutionalism that reflects the dominant constitutional vision on the political right in the UK for much of the last century. The term 'political right' embraces a number of ideological tendencies of course, notably conservatism and neo-

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[10] See Marco Goldoni and Christopher McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 28 *King's Law Journal* _; and Marco Goldoni and Christopher McCorkindale, 'Political Constitutionalism' (2019) *Encyclopedia of the Philosophy of Law and Social Philosophy* (forthcoming).

[11] For the critique that writing on political constitutionalism has tended to be conducted 'in something close to a sociological vacuum' with very limited discussion of the underlying material forces that drive its rise or fall, see Chris Thornhill, 'The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism' (2016) 79 *Modern Law Review* 207, 212-213.

[12] See generally Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (Polity, 1994).

[13] See John Curtice, *The Emotional Legacy of Brexit: How Britain Has Become a Country of 'Remainers' and 'Leavers'* (The UK in a Changing Europe, 2018); and Paula Surridge, 'The Left – Right Divide' in Anand Menon (ed), *Brexit and Public Opinion 2019* (The UK in a Changing Europe, 2019) 6. Both accessible at http://ukandeu.ac.uk.

liberalism. Conservatism, as I see it, expresses themes at the heart of the constitutional thought of the political right in the UK over the last century; themes which have also buttressed political constitutionalism in the UK, or at least so I argue in this essay. My argument is that for most of the last century this conservative tradition of political constitutionalism coexisted with a social democratic variant, with this reflecting and reinforcing a broad-based ideological consensus for and acceptance of the historically political character of the UK's constitution. In this, I view political constitutionalism as straddling multiple ideological traditions. By decoupling these traditions, my aim is to challenge the assumption that some special affinity exists between this theory, social democracy and the political left. Interrogating the conservative tradition of political constitutionalism can helps us to grasp some reasons why this vision of constitutional government has appealed to the right as well as the left. It also renders explicit several ambiguities within political constitutionalist thought relating to, amongst other things, strong government, elite leadership and democratic will. In Part IV, I point to lessons that can be discerned from the conservative tradition of political constitutionalism. No tradition is ever static, and in Part V I argue that the conservative tradition has been changing in several important ways. In its changed guise the conservative tradition now enjoys heightened prominence in both the policy and the academic domains, and I consider some of the reasons for and consequences of this. In Part VI, I return to the larger patterns of ideological support for a political constitution, arguing that this support is beginning to bifurcate between this changed conservative tradition on the one hand and a more radical interpretation emerging on the left on the other. I close by reflecting on the future of political constitutionalism in light of its possible bifurcation along these ideological lines.

II. POLITICAL CONSTITUTIONALISM AND POLITICAL IDEOLOGY

My starting suggestion is that the ideological dimensions to political constitutionalism have been neglected within public law thought, at least for the most part. There are of course many possible ideological dimensions to political constitutionalism (or, indeed, any other constitutional theory for that matter). These include: the role that ideologies have played in the historical development of political constitutionalism; the degree to which this theory is the site of ideological competition; the extent to which the theory has been subject to ideological critique; the degree to which the theory is compatible with different ideologies; and the extent to which the theory itself operates as, or in ways akin to, an ideology. Public law scholarship in the UK has more or less neglected

each of these dimensions.[14] For these purposes, my particular interest lies in the failure of public lawyers to investigate the full range of ideological traditions within which the core claims, values and assumptions of political constitutionalism are embedded. This is so even although (or perhaps because) many assume that some special affinity exists with the left, and with social democracy in particular. Indeed, it sometimes seems as if many public lawyers regard political constitutionalism as embedded within a single social democratic tradition, rather than as encompassing a number of distinct—albeit overlapping—ideological traditions, including but not limited to social democracy.

The term 'social democracy' has no settled meaning of course, but typically includes commitments to: social justice and substantive equality; the democratic state, as a way of promoting social welfare and economic change; and the extension of democratic values to the social and economic spheres as well as the political sphere.[15] As I see it, public lawyers have made little attempt to explore a possible affinity between political constitutionalism in light of and by reference to these commonplace social democratic commitments. There has been little discussion of whether such commitments shape a more or less distinct social democratic account of political constitutionalism. Largely absent from the literature on political constitutionalism are accounts drawing careful connections with social democracy's traditional commitment to parliamentarianism, its broad acceptance of the neutrality of the state within the Fabian tradition, and the tendency towards anti-intellectualism and empiricism of the trade union movement in large parts of the twentieth century.[16] Equally striking is the absence of much debate about whether any special affinity has differed over time in line with the ebb and flow of different concerns of social democrats; for example, it is possible that any special affinity with political constitutionalism might have changed as the left's embrace of the nation state has waned and its embrace of supranational regimes has strengthened.[17]

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[14] Alison Young refers to 'the ideology of political constitutionalism', but regrettably does not elaborate upon this choice of characterization. Of course, the term 'ideology' is itself subject to competing definitions, some carrying negative connotations (e.g. ideology as false ideas that legitimate dominant power structures). Implicitly, Young appeals to an understanding of ideology that implies that political constitutionalism encourages false ideas about the constitution, law and politics; see, for example, the suggestion that it is hard to view political constitutionalism 'as anything other than a form of myth or ideology, or an account of fictional groups that do not really exist': Alison L. Young, *Democratic Dialogue and the Constitution* (OUP, 2017) 83.

[15] For a recent discussion in a constitutional context, see KD Ewing, 'Jeremy Corbyn and the Law of Democracy' (2018) 28 *King's Law Journal* 343.

[16] See generally Dorey (n3) 347-379.

[17] See Danny Nicol, 'The Left, Capitalism and Judicial Power' in Richard Ekins and Graham Gee (eds), *Judicial Power and the Left: Notes on a Sceptical Tradition* (Policy Exchange 2017) 26.

In other words, the tendency has been for public lawyers to assume that some special affinity with social democracy and the political left exists, rather than to interrogate its (possibly changing) nature, limits and implications. Many public lawyers seem content to treat Griffith's 1978 Chorley Lecture on 'The Political Constitution' as sufficient evidence that political constitutionalism is best understood as a social democratic outgrowth of the 'functionalist style in public law'.[18] It is true that Griffith's work exemplified the functionalist method, which was itself defined by a practical reformist agenda that used both law and policy in ways 'directly tied' to the political movement described under labels such as 'new liberalism, social democracy, progressivism, or democratic socialism'.[19] But the status of this lecture as 'a founding text'[20] of political constitutionalism is questioned,[21] with Martin Loughlin arguing that Griffith's lecture cannot be divorced from its functionalist context and repackaged as the beginning of 'political constitutionalism', at least not without distorting Griffith's motivations and methods.[22] I return to Loughlin's critique of some readings of Griffith's lecture later. The key point to note, for now, is that any affinity between political constitutionalism, social democracy and the left remains underexplored.

Almost wholly absent over most of the forty years since Griffith's lecture has been any sustained investigation of possible connections between political constitutionalism and the right. It is true that in the last five years or so some have begun (rather tentatively) to question whether political constitutionalism is 'somehow the property of the left',[23] and as part of this to reappraise the theory's relationship with the right. There are four main threads to this reappraisal. First, some have noted that political

[18] On Griffith's place within the functionalist style, see Martin Loughlin, *Public Law and Political Theory* (Clarendon 1992) 197-201; and Martin Loughlin, 'John Griffith: Ave atque Vale' [2010] *Public Law* 643, 645-649.

[19] Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 363.

[20] Thomas Poole, 'Tilting at Windmills? Truth and Illusion in "The Political Constitution"' (2007) 70 *Modern law Review* 250, 250;

[21] Martin Loughlin, 'Modernism in British Public Law, 1919-79' [2014] *Public Law* 56, 66.

[22] Martin Loughlin, 'The Political Constitution Revisited' (2018) 28 *King's Law Journal* __ (arguing that later generations of public lawyers have misread Griffith's lecture, which is better understood as the 'last gasp' of the functionalism and not the beginnings of a new school of political constitutionalism). For a caution against simply assuming that the functionalist style in public law has an uncomplicated relationship with left ideologies, see Martin Loughlin, 'Reflections on *The Idea of Public Law*' in Emilios Christodoulidis and Stephen Tierney (eds), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, 2008) 47, 53.

[23] K.D. Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111, 2124.

constitutionalism attracts adherents on the right as well as the left.[24] Second, it has been suggested that the theory 'tilts to the right',[25] with its principal pillars—representative democracy, responsible government and legislative supremacy—prone to producing 'conservative outcomes',[26] although this in turn poses the question of what exactly it might mean to talk of 'conservatism' in this context. Third, it has been further suggested that to be a political constitutionalist, and in particular to defend a political constitution in any real world polity, almost inevitably entails a conservative posture.[27] Finally, it has been suggested that, in both the academic and policy realms, the right has sought of late to appropriate political constitutionalism from the left.[28] All of these threads are worth exploring, and I will touch on each of them in this essay, but for the time being these remain mere threads, with the public lawyers who offered these important insights tending to do so in passing and as a small part of larger unrelated arguments. In other words, there has still been no sustained examination of possible connections between political constitutionalism and the political right, and with notions of conservatism in particular. Important questions have therefore pass unasked, such as whether thinking about its appeal to the right, together with its possible affinity with conservatism, may generate fresh insights into the nature, content and future of political constitutionalism itself.

The suggestion, then, is that the relationships between political constitutionalism and each of the left and social democracy on the one hand and the right and conservatism on the other hand have been largely neglected. This relative neglect of the ideological dimensions to political constitutionalism can be explained, in part, by two interlocking trends. The first is a general tendency amongst public lawyers in the UK to have very little to say about how political ideology and public law interact.[29] True, there have

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[24] See e.g. Aileen McHarg, 'Reforming the UK Constitution: Law, Convention, Soft Law' (2008) 71 *Modern Law Review* 853; and Mark Hickford, 'The Historical Political Constitution—Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value' [2013] *New Zealand Law Review* 585, 588.

[25] See e.g Ewing (n23) 2127.

[26] See e.g. Marco Goldoni, 'Political Constitutionalism and the Value of Constitution-Making' (2014) 27 *Ratio Juris* 387, 398; and McHarg (n23) 876.

[27] See e.g. Janet McLean, 'The Unwritten Political Constitution and its Enemies' (2016) 14 *International Journal of Constitutional Law* 119, 136. This suggestion is arguably also implicit in Mac Amhlaigh's partial defence of political constitutionalism: Cormac Mac Amhlaigh, 'Putting Political Constitutionalism in its Place' (2016) 14 *International Journal of Constitutional Law* 175.

[28] See e.g. Ewing (n21); and Loughlin (n20).

[29] The relative absence of ideological analysis is not restricted to public law scholarship, but can be seen across much legal scholarship, with notably exceptions such as critical legal studies. See Andrew Halpin, 'Ideology and Law' (2006) 11 *Journal of Political Ideologies* 153.

been influential accounts that employ historical approaches to explain how ideology has helped to shape the intellectual development of public law,[30] but there is very little exploration of how ideologies map onto contemporary debates.[31] The second trend reinforces the first: a tendency for political constitutionalists to adopt narrow accounts of politics.[32] These accounts usually stress: certain political institutions, but not others (e.g. legislatures, rather than executives); some levels of government at the expense of others (e.g. the national, but overlooking the sub-national and the supra-national); and only certain sites of popular political activity (e.g. voting rather than campaigning and protesting). This leads to an impoverished and incomplete account of political life that seems to suggest that competition between parties channeled via a national legislature, and punctuated by periodic elections, is the only important force in politics. It is of course ironic that proponents of political constitutionalism tend to adopt a reductive understanding of politics even whilst seeking a better appreciation of all of the many and different ways in which political practices can regulate governmental power. The failure to explore the ideological dimensions to political constitutionalism—and, more particularly, to think about the different ideological traditions within which its claims, values and assumptions are embedded—is part and parcel of this reductive approach. The failure of public lawyers generally, and political constitutionalists specifically, to take ideology seriously is unfortunate, at least insofar as the study of public law, and political constitutionalism in particular, presupposes an intimate grasp of political life; and few phenomena within political life are as ubiquitous, persistent and pertinent as ideology.[33]

The ideological dimensions to political constitutionalism matter, in particular, because some level of broad-based, deep-rooted ideological consensus across both the left and right seems a prerequisite for a political constitution to flourish in a real world polity. By ideological consensus, I mean, for these purposes, broad acceptance that traverses ideological traditions of the primary institutional commitments envisaged by political

[30] Martin Loughlin's *Public Law and Political Theory* is the standout example: Loughlin (n16).

[31] See D. Howarth, 'The Politics of Public Law' in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge: CUP, 2015) 37, 50.

[32] On this trend, see Marco Goldoni and Christopher McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2107-2108. See also Panu Minkkinen, 'Political Constitutional Theory vs Political Constitutionalism' (2013) 11 *International Journal of Constitutional Law* 585; and Ming-Sung Kuo, 'Politics and Constitutional Jurisgenesis: A Cautionary Note on Political Constitutionalism' (2018) 7 *Global Constitutionalism* 75.

[33] See generally W. A. Mullins, 'On the Concept of Ideology in Political Science' (1972) 66 American Political Secience Review 498, 498. See also Zizek's reference to 'the unrelenting pertinence' of ideology': Slavoj Zizek, 'Introduction: The Spectre of Ideology' in Slavoj Zizek (ed), *Mapping Ideology* (Verso, 1994) 1, 1.

constitutionalism.[34] Where such a consensus exists, the governing elites from the main different traditions are, for the most part, not only prepared to work within a political constitution, but accept the need to preserve the institutional features envisaged by it. There can still be dissenting voices within each ideological tradition, but provided that most are in broad agreement a consensus can still exist. Similarly, a basic consensus can exist in the face of occasional cross-ideological battles on constitutional questions, provided that there remains a general acceptance of the effectiveness and legitimacy of the overarching constitutional framework. For much of the twentieth century in the UK, for example, there were disputes between the governing parties on constitutional questions, but the governing elites on both the left and the right mostly embraced the institutional features of political constitutionalism, and did not use electoral success to change the essential rules of the constitutional game.[35] Of course the primary reason why ideological consensus is so important for a political constitution is simply stated. A political constitution is defined by the lack of justiciable constraints on the legislature, and is thus susceptible to change (at least in theory) via ordinary political processes whenever a new party enters government. It is substantial ideological consensus about its desirability that—amongst other things—enables a political constitution to endure through the swings and roundabouts of competitive electoral politics.

All of this suggests that patterns of ideological support for political constitutionalism matter. Their importance is heightened whenever there are signs that these patterns might be changing; or if, more dramatically, the traditional ideological consensus may be breaking down. It might be an exaggeration (or at least: premature) to speak of a breakdown in ideological consensus in the UK—but there are signs of change. There seems to be contrasting constitutional dynamics within the left and the right. Of note is the waning judicial scepticism on the left, with many politicians and lawyers on the left seeming to feel that stricter legal controls are required to constrain governmental powers, with it also now necessary to empower courts to safeguard individuals from the perceived ideological excesses of the right.[36] At the same time, there seems to be growing and deepening concern amongst sections of the political and legal right about

[34] On definitions of consensus, see Dennis Kavanagh and Peter Morris, *Consensus Politics from Attlee to Thatcher* (Wiley-Blackwell 1989). Cf Ben Pimlott, 'Is the "Postwar Consensus" a Myth?' (1989) 2 *Contemporary Record* 12.

[35] See Vernon Bogdanor, *Politics and the Constitution: Essays on British Government* (Dartmouth, 1994) 3-20.

[36] For a range of different views on changes in the left's traditional scepticism towards the courts, see Richard Ekins and Graham Gee (eds), *Judicial Power and the Left: Notes on a Sceptical Tradition* (Policy Exchange 2017)

judicial expansionism, a concern directed at supranational courts in particular, but ensnaring domestic judicial review as well. Moreover, amongst sizable sections of the left, there seems to be declining confidence in the UK Parliament's ability to serve as an effective check on government at the same time as some on the right seem unconcerned about the potential for the massive enlargement of executive power at Parliament's expense in the event of the UK's withdrawal from the EU. Changing patterns are not necessarily fixed of course, but the current unsettled nature of the constitution suggests that such changes deserve scrutiny. Whether long-lasting or not, such changes point to the need to better understand the reasons for and durability of the appeal of political constitutionalism to each of the left and the right.

III. A CONSERVATIVE TRADITION OF POLITICAL CONSTITUTIONALISM

It is against this background that I want to outline a conservative tradition of political constitutionalism that reflects the dominant constitutional vision on the political right in the UK over the last century. It is by design that I speak of a conservative 'tradition' of political constitutionalism, which I understand as 'customary beliefs, practices, and actions that [have] endured from the past to present and attracted the allegiance of people so that they wish to perpetuate it'[37] and, in this way, is a 'collaborative, multi-generational enterprise'.[38] The set of beliefs, practices and actions that comprise the conservative tradition of political constitutionalism are to be found, for the most part, not in academic works, but rather in the writings of politicians on the right during the first part of the twentieth century, such as Conservative MPs Hugh Cecil, Quintin Hogg and Leo Amery. There is no explicit, comprehensive or authoritative statement of this tradition. Its beliefs, practices and actions are traceable instead to a 'hinterland of rhetoric, values and received ideas'[39] which have shaped constitutional thinking on the political right (and within the Conservative Party in particular) over the last century, with the good sense assumed to be embodied in these received ideas usually possessing a tacit and taken-for-granted status, until recently at least. Participants in this tradition have exhibited a confidence in and allegiance to the basic institutional commitments of political constitutionalism, and have sought to operate within them, and also to preserve them. The conservative tradition of political constitutionalism, in other words, envisages a constitutional order based around legislative supremacy and responsible government, where political power is checked primarily through political

[37] John Kekes, *A Case for Conservatism* (Cornell University Press, 1998) 38.

[38] Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (OUP, 2012) 291.

[39] EHH Green, *Ideologies of Conservatism* (OUP, 2008) 3.

processes, and where the legislature is ultimately responsible for the justice of the law, with courts contributing to the rule of law by resolving disputes impartially, and by keeping faith with past legal commitments.

All of this is familiar to orthodox accounts of political constitutionalism. At the same time, the conservative tradition is distinctively 'conservative', inasmuch as it is primary features are underpinned by four core conservative themes: intellectual imperfection, scepticism, traditionalism, and organicism.[40] These themes relate to how conservatives view human nature, human reasoning, political knowledge and political organization. At the very root of the conservative creed is the belief that human reasoning is limited in its ability to comprehend all of the complexities of social practices, with abstract reasoning in particular an unreliable guide for making sense of and assessing existing arrangements (*intellectual imperfection*).[41] Political wisdom, on this account, is to be found not in abstract reasoning or theories, but rather in the accumulated experience of the polity as a whole (*scepticism*). The knowledge required for successful political action accrues over multiple generations, and resides in the concrete traditions of behaviour and institutions that express the consolidated wisdom of the polity.[42] This encourages, in turn, an attachment to established practices, institutions and ways of doing things that have contributed to the common good over time together with an associated resistance to precipitate and far-reaching change (*traditionalism*). Of special importance for conservatives is that long-standing institutions and practices often embody wisdom, and furnish structure, stability, continuity, and (in the best of cases) unity in ways that are seldom fully understood. This leads to scepticism of reforms that seek to overhaul existing arrangements: the knowledge expressed in long-standing ways of doing things and settled institutions has accumulated over multiple generations, whereas reform efforts tend to be the product of only a single generation at most. Ultimately, for conservatives, a political community is not an experiment for a social engineer, but rather a complex whole that is comprised of individuals whose relationships with each other—in the best of cases—are facilitated by shared histories and cultures themselves not the product of planning (*organicism*).

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[40] These four principles recur throughout conservative political thought. See e.g. Anthony Quinton, *The Politics of Imperfection: The Religious and Secular Traditions of Conservative Thought in England from Hooker to Oakeshott* (Faber, 1978).

[41] See Michael Oakeshott, 'Rationalism in Politics' in *Rationalism in Politics and Other Essays* (rev edn, Liberty Fund 1991) 5. The relevance of conservative themes for thinking about change in the context of constitutional flux is discussed in Graham Gee and Grégoire CN Webber, 'A Conservative Disposition and Constitutional Change' (2020) 40 *Oxford Journal of Legal Studies* (forthcoming).

[42] See Edmund Burke, *Reflections on the Revolution in France* [1790] (Penguin 2004).

These core conservative themes mould a more or less distinctive tradition of political constitutionalism, which has four key characteristics. First, *strong government* is at its very heart. That legislative supremacy, when combined with high degrees of centralization, tends to enable strong, decisive and efficient government in the national interest goes some way to explaining the appeal to the political right of political constitutionalism. As Leo Amery put it, '[t]he spirit of strong and stable government…is of the essence'[43] for the political right, where government is 'always the starting point and mainspring of action'.[44] Strong government, according to conservatives, is necessary to foster the settled and peaceful conditions that furnish the space for individual citizens to pursue their own conceptions of the good life. For most conservatives, some level of authority is always necessary within a political community to secure some measure of individual freedom. But it is a notion of strong but *limited* government that animates conservative political thought: the function of strong government is not to pursue some overarching plan, where the state imposes ultimate purposes on its citizens, but involves securing instead the conditions that facilitate citizens and their intermediate associations (e.g. families, churches and companies) in the pursuit of their own ends, undertakings and goals.[45] Government should therefore be strong but limited, in the sense of confined to paradigmatically governing activities: namely, 'the provision and custody of general rules of conduct'[46] that help to maintain peace, justice, property and liberty. Limited government is favoured both because it promotes individual self-reliance, and also in recognition of the limits on the reach of human reasoning, and hence the limits on the wisdom of any one set of governing elites.

This notion of strong, limited government is intertwined with political leadership in the national interest, with a stress on the statecraft required to govern for the common good through established ways of doing things, including knowing how far elastic tacit rules can be stretched without breaking. Quoting Amery once more, it is the government that has 'the responsibility of leading and directing Parliament and the nation with its judgement and convictions'.[47] There are checks on government power

[43] LS Amery, *Thoughts on the Constitution* (OUP, 1947) 18.

[44] Amery (n43) 15.

[45] In Oakeshott's terms: civil association, rather than an enterprise association. See Michael Oakeshott, *On Human Conduct* (Clarendon, 1975).

[46] Michael Oakeshott 'On Being Conservative' in *Rationalism in Politics and Other Essays* (rev edn, Liberty Fund 1991) 407, 424.

[47] Amery (n43) 31.

within this constitutional order—but not so many as to prevent the government from performing its main tasks.[48] Much is entrusted to the legislature of course, including its exposure to electoral competition, as the discipline to ensure that governmental power is not misused, or that misuses are quickly corrected. The government is answerable in the courts for legal wrongs; this is a vital complement to parliamentary accountability. But, under this tradition, judicial review of government action is limited to specified kinds of grounds only, does not extend to every domain of government action and largely aims to avoid questioning the merits of policy choices.

Second, part of the appeal of political constitutionalism, on this conservative tradition, lies in its combination of strong government with a limited notion of representation,[49] which acknowledges the vital importance of democratic will, but without fetishizing it. (The political constitution involves, in Amery's aphorism, 'government of the people, for the people, but not by the people'[50]). Representation is limited in the sense that it combines political equality and mass participation at one stage (elections), before then separating policy deliberation by elites at an earlier stage (preparing a manifesto) and a later stage (designing and implementing policy inside government). Voters have very real influence in choosing the identity of the governing elites—but their participation is minimized as well as routinized through elections.[51] In reality, a mass electorate can only participate infrequently, and can only cope with fairly uncomplicated choices, and therefore electoral competition tends to reduce to a choice between a handful of major national parties, with governments ultimately answerable to the voters who put them in office. Hence, voter participation is centred around government formation, not policy formation. This in turn gives the governing parties scope to monopolize the policy agenda, with national political leaders enjoying significant room to act as they see fit, including departing from popular will where they decide that doing so is in the national interest. This approach to representation, laced as it is with 'a scepticism as to unbridled democracy',[52] coheres with conservative accounts of the political knowledge that should guide political action. On those accounts, political knowledge is found in the accumulated experience of the polity, which is a product of multiple generations, not just a single generation of

[48] See generally Quintin Hogg, *The Case for Conservatism* (Penguin, 1947).

[49] See Matthew Hall, David Marsh and Emma Vines, 'A Changing Democracy: Contemporary Challenges to the British Political Tradition' (2018) 39 *Policy Studies* 365, 367.

[50] Amery (n43) 20-21.

[51] See Paul Hirst, *Representative Democracy and Its Limits* (Polity, 1990).

[52] This draws on Norton's excellent account: Philip Norton, 'Speaking for the People: A Conservative Narrative of Democracy' (2012) 33 *Policy Studies* 121, 121. Cf Anthony Wright, *Citizens and Subjects: An Essay on British Politics* (Routlege,1993) 64-65.

contemporary voters. Conservatives accept that weight should be given to the popular will of the current generation, but that this must at the same time be seen as transient. Good government, in particular, requires awareness of the past, and an acceptance that there are tried and tested ways in which governing has developed over time.[53] This implies that there should be politically specified limits on the democratic will. This reinforces the importance of strong government, where the governing elite can resolve to depart from the popular will where the best interests of the nation require it. Of course no government will do so lightly or frequently, since any governing party deemed unresponsive is likely to be removed from office at the next election.

Third, a confidence in the capacity of a healthy political culture to secure competent, responsible self-government, in line with the rule of law and in ways that secure rights, is a hallmark of the conservative tradition of political constitutionalism. This political culture rests on and is a product of an intelligent scheme of government (legislation, administration and adjudication) that has developed over time. The knowledge that is required to manage human affairs in ways that secures the common good, including by fostering a culture of rights, is not found in abstract statements of constitutional principles or in bills of rights, and the technocratic and scholastic approach that such instruments encourage.[54] Rather, political knowledge resides in the customary ways of conduct, historically accumulated experience and the institutions that help to shape a whole political culture. Conservatives stress, in particular, the role of institutions within that culture. Institutions not only supply structure and continuity. In a healthy polity, institutions, which have become known and understood by a community over generations, transcend social and political divisions, and in this help to promote order, stability and liberty. The common law, and the courts in their traditional secondary role on the constitutional stage, are both important institutions for conservatives, each worthy of reverence in helping to forge a political culture that generates more rights, prosperity, stability and legal certainty than most. However, the role of the courts is circumscribed, with judges contributing to the vital political project of ordering social life over time by resolving legal disputes in accordance with publicly promulgated standards, a project that judges jeopardize if they seek to remake those standards when adjudicating.

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[53] Norton (n52) 121-124.

[54] But of course note the important role of some Conservative Party politicians in the conception of the ECHR: Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics and the Origins of the European Convention* (OUP, 2017).

Fourth, the conservative tradition of political constitutionalism unashamedly envisages an elite-led and executive-oriented constitutional order, where ministers are entrusted with considerable political and legal power, subject above all to robust parliamentary scrutiny. Political leadership and statecraft are central elements of this tradition,[55] with the activity of governing assumed to require particular skills;[56] or, as Oakeshott put it, a particular 'political education' in the established modes of government behaviour.[57] Trust in government 'is created and sustained by appropriate behaviour on the part of officeholders', where political elites are 'conscious of their obligations towards society', and behave in ways that 'generate the habits and prescriptions on which constitutional norms rest'.[58] In a political constitution defined by the lack of judicially enforceable limits on the legislature, and with weak-form judicial review, there is a particular need for political leadership to navigate skillfully the constraints on governmental power, and more especially to exhibit prudence when exercising that power given the relative *lack* of legal constraints. Ministers must govern within the frame of settled law, taking care to exercise their powers lawfully, and to direct the state's personnel and resources wisely. In this context, statecraft is required to ascertain how to pursue change within the established ways of doing things. Politicians, after all, are 'heirs before they are choosers',[59] with much governing activity devoted to addressing the consequences of inherited policies that would not necessarily have been chosen by the government-of-the-day. This requires prudent political leadership to work out how policy inheritance conditions future policy change. It also requires, on this view, recognition of the ways in which settled arrangements can provide structure, continuity and, in the best of cases, unity and allegiance.[60] It further requires skilful leadership to determine when it might be necessary to depart from the popular will in service of the national interest and, in this, to reconcile what Andrew Gamble has termed 'the politics of power' (the statecraft required to govern within social and economic forces not of a government's

[55] On the importance of leadership, both within conservative political thought and the political practice of the Conservative Party, see John Ramsden, 'Political Parties: Conservative Political and Constitutional Ideology' in Robert Blackburn (ed), *Constitutional Studies: Contemporary Issues and Controversies* (Mansell, 1992) 79, 83.

[56] Norton (n52) 126. See also Hugh Cecil, *Conservatism* (Williams & Norgate, 1913) 232.

[57] Michael Oakeshott, 'Political Education' in *Rationalism in Politics and Other Essays* (rev edn, Liberty Fund 1991) 43.

[58] Nevill Johnson, 'Constitutional Reform: Some Dilemmas for a Conservative Philosoph' in Zig Layton-Henry (ed), *Conservative Party Politics* (MacMillan, 1980) 127, 131.

[59] Richard Rose, 'Inheritance Before Choice in Public Policy' (1990) 2 J Theoretical Politics 263, 263.

[60] Philip Norton, 'The Constitution' in Kevin Hickson (ed), *The Political Thought of the Conservative Party Since 1945* (Palgrave, 2005) 93, 93-94.

own making) with the 'politics of support' (the basic electoral imperative of crafting a programme for government that will attract and retain popular support).[61]

These four characteristics, as I see it, underpin and inform a conservative tradition of political constitutionalism. There are differences in emphasis from the more familiar interpretations of political constitutionalism found in the literature. There is much less explicit emphasis on the potential for disagreement about questions of law, justice, rights and the constitution itself, but this seems implicit in (or at least not far removed from) the conservative attachment to political skepticism. A different lexicon animates the conservative tradition. It does not speak in highfalutin terms of political equality, but it shares the familiar political constitutionalist commitment to framing institutional arrangements in a representative democracy around majority rule. In this, it embraces the basic notion of equal respect that is at the root of democratic constitutions defined by electoral competition. It prioritizes the mechanisms of political accountability, and envisages a secondary constitutional role for judicial review, with this partially justified under the conservative account on the grounds that this governing approach has been proven to work passably well and therefore should not be lightly displaced. But the commitment to this institutional framework, including to a circumscribed role for the courts, has not been accompanied (until recently) by the sort of biting critique of patterns of judicial decision-making articulated on the left by Griffith,[62] where it was argued that judges had manipulated the common law to frustrate policies of Labour Governments and the pursuit of workplace justice by trade unions.

I have sketched (admittedly with a very broad brush) the contours of a conservative tradition of political constitutionalism. Keeping this conservative tradition in mind is important since it helps us to appreciate the extent to which political constitutionalism is ideologically capacious. That its claims, values and assumptions can be embedded within different ideological traditions, and that it is capable of attracting adherents from across the ideological divide, is a large part of its appeal as a way of ordering constitutional government. Throughout the last century this conservative tradition has coexisted with a social democratic variant. In the last twenty years or so, these have been joined by liberal and republican variants. The former is associated with Jeremy Waldron and the latter with Richard Bellamy and Adam Tomkins. For now, what bears emphasis is that each of social democracy and conservatism has served as an

[61] Gamble develops this famous analytical framework for understanding conservative politics in the UK in Andrew Gamble, *The Conservative Nation* (Routledge, 1974). See the very useful discussion in Norton (n52).
[62] See e.g. JAG Griffith, *The Politics of the Judiciary* (Fontana, 1977).

ideological 'bedfellow'[63] for political constitutionalism. Within the academic realm, the social democratic tradition has tended to obscure its conservative counterpart in ways that reflect and reinforce the assumed special affinity between the theory of political constitutionalism and the political left. However, it is important for public lawyers to recognize that it is the interaction of the two traditions that has buttressed political constitutionalism in the UK. Both contributed to forging cross-ideological support for its basic institutional commitments of legislative supremacy, responsible government and political accountability. Politicians from left and right have largely respected the tacit rules and common understandings that sustained throughout much of the twentieth century the political culture, and assumptive worlds, presupposed by political constitutionalism. With this sketch of the conservative tradition in place, I now want to reflect on lessons that are suggested by it about political constitutionalism itself.

IV. LESSONS FROM A CONSERVATIVE TRADITION

There are three special lessons to be drawn from a conservative tradition that can help us to better understand some ambiguities within political constitutionalism. First, this tradition offers a partial response to an important critique of political constitutionalism developed by Marco Goldoni over the last seven years. Goldoni suggests that political constitutionalism 'idealises a model of constitutionalism that is locally and historically determined', and which is reliant upon a shared political culture.[64] This shared culture structures the possibilities of political action, but its impact on the political constitution 'is not spelled out and is left unexplored'.[65] Political constitutionalists, he argues, lack 'an account of the common world which shapes the political constitution'.[66] Typically, for example, political constitutionalists stress the prevalence of disagreement, and then explain why those disagreements are best addressed in legislative arenas, where debate is unconstrained by legal technicalities and open to a much wider array of views. But political constitutionalists have failed by and large to acknowledge and/or respond to the fact that such disagreements are also constrained by the shared culture from which political debates emerge.[67] The mistake that most political constitutionalists make, for

[63] Goldoni and McCorkindale (n31) 2104.

[64] Marco Goldoni, 'Constitutional Reasoning According to Political Constitutionalism' (2013) 14 *German Law Journal* 1053, 1071.

[65] Goldoni (n64) 1073.

[66] Marco Goldoni (n26) 399.

[67] Goldoni (n26) 403 ('political action does not take place in a vacuum, nor can it be conceived as totally unfettered … there is always a common world from which political action emerges').

Goldoni, is to underestimate the way in which deep-seated structures work to limit the transformative potential of ordinary political processes—and most especially in respect of any attempts to overhaul those processes or the political regime itself.[68] In other words, they have paid insufficient attention to the fact that political constitutionalism 'emerges and develops out of a concrete ordering of society',[69] with 'layers of material complexity lying at the heart of the political constitution'.[70]

This is a powerful critique. As I see it, however, it applies more to social democratic (and republican and liberal) accounts of political constitutionalism. The conservative tradition of political constitutionalism is, in some respects, more in touch with—or at the very least, offers a distinct perspective on and way of thinking about—the material complexity of the political constitution. It does not shirk away from the 'historicity'[71] of political constitutionalism. Rather, it conceives of political knowledge, action and community in ways that recognize that the subsisting constitutional order is partially determined by the past, with this moulding and limiting political and legal behaviour. That human reasoning is limited in its capacity to grasp every subtlety of complex social practices encourages conservatives to be sensitive to those manners of behaviour that, in their view, embody the knowledge accumulated by the polity over time. This encourages, in turn, an appreciation of the ways in which the possibilities of change are channeled by existing institutional structures and cultural expectations—and, of course, insofar as this contributes towards a dynamic of constitutional continuity that conditions proposals for change, this is something that (unlike Goldoni) conservatives generally welcome.

Second, and related to this, thinking about a conservative tradition also helps to draw out some ambiguities about the place of and limits on democratic will within political constitutionalism. In pointing to the theory's democratic credentials, with its emphasis on majority rule, electoral competition and the mutual respect that flows from hearing the other side, some proponents of political constitutionalism have suggested that 'the democratic process *is* the constitution'.[72] This encourages the impression that there is an unfettered notion of democracy animating political constitutionalism, glossing over

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[68] See Marco Goldoni and Christopher McCorkindale 'Why We (Still) Need a Revolution' (2013) 14 *German Law Journal* 2197.

[69] Marco Goldoni and Christopher McCorkindale, 'Political Constitutionalism' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, 2017) _, __.

[70] Marco Goldoni, 'The Materiality of Political Jurisprudence' in Michael A. Wilkinson and Michael W. Dowdle (eds), *Questioning the Foundations of Public Law* (Hart, 2018) 165, 170.

[71] Hickford (n24) 586-592.

[72] Bellamy (n4) 5.

certain ambiguities about just how democratic a political constitution needs to be; for example, in what ways, to what extent, and in what contexts its proponents might be prepared in any real world setting to compromise on a strong, citizen-oriented notion of democracy in order to secure effective, informed, rational but elite-led deliberation. The priority of the various values that animate political constitutionalism (democracy, deliberation, accountability, efficiency) needs careful elaboration in specific contexts and through time. Keith Ewing has argued, for example, that the late 1890s and early 1900s was in many respects 'the high water-mark' of political constitutionalism in the UK, insofar as there then existed a representative government that was responsible to an independently-minded but democratically deficient legislature that was not subject to the grip of party discipline. Furthermore, to assume that democratic ideals occupy an uncomplicated place within political constitutionalism risks concealing the tension between, on the one hand, its transformative potential (i.e. every question of law and policy, including the framework of the constitution, is open to the possibility of radical change by a legally unlimited legislature) and, on the other hand, the political forces that temper radical change (i.e. 'the brutal capacity of the political constitution to develop political restraints to contain…any such latent transformative potential'[73]). Different political constitutionalists will (and do) have differing opinions on questions such as whether prerogative powers, political parties or unelected second chambers, and other seeming institutional lags on the democratic ideal, should form any part of a political constitution that adequately instantiates political equality, accountability and deliberation. Views will differ as well on the extent to which the elite-centred nature of political constitutionalism is itself problematic. The conservative tradition sketched above helps to explain why, for some political constitutionalists at least, there has been an important and justified place for elite-led deliberation with a political constitution that tempers popular will in order to blend continuity and change.[74]

Third, a conservative tradition can help us to better appreciate the ambiguous place that strong government enjoys within political constitutionalist thought. Some public lawyers today fail to appreciate that strong government forms an important part of at least some interpretations of political constitutionalism. They wrongly assume instead that political constitutionalists invariably hold that any executive power that has not been statutorily conferred on ministers by a legislature lacks legitimacy, that each and every reallocation of power from the executive to the legislature is welcome, and that

[73] Ewing (n23) 2117.

[74] See generally Stephen Tierney, 'Whose Political Constitution? Citizens and Referendums' (2013) 14 *German Law Journal* 2185.

every conceivable way of subordinating the executive to the legislature is desirable.[75] On the one hand, this assumption might seem forgivable, insofar as several prominent political constitutionalists over the last twenty years or so have seemed either to almost wholly write the executive out of the constitutional picture,[76] or to envisage executive power in wholly negative terms, focusing exclusively on constraining the executive.[77] On the other hand, thinking about a conservative tradition demonstrates how a strong government is consistent with at least some accounts of political constitutionalism.[78] In this tradition, the executive is a vital part of a scheme of good government, fulfilling tasks necessary for the public good, including directing the armed forces, managing the police, and conducting foreign relations.[79] It further recognizes that, in a political constitution, the government is responsible. Ministers are accountable to: their party; the legislature, where they are subjected to scrutiny by an opposition;[80] and ultimately, through legislative elections, to the will of the voters. In a political constitution, the government is not some democratic anomaly; rather, the government and legislature 'share democratic credentials'.[81] To my mind, it is deeply regrettable that some have airbrushed effective and accountable government out of the political constitutionalist picture. It is of course very important to be aware of the potential for a government to misuse power, and therefore to ensure that executive power is subject to political accountability, to the possibility of change via legislative supremacy, and to the rule of law. But it is equally important that accounts of political constitutionalism 'should encompass the role of government in extending liberty and well-being, as well as its role in restricting it'.[82]

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[75] See the cursory dismissal of the connection between strong government and political constitutionalism in: Gavin Phillipson, 'Brexit, Prerogative and the Courts: Why did Political Constitutionalists Support the Government Side in *Miller*?' (2017) 36 *University of Queensland Law Journal* 311.

[76] See e.g. Bellamy (n4).

[77] See e.g. Tomkins (n4).

[78] If there were an explicit account of the social democratic tradition of political constitutionalism, it too would recognize the importance of strong responsible government in a political constitution, albeit it would differ on the rationale for and scope of executive power within a healthy polity, and would stress the government's role to develop, initiate and implement legislation that drives social reform and wealth redistribution. See generally Ewing (n15).

[79] For a refreshing defence of executive power, arguing that there is no general reason to strip powers from the executive in the UK, see Timothy Endicott, *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, 2017).

[80] See Grégoire Webber, 'Loyal Opposition and the Political Constitution' (2017) 37 *Oxford Journal of Legal Studies* 326.

[81] Endicott (n79) 21.

[82] Danny Nicol, 'Review of Adam Tomkins, *Our Republican Constitution*' (2006) 69 *Modern Law Review* 280, 281.

V. A 'NEW' CONSERVATIVE TRADITION

So far, then, I have sought to correct the relative neglect of the ideological dimensions of political constitutionalism by sketching the characteristics of a conservative tradition that reflected the dominant constitutional vision of the political right throughout most of the last century, and to explain how this tradition can help us to better understand political constitutionalism itself. Traditions are not static of course, but rather involve 'the active achievement of continuity',[83] changing in order to remain relevant to the communities in which they apply, and in order to continue to attract the allegiance of those who choose to participate in them. I now want to suggest that the conservative tradition of political constitutionalism has been changing in important ways over the last decade, and so much so that it is apt to talk for these purposes, albeit in rather un-conservative terms, of a 'new' conservative tradition. (I talk of a 'new' tradition mainly for the purposes of exposition; the new conservative tradition is very plainly both an inheritance of and extension upon the tradition of political constitutionalism outlined earlier in this essay). When Amery, Cecil and Hogg wrote about conservatism in the early to mid twentieth century, the social and political conditions were still favourable to the flourishing of a political constitution. Today, a new conservative tradition seems to be emerging in response to a changing, and less favourable, constitutional context. This involves a move away from 'natural conservatism' (where favourable conditions enabled the participants in the tradition merely to enjoy the prevailing arrangements, without having to worry much about the prospect of or need for change) to 'reflective conservatism' (where participants have concluded that something has gone awry with prevailing arrangements that requires correction).[84]

This new tradition encompasses both policy and academic limbs. Its concerns animate large sections of the right, including within the Conservative Party, but find expression in the writings of a small number of academic public lawyers as well.[85] Of note is that the academic and policy limbs are also increasingly intertwined, with the centre-right think-tank Policy Exchange supplying an institutional focus for much of the policy-

[83] Roger Scruton, *The Meaning of Conservatism* (Palgrave Macmillan, 3rd edn, 2001) 37.

[84] Kekes (n37) 7-14.

[85] Some participants would include Richard Ekins, Jason Varhaus and Christopher Forsyth. I would include myself as someone working in this new conservative tradition of political constitutionalism, and my analysis should plainly be read with that disclosure in mind.

oriented work since the creation in 2015 of its Judicial Power Project.[86] What unites the academic and policy limbs, and distinguishes this new tradition from its precursor, is a profound concern with and critique of the rise of judicial power. As participants in this new tradition view it, the growth of judicial power over recent decades cannot reasonably be denied. People might debate the extent of and reasons for its expansion, and also whether it is a good or bad thing, whether in general or in respect of some of the specific ways in which the judicial function has expanded. But no one can sensibly deny that both the scope and intensity of judicial power, and its reach into domains previously the sole province of elected politicians, have increased over fifty years. As the new conservative political constitutionalists see it, the changed judicial function is a consequence of twin developments: firstly, the dubious decisions of national political authorities to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of supranational courts; and secondly, changes in the legal culture in respect of how many judges, lawyers and academics now seem to regard, among other things, the judicial role, human rights, the nation state, and the relationships between and priority of law and politics.[87]

On one reading, conservative concerns about the inflated judicial function might seem to be driven by political expediency. According to this critique, it seems convenient that conservative political constitutionalists have grown concerned about the exercise of judicial power only after courts have become increasingly assertive when reviewing executive power and challenging established interests. This critique applies over both a longer-term and a shorter-term timeframe. Over a longer arc, it is notable that the conservative political constitution tradition exhibited little or no concern with patterns of judicial power throughout much of the twentieth century, when the domestic courts frustrated the redistributionist policies of left-wing governments or diluted the effect of employment legislation promoted by trade unions, and when the Atlee Government opposed the creation of the European Court of Human Rights. Over a shorter arc, it is notable, that the new conservative critique of judicial power has coincided with a period when the Conservative Party has been in government.[88]

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[86] For a critique of the Judicial Power Project, see Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 *University of Queensland Law Journal* 355. For a reply, see Ekins and Gee (n5).

[87] See generally Ekins and Gee (n5).

[88] It might also be noted, however, that the so-called 'reflexive turn' in political constitutionalist scholarship, where the focus has turned away from the biting critique of judicial review and rights adjudication and towards the social and political conditions necessary for a political constitution to flourish, has coincided with the Conservative Party returning to power. In other words, some political constitutionalists who are not aligned on the political right might be said to have arguably grown less agitated about judicial review and rights adjudication during this period.

To my mind, both parts of this critique seem rather ungenerous. It is true that the sort of concerns about judicial power so forcefully articulated on the left by the likes of Griffith were almost wholly absent on the right throughout much of the last century. Politicians and academics on the political right exhibited a comfortable complacency towards the judicial function that only began to fray in the 1990s. However, it is also true that the tradition of political constitutionalism that in this essay I have traced to the conservative thought of politicians such as Amery, Cecil and Hogg took shape at a time when domestic courts still occupied a secondary role on the constitutional stage, and before the long shadow cast by the Luxembourg Court and Strasbourg Court had become clear. As for the new conservative tradition that emerged over the last decade, it is scarcely surprising that this should have become prominent during a time when the constitution has been in flux, and (on one view) the cumulative consequences of a series of changes to the judicial role have become more apparent. It is also important to note that several participants in this conservative tradition criticized the exercise of judicial power when Labour Governments were in office. It is reasonable, however, to note that this new conservative tradition of political constitutionalism has become prominent at a time when sizable parts of the Conservative Party seem receptive to its critique of the courts.[89] At the same time, what is often overlooked is that this new conservative tradition criticizes political institutions as well as judicial institutions, with both Labour and Conservative politicians criticized for not exercising their political responsibility for monitoring the changing contours of judicial power and responding when those changes threaten the balance of the constitution.[90]

This new conservative tradition of political constitutionalism is defined by continuity as well as change. For example, it continues to envisage a political constitution that is oriented around a strong government able to exercise power for the public good. Part of its critique of judicial review is therefore centred on how the courts have crimped the legitimate policy-making role of ministers,[91] and how decisions of the Supreme Court and the European Court of Human Rights have extended the common law and European human rights law in ways that affect the efficacy of the armed forces, by

[89] One fairly novel feature of this period of the UK's political history is the extent of the constitutional fissures on the political right, with very real divisions on questions such as European integration, the reform of human rights law, and the reform of the House of Lords.

[90] See e.g.. Ekins and Gee (n5) 390-394.

[91] See e.g. Richard Ekins and Christopher Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Courts* (Policy Exchange, 2015); and Jason Varhaus, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

for example reinterpreting the notion of 'jurisdiction' to apply to military action abroad.[92] Similarly, the new conservative tradition continues to believe that a healthy political culture remains the most effective safeguard of individual liberty. It thus regrets the enactment of the Human Rights Act which has changed the reasoning of the domestic courts, which now extends to: how convention rights should be understood; whether particular legislative or executive action is a proportionate limitation on some general interest; and whether it is possible to read and give effect to legislation in a way that is compatible with convention rights or whether it should be declared out of line. That legislation and executive action is routinely questioned in domestic courts, including policies relating to foreign policy and military action, is of very grave concern for the new conservative tradition. There are additional changes beyond the new critique of the judicial function. Some conservative political constitutionalists now recognizes that there is a strong case for occasional use of constitutional referendums as a tool for resolving vital questions about the long-term identity of the state,[93] with such a case especially strong where elite consensus works to prevent certain questions that have agitated the public at large from properly piercing the mainstream policy agenda.[94]

There are tensions within this new conservative tradition, especially over what sort of and degree of corrective change may be required to restore an appropriate separation of judicial and political authority. Some participants within this new tradition seem at times to combine both a radical as well as a conservative disposition. For example, for some participants, the prospect of leaving the EU involves an assertion of democratic self-government that will reaffirm elements of the political constitution, and not least by reasserting the primacy of national political authorities and by rebalancing some of the relationship between the UK's national political system and a supranational legal regime.[95] For the more radical participants within this tradition, this rebalancing is only part of the corrective action that is required. The repeal of the Human Rights Act and the UK's withdrawal from the ECHR are the next stages in the larger project of restoring balance to the UK's political constitution. For other participants, the new tradition remains imbued with the conservative disposition that

[92] See e.g. *Serdar Mohammed v Secretary of State for Defence* (2014) EWHC 1369; *Al-Skeini v UK* (2011) 53 EHRR 18; and Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of War: Saving Our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange, 2015).

[93] See e.g. Richard Ekins, 'Restoring Parliamentary Democracy' (2018) 39 *Cardozo Law Review* 101.

[94] See e.g. Richard Ekins, 'The Value of Representative Government' in Claire Charters and Dean R. Knight (eds), *We the People: Participation in Governance* (Victoria University Press, 2011) 29, 48.

[95] See eg Richard Ekins, *Brexit and Judicial Power* (Policy Exchange 2017) 7.

cautions against too much reform at any one point in time, especially given the risk of mismanaging the constitutional changes involved in a possible exist from the EU. Some commentators discern an authoritarian streak within the new conservative tradition; or an 'anarcho-conservatism' that is dismissive of any institutional safeguards on executive power, and which 'treats established constitutional forms and norms as fungible, even disposable, and presses exceptional moments in the direction of a central authority delivering the "will of the people"'.[96]

This new conservative tradition has been the subject of other criticism as well, both from those sharing broadly similar concerns about the growth of judicial power as well as those who do not. Some political constitutionalists—notably, Richard Bellamy—argue that the new conservative tradition bears only superficial similarity to the social democratic, republican and liberal accounts of political constitutionalism, and that it should not be subsumed within the political constitutionalist school of thought.[97] This is unconvincing insofar as it overlooks the fact that political constitutionalism has long been ideologically promiscuous, with its core commitments capable of taking root in a wide variety of ideological traditions, including conservatism. Others have bridled at attempts to link this new conservative tradition with the constitutional thought of that man of the left, John Griffith.[98] Martin Loughlin, in particular, objects to attempts to poach Griffith's arguments for a political constitutionalist project that is driven by a very different political orientation, amongst other things. Loughlin says that 'we must acknowledge the nature of manoeuvres being made in the reconstructions of Griffith's arguments';[99] that is to say, the refashioning of arguments inspired by Griffith within a very different ideological tradition from which he himself inhabited.

For my part, I think that Loughlin is both right and wrong. He is wrong to bridle at conservative attempts to draw upon and reconstruct Griffith's thought, but correct to

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[96] This argument has been most forcefully put by Thomas Poole in the context of debates about ministerial advice, and royal assent and Brexit. See Thomas Poole, 'The Executive Power Project', *London Review of Books Blog* (2 April 2019). https://www.lrb.co.uk/blog/2019/april/the-executive-power-project. For a forceful rebuttal, see Richard Ekins, 'Constitutional Government, Parliamentary Democracy and Judicial Power' (Judicial Power Project, 5 April 2019). http://judicialpowerproject.org.uk/constitutional-government-parliamentary-democracy-and-judicial-power-richard-ekins/. For an important discussion, albeit in a different context, of what the author views as the rise of a more authoritarian style of conservative ideology, see Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law Journal* 299.

[97] See e.g. Bellamy (n2).

[98] See e.g. Loughlin (n22).

[99] Loughlin (n22) _.

call for greater explicitness when this is being done. The central claim of my essay is that there has long been a conservative tradition of political constitutionalism that for much of the twentieth century coexisted alongside a social democratic variant, and that over the last ten years or so a new conservative tradition has been emerging. It is unsurprising that this new conservative tradition should have been informed by, and partially parasitic on, other traditions of political constitutionalism. Traditions 'do not stand independently of each other: they overlap, form parts of each other, and problems and questions occurring in one are often resolved in terms of another'.[100] It is certainly the case that several of those participating in the new conservative tradition view themselves as working within an ideologically capacious political constitutionalist school of thought, where certain basic institutional commitments continue to traverse the left and the right. Griffith's Chorley Lecture remains an important reference point and many of his arguments resonate with conservative political constitutionalists, who also see themselves as sharing at least some overlapping concerns with republican political constitutionalists such as Bellamy. For sure, the intellectual inspirations for the new conservative tradition differs, with more stress on the thought of Burke and Oakeshott, and they find support in the work of senior judges such as Lords Sumption and Sales, some of whose judgments will rankle political constitutionalists from other ends of the ideological spectrum. And some of the substantive contexts in which the conservative critique of the courts comes to the fore—such as national security cases, and especially those involving the armed forces—may not attract much sympathy from some others who self-identify as political constitutionalists. But at least until recently, there was a basic continuing coherence between the different interpretations of political constitutionalism. There are signs that this might be changing, as I briefly suggest in the next section.

VI. THE BIFURCATION OF POLITICAL CONSTITUTIONALISM?

I have suggested, then, that political constitutionalism is ideologically capacious, with its main claims, values and assumptions finding expression in a number of ideological traditions—including social democracy, liberalism, republicanism and conservatism. Despite its ideological capaciousness, there has—until recently—been a relatively high degree of coherence within and between the different ideological threads to political constitutionalism. For sure, there have been differences in emphasis, as was illustrated by the sketch of the conservative tradition emblematic of the constitutional thought of the right during the twentieth century. Yet, from across the different ideological

[100] Kekes (n37) 39.

traditions, the proponents of political constitutionalism have coalesced around a similar institutional framework (i.e. a representative democracy organized around legislative supremacy and responsible government, and which is defined by its reliance upon mechanisms of political accountability); a similar set of constitutional values (e.g. political equality and self-government); and largely similar assumptions (e.g. about the proper relationship between law and politics). It is this coherence that for a long time concealed the range of ideological traditions within which political constitutionalism can take root. I now want to suggest that there are signs that this coherence is under strain, and that political constitutionalism may be bifurcating along ideological lines.

The new conservative tradition of political constitutionalism associated with the right that has emerged over the last ten years or so can be contrasted with a radical, nascent understanding of political constitutionalism expounded by a new cohort of left-leaning academics, such as Marco Goldoni, Michael Gordon and Christopher McCorkindale. Animating this new radical understanding is a concern to identify and address the forces that frustrate the political system's capacity for transformative change. Whereas conservatives might view at least some of those forces as furnishing continuity and stability, this cohort of political constitutionalists seem suspicious of how those forces marginalize and exclude certain voices from the political arena. Although sympathetic to and basically supportive of the basic institutional frame of a political constitution, these political constitutionalists search for new sites of political activity that can disrupt the status quo. They seek to illuminate the 'deeply engrained form of entrenchment'[101] that, as they see it, results from the party system, electoral law, campaign finance rules and so forth. Their concerns extend to the pathologies of parliamentary government, such as the sometime failure of legislatures to hold the government to account, and the risk that political representation inside legislatures is all too often inadequate or unequal.[102] Moved in these ways by some of the shortcomings of political processes, they question some of the seeming fundamentals of political constitutionalism, such as whether it must be premised on a model of representative democracy, and ask instead whether there is a need to experiment with new institutional forms, such as citizens juries. Some have even questioned several shibboleths of political constitutionalism, with Goldoni going so far as to argue that

[101] Goldoni (n26) 400.

[102] Goldoni and McCorkindale (n68).

in some circumstances higher order law and strong judicial protection of constitutional rights might be appropriate.[103]

Or to put this differently: if the multiple ideological traditions that comprised political constitutionalist project tended to exhibit a basic unity, this may be changing, and we may be witnessing the bifurcation of political constitutionalism into two less coherent and less unified traditions: a new conservative tradition associated with the right and a new radical variant associated with the left. The conservative tradition—for better or worse—hews quite closely to political constitutionalism as we have known it, while the radical variant seeks to re-imagine the institutional form of political constitutionalism and to interrogate the political and social forces that have shaped it. If we are indeed observing the bifurcation of political constitutionalism, is this to be welcomed? On the one hand, this may be a harbinger of the waning of the ideological consensus that has (until recently) sustained cross-party support in the UK for the political constitution. It might be that a growing gulf between different ideological traditions within political constitutionalism speaks to a loss of faith by at some of its adherents in its basic claims, values and assumptions. More than this, it could be suggested that this is symptomatic of an 'epistemological crisis'[104] brewing within the political constitutionalist project, where its proponents are slowly coming to terms with the limits on using this theory to understand the UK's unsettled constitution. Indeed, parts of the 'internal critique'[105] of political constitutionalism offered by Goldoni might lead some to wonder whether he has argued himself out of the political constitutionalist project altogether. It may be that, in the face of a possible epistemological crisis, Goldoni seeks 'the invention or discovery of new concepts and the framing of some new type or types of theory' that is in 'no way derivable from those earlier positions'[106] that have been so characteristic of political constitutionalism. On the other hand, a better reading, as I see it, is that the disaggregation of the various ideological traditions within political constitutionalism is overdue, and that this is a welcome chance to flush out the tensions and limitations secreted within much of the political constitutionalist scholarship to date. It may be that the bifurcation of political constitutionalism into better-defined and more distinct traditions can cultivate a more self-reflexive debate between its proponents that, in turn, renders explicit the renewed

[103] See e.g. Goldoni (n64).

[104] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) 364.

[105] Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2012) 10 *International Journal of Constitutional Law* 926.

[106] MacIntyre (n104) 362.

relevance of this theory to the UK's rather unhappy contemporary constitutional condition.

VII. CONCLUSION

In recent years political constitutionalists have sought to render explicit the political conditions and social forces that are necessary for a political constitution to flourish in a real world polity. However, largely absent from this 'reflexive' wave has been much attempt to explore how different ideological traditions help or hinder the development of political constitutionalism. This is regrettable: the ideological dimensions to political constitutionalism matter. They matter insofar as cross-party ideological consensus is vital if a political constitution is to endure the whirlwind of competitive party politics within a constitutional order defined by the lack of justiciable limits on the legislature. In this essay I have begun to remedy the neglect of these ideological dimensions by charting a changing conservative tradition of political constitutionalism that helps to explain this theory's connection with and appeal to large sections of the right in the UK over the last century or so. I have explained how this conservative tradition has acquired a heightened prominence and slightly different character over the last ten or so years, defined as it now is by sharp critiques of the expanded role of domestic and supranational courts as well as the decisions of national political authorities that have enabled this. A possible bifurcation within political constitutionalism may be emerging between a conservative tradition associated with the political right on the one hand and a more radical variant associated with the political left on the other. If correct, this suggests that the various ideological dimensions to political constitutionalism are only going to grow in importance.