Political Constitutionalism and Legal Constitutionalism – an imaginary opposition?

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This article argues that the opposition between political and legal constitutionalism can be traced to a cleavage in what philosophers have called the 'social imaginary': the shared understandings that underpin social life. Since social imaginary understandings are by their nature nebulous and ill-defined, political and legal constitutionalism should not be thought of as competing theories or heuristic models, but – more abstractly – contrasting ways of imagining the political world. Drawing on historical and contemporary examples, I argue that my claim is supported by the way in which legal constitutionalism embedded itself as the governing idea in the US and in France, and also by the failure of the 'new Commonwealth model of constitutionalism' to yield a genuinely distinctive alternative to political and legal constitutionalism.

Keywords: political constitutionalism; legal constitutionalism; social imaginary; US Supreme Court; French Constitutional Council; new Commonwealth model of constitutionalism

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1. Introduction

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The word 'imaginary' is often used as a synonym of 'unreal'. Thomas Hobbes, for instance, described ghosts as 'the imaginary inhabitants of man's brain'.[1] What Hobbes meant was that ghosts do not exist. This article argues that there is an imaginary opposition between political and legal constitutionalism. But I do not mean to suggest that the opposition between political and legal constitutionalism does not exist. On the contrary, it is my contention that the opposition is both real and important. In labelling the opposition 'imaginary', I mean that it pertains to what philosophers have called the 'social imaginary', the 'common understanding that makes possible common practices and a widely shared sense of legitimacy'.[2] My thesis is that the opposition between political and legal constitutionalism can be traced to a cleavage in the social imaginary. While political practices in modern western democracies are premised on shared basic understandings about fundamental constitutional ideas – 'law', 'politics', 'representation', 'the separation of powers' and so on – two incompatible ways of arranging these ideas have arisen. This is the root of the political-legal constitutionalism divide: the modern constitutional imaginary permits us to imagine the constitution essentially as a matter of politics or as a matter of law.

[1] Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991) pt III, ch XXXIV.

[2] Charles Taylor, *Modern Social Imaginaries* (Duke University Press 2004) 23. The term 'social imaginary' was coined by Cornelius Castoriadis (*The Imaginary Institution of Society* (Kathleen Blamey tr, Polity Press 1987)) and the notion has been developed by a wide range of writers, including Paul Ricoeur (*Lectures on Ideology and Utopia* (George H Taylor ed, Columbia University Press 1986)), Craig Calhoun ('A World of Emergencies: Fear, Intervention and the Limits of Cosmopolitan Order' (2004) 41 Canadian Review of Sociology and Anthropology 373), Benedict RO'G Anderson (*Imagined Communities: reflections on the origins and spread of nationalism* (Verso 2006)), Manfred B Steger (*The Rise of the Global Imaginary: political ideologies from the French Revolution to the global war on terror* (Oxford University Press 2008)), as well as Taylor. For an overview of the literature, see Dilip Parameshwar Gaonkar, 'Toward New Imaginaries: an introduction' (2002) 14 Public Culture 1. While the concept has not been widely employed in legal studies, it is prominent in the work of Paul W Kahn (*Political Theology: four new chapters on the concept of sovereignty* (Columbia University Press 2012)) and more recently has been invoked by Martin Loughlin ('The Constitutional Imagination' (2015) 78 MLR 1) and Zoran Oklopcic (*Beyond the People: social imaginary and constituent imagination* (Oxford University Press 2018)).

This thesis, if correct, explains why, despite the debate having preoccupied constitutional theory for a number of years now, no canonical definition of political or legal constitutionalism exists.[3] The shared understandings of the imaginary are by their very nature vague and nebulous, and so if political and legal constitutionalism are competing arrangements of imaginary understandings, it would be misleading to try and boil down the debate to any particular well-defined theoretical controversy. Differences in how the political world is imagined stand behind, motivating but not reducible to, specific theoretical disagreements.

The thesis also explains why the dispute between political and legal constitutionalists has persisted, to the frustration of those who have seen clear strengths and weaknesses in the arguments of either side.[4] For if what we are dealing with here are two incompatible ways of imagining the political world, then we cannot simply agree to accept a balanced intermediate position. The debate between political and legal constitutionalists is not simply about how much weight should be given to competing values, with the former side prioritising democracy and the latter human rights. It is about which understanding of the nature of democratic political practices is most capable of making sense to modern citizens, accommodating the normative demands that we make on a political regime and providing a coherent legitimating narrative capable of yielding ongoing stability. While there is nothing to say that political and legal

[3] Gee and Webber have explicitly made this point in relation to political constitutionalism: see Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30 OJLS 273. See also Jo Eric Khushal Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 OJLS 427.

[4] For example: Mark Elliott and Robert Thomas, *Public Law* (3rd ed, Oxford University Press 2017) 39: 'it is simplistic to suppose that a given constitutional system must opt for one or other of those two models'; Aileen Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62 CLP 102, 112: 'the goal of securing popular participation must be *balanced* against other valuable goals' (emphasis in original); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: theory and practice* (Cambridge University Press 2013) 1: '[The new Commonwealth model of constitutionalism] provides novel, and arguably more optimal techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance than under either of these two lopsided models.'

constitutionalism must remain the exclusive options, any 'third way'[5] will have to (literally) capture the imagination of officials and citizens and provide a new way of understanding the nature of a constitution and the relationship between politics and law.

The value of the debate between legal and political constitutionalism has recently been called into question by some distinguished commentators,[6] who have criticised those who have depicted legal and political constitutionalism as rival normative theories,[7] or deliberately extreme ideal types.[8] Aileen Kavanagh has argued that 'political and legal constitutionalism are held together – if at all – by theme rather than thesis', the former being 'a general pro-Parliament/anti-court outlook on public law issues' and the latter 'a more supportive orientation towards judicial power'.[9] I agree with this characterisation of the divide, but reject the conclusion that Kavanagh draws from it: that we should cease to think of our constitutional theory in terms of 'political *versus* legal constitutionalism'.[10] For even if one has found much of the debate unproductive, the question still arises: *why* has a dispute over whether the solution to the problem of executive accountability should be 'more Parliament' or 'more courts' come to be seen as a 'battle for the soul of the British constitution'?[11] The answer, as I shall argue, is that underlying this debate lies a clash between two incompatible ways of imagining the political world.

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[5] Gardbaum (n 4) 51: 'The essential case for the new Commonwealth Model is that it is to forms of constitutionalism what the mixed economy is to forms of economic organization: a distinct and appealing third way in between two purer but flawed extremes.'

[6] Aileen Kavanagh, 'Recasting the Political Constitution: from rivals to relationships' (2019) 30 KLJ 43; Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 KLJ 5.

[7] Kavanagh, 'Recasting the Political Constitution' (n 6) 53-61; Loughlin, 'The Political Constitution Revisited' (n 6) 12-15.

[8] Kavanagh (n 6) 61-3; Loughlin (n 6) 16-19.

[9] Kavanagh (n 6) 61.

[10] Kavanagh (n 6) 44.

[11] Kavanagh (n 6) 44, quoting A McHarg, 'Reforming the United Kingdom Constitution: law, convention, soft law' (2008) 71 MLR 853, 853.

This essay is divided into two parts. The first expands on the idea that the divide between political and legal constitutionalism is traceable to a cleavage in the social imaginary. While Charles Taylor's description of the social imaginary, quoted above,[12] will serve as a working definition, the concept is perhaps somewhat difficult to grasp in the absence of a concrete example. To illustrate what I have in mind, I trace an account of the modern constitutional imaginary. Armed with this basic idea, I then attempt to show how political and legal constitutionalism can be understood as incompatible configurations of the basic shared understandings of the constitutional imaginary, taking the work of JAG Griffith and TRS Allan respectively as representative of the two ways of imagining the political world. The first part of the essay closes with an explanation of how my thesis differs from the various ways in which the political-legal constitutionalism divide has been understood in the literature to date.

The second part of the essay looks at historical and contemporary examples which I believe support my thesis. I look at the early history of constitutional review in the US and in France, which shows legal constitutionalism embedding itself as the governing idea in those jurisdictions not through the widespread acceptance of normative argument, but through the impact of symbolic connections between the practice of constitutional review and the basic idea that the constitution is a form of fundamental law. This suggests that what has become embedded is not a specific theory, but rather a loose (but powerful) way of understanding the relationship between law and politics. I then examine the so-called 'new Commonwealth model of constitutionalism',[13] noting that it has failed to yield a genuinely distinctive alternative to political and legal constitutionalism. This indicates that without an overarching vision of the

[12] n 2.
[13] Gardbaum (n 4).

relationship between law and politics capable of legitimating institutional practices, attempts at a hybridisation between political and legal constitutionalism will prove unstable.

2. Political and Legal Constitutionalism as Incompatible Ways of Imagining the World

A. The Modern Constitutional Imaginary

If there is anything like a universal characteristic of human nature, it is that humans are always trying to make sense of their experiences. Out of the constant bombardment of sense-data, they construct myths and legends, spirits and gods, stories and theories, categories, kinds and concepts, to impose order onto chaos and attach meaning to their existence, to their past, present and future. The social imaginary is the medium through which a society links together various actions, entities and values into a relatively clear, comprehensible and stable constellation of meaning. It provides a broad, abstract framework that allows members of society to organise various phenomena and so derive order and meaning from multitudinous goings-on.

While modern societies are characterised by a remarkable diversity of opinion on the question of how social life ought to be organised, some shared horizon of meaning is essential: without any common vantage-point, the maintenance of collective social practices would be impossible. Notwithstanding the lack of consensus over questions of justice, rights and the common good, modern political regimes are undergirded by a rich web of shared understandings, which we may call the *modern constitutional imaginary*.[14] The modern constitutional imaginary is a constitutive component of liberal democracy, lending meaning to and thus legitimating

[14] With a nod to Taylor (n 2).

democratic political practices. While a full account of the modern constitutional imaginary would be beyond the scope of this essay, a few key features can be identified.[15]

One of the most basic shared ideas in modern western societies is the notion that members of a political community comprise a *public*.[16] While medieval subjects were bound together by bonds of fealty, modern citizens are co-participants in 'public debate' and bearers of 'public opinion'. The fact that modern societies are characterised by widespread political disagreement is testament to an underlying acceptance of the legitimacy of debate.[17] Linked to this is a shared understanding about the purpose of politics: it exists to promote a collective interest that is the proper subject of debate and contestation. Politics is the pursuit of the public interest.

Another shared understanding unique to the modern era is that of representative democracy. In ancient thought, democracy was conceived of in terms of participation – to 'rule and be ruled in turn'[18] – so that 'representative democracy' would have appeared a contradiction in terms. Today, however, citizens who are *individually* bereft of political power are conceived of as *collectively* controlling the political process, through elections and (more indirectly) through the force of public opinion.[19] These ideas of the public and of representation are fundamental to modern political regimes. Despite the prevalence of deep and persisting

[15] In what follows, I am indebted to Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004).
[16] See Jürgen Habermas, *The Structural Transformation of the Public Sphere: an inquiry into a category of bourgeois society* (Thomas Burger and Frederick Lawrence tr, Polity 1992); and Charles Taylor, 'Liberal Politics and the Public Sphere', in *Philosophical Arguments* (Harvard University Press 1995).
[17] See Alexander Latham-Gambi, 'Jeremy Waldron and the Circumstances of Politics' (2021) 83 Rev Pol (forthcoming).
[18] Aristotle, *The Politics* (Stephen Everson tr, Cambridge University Press 1988) Book VI, pt ii.
[19] While it is true that there are certainly large numbers of citizens in modern societies who complain that they do not feel represented by those who rule in their name, the clamour is not generally for more intensive opportunities for political participation (such as sortition), but rather for a different (more inclusive, perhaps, or more authentic) form of representation. To the extent that populist movements do denounce the very idea of representative democracy, they can be seen to be challenging the basic understandings underlying modern liberal politics.

disagreement in relation to political matters, no hopeful politician today could hope to gain any support if he advocated abandoning the public interest, ignoring public opinion, or rejecting the role of a democratic representative.

A more detailed examination would reveal further basic ideas, for example: individual members of the political community are conceived of as rights-bearing citizens; the powers of political rulers are defined by a constitution; political power separates into the legislative, executive and adjudicative; individuals enjoy a private life that should be free from political interference; there exists such a thing as civil society, a realm of associations separate from the state; and so on. For the purpose of examining political and legal constitutionalism, however, the most important ideas are those of *law* and *politics*.

B. A Cleavage in the Constitutional Imaginary

Feudal society was characterised by a strong shared understanding of the nature of the relationship between law and politics, with law the reflection of a transcendental order and politics the craft of managing a relatively narrow band of affairs of state.[20] Modern societies, on the other hand, lack such unified understanding of this relationship. But this is not to say that they are without *any* shared understanding of the nature of law and politics. For example, while there is an array of modern theories of law, they are all underpinned by the idea that law is a form of *order* that allows members of society to go about their lives without the fear of having their expectations frustrated. Law is also intimately linked with the idea of *impartiality*, even if it is not clear precisely what this concept entails.[21] I have already identified the notion of politics as

[20] See Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010 ch 1; and Chris Thornhill, *A Sociology of Constitutions: Constitutions and state legitimacy in historical sociological perspective* (Cambridge University Press 2011) ch 1.
[21] Legal theorists of different stripes have converged on these basic ideas: see, for example, Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) ch II; John Rawls, *A Theory of Justice* (Clarendon Press 1973) §38; Joseph Raz,

public affairs as a crucial component of the constitutional imaginary. Modern politics is an arena of public contestation and debate. We identify politics with the 'forum', which – though distinct from the 'market' – is nevertheless a place of competition as well as cooperation.[22]

Modern law and politics are thus premised upon certain fundamental understandings, albeit in an inchoate, fragmentary form. In the absence of a unified vision, fragmentary understandings may be pieced together in different ways. This is, I suggest, the root of the political-legal constitutionalism divide. On the basis of the very same set of basic notions, two different ways of imagining the structure of the political world have developed. Political and legal constitutionalism are two relatively stable arrangements of constitutional imaginary understandings, two different frameworks for understanding what is going on in the political world.

An overview of these competing visions can be concisely given. For political constitutionalism, the fundamental, defining role of politics is the management of disagreement, where disagreement is imagined as a natural feature of social life. Law is conceived of as a tool capable of managing disagreement by providing a set of partial and provisional settlements that allow social life to proceed on a relatively stable footing, and the constitution comprises those processes and institutions through which disagreement is managed in a more-or-less peaceable manner. While the constitutional framework may be relatively stable, it is the product of ongoing political action and, as such, retains an inherent contestability. The relationship between politics and constitution is therefore akin to the relationship between a river and its banks: while on one

'The Rule of Law and its Virtue', in *The Authority of Law: essays on law and morality* (Clarendon Press 1979); and John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) X.4.

[22] See John Elster, 'The Market and the Forum' in James Bohman and William Rehg (eds), *Deliberative Democracy: essays on reason and politics* (MIT Press 1997).

hand riverbanks are relatively stable and succeed in channelling the river's flow, on the other hand they are continually shaped by the river – usually gradually, but potentially also suddenly and dramatically. Furthermore, one cannot meaningfully talk about riverbanks as if they were in any way separate from (or prior to) the river. For the political constitutionalist, the constitution is continually shaped by – and cannot be detached from – ongoing political action: it 'lives on, changing from day to day, for the constitution is no more and no less than what happens'.[23] Hence the basic framework of a political community is essentially a matter of politics. This vision has an inherent normative dimension: politics is seen as a mainly healthy and democratic mechanism for negotiating disagreement.[24] Any notion of 'higher law' – law superior to politics – is therefore viewed as at best stultifying the community's democratic agency and at worst a medium of anti-democratic domination.

Legal constitutionalism does not deny the existence of political disagreement, but it takes a different view as to its nature and significance.[25] Rather than viewing disagreement as natural and inevitable, legal constitutionalists imagine disagreement as something to be worked through, in the pursuit of consensus over matters of principle.[26] Political processes and institutions are seen as embodying those fundamental principles that undergird the political community. As the constitutional order is premised on these shared principles, it can be understood as impartial, and

[23] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19.
[24] It has been suggested to me that my claim that Griffith's political constitutionalism is grounded upon a normative thesis would be denied by Loughlin, who has argued that Griffith's work has been, *ex post facto*, 'repackaged' as a normative theory (Loughlin (n **Error! Bookmark not defined.**) 12). However, I take Loughlin to be arguing only against the view that Griffith's account was *purely* normative. As he goes on to state later in the same article, 'Griffith's account was not "entirely" descriptive' (ibid 14).
[25] It is true, as Jeff King has pointed out ('Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30 Const Comment 101, 114), that 'legal constitutionalism' is a label mainly invoked by political constitutionalists to describe their opponents' position, and that the characterisation of legal constitutionalism by political constitutionalists is not always fair (King rightly criticises the 'six tenets of legal constitutionalism' set out by Adam Tomkins, *Our Republican Constitution* (Bloomsbury Publishing 2005) 11). However, it is clear that the vision of the constitution that I label 'legal constitutionalism' is widely shared, and that it stands in opposition to 'political constitutionalism'.
[26] For a classical statement see John Rawls, *Political Liberalism* (Columbia University Press 2005) lecture VI.

thus having the character of 'higher law'. The democratic agency of the community lies in the process of public reasoning that yields consensus over those matters of principle that animate the law, and so the legal constitution is understood as essentially democratic in nature.

Thus described, political and legal constitutionalism are not two competing *theories*: they are much less well-defined and more indeterminate than that. Belonging to the social imaginary, they stand behind – motivating, but not reducible to – specific theoretical disagreements. Legal and political constitutionalist theories are thus built upon incompatible ways of imagining the political world. This background incompatibility between the two sets of ideas manifests itself in the mutual incomprehension that frequently surfaces between those working on opposite sides of the divide. The writings of Griffith and Allan serve as a case in point.

Starting with an understanding of politics as public contestation, Griffith argues that such contestation is an unavoidable and mostly healthy feature of modern societies, which ought not to be unwarrantedly suppressed.[27] He then posits law as a potential threat to politics. In line with the political constitutionalist vision, Griffith sees law as a useful tool so long as it is contained within an overarching political framework, that is to say, a (political) constitution premised on the prime importance of ongoing public debate. But if law is not appropriately contained, it will threaten to ossify the political order, suppress political disputes and close down the space for public contestation. Legal limits to political action, such as judicially-enforceable bills of rights, cabin the democratic agency of the public within relatively fixed boundaries. Furthermore, law does not in fact resolve the conflicts that underlie politics – it merely removes them from the political domain. Therefore, a 'legal constitution' is a kind of a fraud, purporting to constitute a

[27] For Griffith's political constitutionalism see Griffith, 'The Political Constitution' (n 23); 'The Brave New World of Sir John Laws' (2000) 63 MLR 159; 'The Common Law and the Political Constitution' (2001) 117 LQR 42; and Graham Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28 LS 20.

community on the basis of an impartial order, when in fact the constitution will inevitably be shaped by power struggles between groups with differing interests and ideologies.

In contrast, Allan's conception places the idea of law as impartial order at the centre.[28] Impartiality, he reasons, requires equal treatment. Thus the role of law is to enforce a substantive moral standard, restraining the use of force in such a way that is compatible with equal citizenship. While he accepts that politics is an ongoing process of public contestation, he argues that citizens cannot be expected to accept the outcome of this process no matter what. Law serves as a guarantor that the outcomes of political struggles will remain compatible with citizens' status as moral equals. It might do this through strong constitutional review, although Allan holds that it can usually achieve its ends through simply interpreting political enactments on the assumption that the legislature intends citizens to be treated as moral equals.

Interestingly, each side accuses the other of relying on an exaggerated dichotomy between law and politics. As is well-known, Griffith's 'fundamental objection' to entrenched bills of rights was that 'law is not and cannot be a substitute for politics… To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.'[29] Elsewhere he chides Sir Stephen Sedley for supposedly overlooking the fact 'that law is politics carried on by other means',[30] while Adam Tomkins charges legal constitutionalists with believing that 'law is autonomous to and superior over politics' (in contrast, he says, to political constitutionalists, who hold 'that law is nothing more than a sophisticated (or elitist)

[28] For Allan's legal constitutionalism see TRS Allan, *Law, Liberty and Justice: the legal foundations of British constitutionalism* (Oxford University Press 1994); *Constitutional Justice: a liberal theory of the rule of law* (Oxford University Press 2003); and *The Sovereignty of Law: freedom, constitution and common law* (Oxford University Press 2013).
[29] Griffith (n 23) 16. See also Richard Bellamy, *Political Constitutionalism: a republican defence of the constitutionality of democracy* (Cambridge University Press 2007) 149.
[30] Griffith, 'The Common Law and the Political Constitution' (n 27) 59.

discourse of politics').[31] Yet far from embracing a clear-cut distinction between law and politics, legal constitutionalist Ronald Dworkin tells us that: 'Law… is deeply and thoroughly political.'[32] Allan turns the tables on the political constitutionalists, stating: 'We cannot … fix the division between law and politics on the basis of abstractly formulated doctrinal categories, as Griffith seems to suppose.'[33] It should be clear from this mutual finger-pointing that the two sides understand the ideas of 'law' and 'politics' in incompatible ways. Griffith and Tomkins view political conflict as the driving force that shapes the constitution, and thus interpret legal constitutionalists as attempting to bypass or transcend such conflict – an attempt they see as doomed to fail. They emphasise the political nature of law to make clear that any legal settlement of a contested issue will itself be controversial. Dworkin and Allan, on the other hand, interpret political constitutionalists as attempting to hive off certain issues from the demands of constitutional principle. They emphasise the political nature of law to make clear that the fact that an issue is politically controversial does not free political officials from their obligation to treat citizens with equal concern and respect. Both claims make sense on their own terms, but they are premised on incompatible frameworks.

Seeing the divide between political and legal constitutionalism as a cleavage in the constitutional imaginary can help us understand this apparent mutual incomprehension. It should not surprise us that a debate between theorists who have as their starting-points fundamentally incompatible notions of 'law' and 'politics' will sometimes feel like it is being conducted at

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[31] Adam Tomkins, 'In Defence of the Political Constitution' (2002) 23 OJLS 157, 158. In the quoted passage, Tomkins does not use the terms 'legal constitutionalists' and 'political constitutionalists', but rather opposes 'red-light' and 'amber-light' theorists on one side against 'green-light' theorists on the other. But the way he uses these terms makes clear that he equates the former with legal constitutionalists and the latter with political constitutionalists. (The terms 'red-light', 'amber-light' and 'green-light' theory derive from Carol Harlow and Richard Rawlings, *Law and Administration* (2nd ed, Butterworths 1997).)

[32] Ronald Dworkin, 'How Law is Like Literature' in *A Matter of Principle* (Clarendon 1986) 146.

[33] Allan, *The Sovereignty of Law* (n 28) 304.

cross-purposes. On the other hand, the political and legal constitutional imaginaries are built up out of the same basic components: each accepts that law is a form of impartial order and politics a form of public contestation. Thus those who tend to view the world along political-constitutional lines will not find legal constitutionalism wholly unintelligible, and *vice versa*. Indeed, many may find that their vision oscillates from one perspective to the other. Like the 'duck-rabbit' drawing, most of us are capable of seeing things sometimes one way and sometimes the other: in any given moment it will depend to a significant extent on what we are looking for.[34]

C. A Word on the Alternatives

To give a clearer sense of what is distinctive about my thesis, I should briefly explain how thinking of political and legal constitutionalism as conflicting arrangements of constitutional imaginary understandings differs from other ways of conceiving of that divide.

(i) Theories

It is important to distinguish constitutional imaginary from constitutional theory. A theory is a conscious attempt to describe, explain and/or evaluate. It may be held only by small numbers of experts – or perhaps even a single thinker. The constitutional imaginary, by contrast, is broader, more inchoate and more implicit. While a theory is an attempt to render things clear and precise, the imaginary is by its very nature incapable of neat analytical expression. Since it comprises those shared understandings underlying common political practices, it cannot conceivably be the property of a single mind or an intellectual elite. The nebulous quality of the imaginary enables us to disagree – often wildly and passionately – on constitutional issues. At the same time, the

[34] See Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, Blackwell 1968) IIxi.

fact that we share imaginary understandings means that we have genuine disagreements rather than simply a confused panoply of cross-purposes.

There are, of course, political and legal constitutionalist theories (such as those of Griffith and Allan discussed above). Such theories attempt to systematise our concepts and to justify particular claims about what the constitution is and/or how it should operate. If my thesis is sound, then theories of political and legal constitutionalism elaborate and refine two incompatible inchoate visions. As I noted above, this explains why constitutional theorists so often seem to be talking across one another. It also explains why the essence of the political-legal constitutionalist divide has been difficult to pinpoint. Well-defined controversies can be identified across a number of fronts, including clashes between different theories of law (positivism versus non-positivism),[35] conceptions of constitutionalism (positive-republican versus negative-liberal),[36] methodologies (functionalist versus normativist),[37] conceptions of liberty (non-domination versus non-interference),[38] moral theories (utilitarianism versus Kantianism) [39] and systems of constitutional design (legislative supremacy versus judicially-enforceable bills of rights).[40] In each of these sets of oppositions, we can associate political constitutionalism with the former term and legal constitutionalism with the latter, but none of

[35] Griffith (n 23); Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 ICON 86, 90-91.
[36] Richard Bellamy, 'The Political Form of the Constitution: the separation of powers, rights and representative democracy' (1996) 44 Pol Stud 436; Eric Barendt, 'Is there a United Kingdom Constitution?' (1997) 17 OJLS 137.
[37] Martin Loughlin, *Public Law and Political Theory* (Oxford University Press 1992); Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30 KLJ 74.
[38] Bellamy, *Political Constitutionalism* (n 29) ch 4; Tomkins, *Our Republican Constitution* (n 25) ch 2.
[39] Griffith (n 23); John Laws, 'The Good Constitution' (2012) 71 CLJ 567.
[40] This issue has become so closely associated with the political/legal constitutionalism debate that Gardbaum feels free to use 'constitutional supremacy, judicial supremacy and legal constitutionalism' and 'parliamentary sovereignty, legislative supremacy and political constitutionalism' 'more or less synonymously' (Gardbaum (n 4) 16). To see that this reduction is misleading, one only needs to consider Allan's argument that the 'sovereignty of law' can be achieved without the existence of a judicial strike-down power (Allan, *The Sovereignty of Law* (n 28) 323-31). And the 'popular constitutionalism' described by Larry D Kramer in *The People Themselves: Popular sovereignty and judicial review* (Oxford University Press 2005) might be thought of as a form of political constitutionalism that accepts judicial review of legislation.

them map perfectly onto the political-legal constitutionalist divide: one may be a non-positivist political constitutionalist, say, or a legal constitutionalist utilitarian. So it would be misleading to try and boil down the debate into one or more of these specific theoretical divides. On the other hand, something would be lost if we were to cast the ideas of political and legal constitutionalism aside and focus solely on the more well-defined questions. My thesis is able to explain both the elusiveness and the persistence of the debate.

(ii) Models

Political and legal constitutionalism are often referred to as 'models'.[41] The term is usually used casually and it is not at all clear that those who do so have in mind any particular conception of the ontological status of the political-legal constitutionalist divide. Graham Gee and Grégoire Webber are an exception: they explicitly propose that we should think of political constitutionalism as a 'normative model', supplying an 'explanatory framework within which to make sense of a real world constitution'.[42] Their conception of a 'model' is, however, different from the way in which the term is typically used in the social sciences,[43] being closer to a Weberian 'ideal type'. I thus need to distinguish what I have called 'stable arrangements of constitutional imaginary understandings' both from models conventionally understood and from Weberian ideal types.

In general terms, a model of X is something that resembles X in certain respects and which is used to describe, explain or predict X's behaviour.[44] The simplest kind of model is a

[41] For example by Tomkins (n 38); Gee and Webber (n 3); Bellamy (n 29); and Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2012) 10 ICON 926.
[42] Gee and Webber (n 3) 290, 291.
[43] See, for example, Charles A Lave and James G March, *An Introduction to Models in the Social Sciences* (Harper & Row 1975).
[44] See Roman Frigg and Stephen Hartmann, 'Models in Science', *Stanford Encyclopedia of Philosophy* (Summer edn, 2018) https://plato.stanford.edu/archives/sum2018/entries/models-science/ accessed 27 February 2020.

physical model: an anatomical model can be used to describe how the human body works; a scale model of an aircraft can be used to predict the behaviour of the aircraft in flight; a bucket of water, swung around one's head, can serve as a model of the earth's orbit to explain why gravity does not cause the planets to all come crashing into the sun. These models achieve their goals by reproducing the pertinent features of the phenomenon under study in a simplified, more tractable form. Non-physical models – that is, models that consist of ideas – can be used in the same way. The notion of an object sliding along a frictionless plane can be used as a model to predict the movement of real objects on real surfaces. John Rawls used the model of a 'well-ordered society' to explain why (he believed) his two principles of justice are binding in the real, non-well-ordered world.[45] Like physical models, these idealised models work by allowing us to focus on the most pertinent features of a phenomenon without being troubled by other factors. Those features which have been bracketed away are either so negligible that they can be disregarded (e.g. the effect of air resistance on a falling anvil), or can be safely catered for by being reintroduced later (thus Rawls advocated developing 'partial compliance theory' to deal with the ways in which real societies diverge from the ideal).[46] So, the key feature of a model is that it functions as a simplified approximation of reality for the purpose of rendering certain problems more tractable.

There is a sense in which imaginary understandings also serve to render reality more tractable. As I alluded to earlier, it is through the imaginary that humans impose order onto chaos: it allows what would be a baffling array of sense-data to take meaningful form. Ideas of law and politics, representation, the public interest, etc., afford ways in which various phenomena can be lent

[45] See Rawls (n 21) especially §69.
[46] See ibid 8.

shape and come to terms with. However, when we use a model, we accept that there exists a reality, separate from the model, of which the model is a simplification.[47] The imaginary works quite differently: it does not approximate or simplify social reality so much as *constitute* it. It is our shared understandings about the political world that enable political actions and institutions to be the kind of things that they are. For example, shared understandings enable the physical act of placing a cross on a piece of paper to take on the significance of a *vote*, rendering it an instrumental mechanism for allocating political power and, further, an expression of political freedom, a signifier of respect for the citizen's equal membership of the political community and so on.[48] If I am right that political and legal constitutionalism are arrangements of social imaginary understandings, then they are not so much competing attempts to simplify the constitutional landscape, as different ways of attributing meaning to constitutional goings-on.

(iii) Ideal types

As noted above, when Gee and Webber describe political and legal constitutionalism as 'models', they do not appear to be using the term in the sense employed in the previous subsection. Rather than viewing the two concepts as competing simplifications of the real world, they argue that their utility is realised by viewing them as the extreme poles of a spectrum, where reality will always fall somewhere between the two – not so much approximations to reality as

[47] Hence Box's well-known aphorism, 'all models are wrong but some are useful' (GEP Box, 'Robustness in the Strategy of Scientific Model Building' in Robert N Launer and Graham N Wilkinson (eds), *Robustness in Statistics* (Academic Press 1979) 202.
[48] Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25 Rev of Metaphysics 3, 25-7.

stylised exaggerations of it.[49] What Gee and Webber have in mind here is what Max Weber called 'ideal types': 'one-sided *accentuation[s]* of one or more points of view'.[50]

Weber claimed a number of uses for the ideal type. Firstly, it allows individual phenomena to be grouped together and categorised without excessive concern about the differences between them, for example we can usefully classify the economies of the US, Germany and France as 'capitalist' in nature because they all share similarities with the capitalist ideal type. Secondly, the ideal type helps us describe individual phenomena by allowing us to point to the discrepancies between the phenomenon and the ideal type, such as when we describe the French economy by pointing to the ways in which it departs from pure capitalism. Thirdly, ideal types can help determine causal explanations of historical events: asking what Hannibal, Henry VIII or Hitler would have done had they behaved with pure *Zweckrationalität*[51] allows us to see how their actions are attributable to non-instrumental considerations.

Gee and Webber claim that their conception of legal and political constitutionalism enables us to see 'how it can be true *both* that a real world constitution will embrace both models *and* that a political model and a legal model are, at least in some significant respects, at odds'.[52] Accentuated versions of political and legal constitutionalism attempt, not to describe reality as such, but to provide points of contrast against which reality can be described. Armed with these ideal types, we can point to aspects of both 'political constitutionalism' and 'legal constitutionalism' in the UK: select committees, ministers' questions and an independent civil

[49] Gee and Webber (n 3) 291-3.
[50] Max Weber, '"Objectivity" in Social Science' in *The Methodology of the Social Sciences* (Edward A Shils and Henry A Finch eds and trs, Free Press 1949) 90 (emphasis in original). For Weber's account of the ideal type see, in particular, ibid 89-110; and Max Weber, *Economy and Society: an outline of interpretive sociology* (Guenther Roth and Claus Wittich eds, Ephraim Fischoff et al trs, University of California Press 1978) 19-22.
[51] Meaning 'instrumental rationality', this is Weber's term for the mode of behaviour of the egoistic calculator of classical economic theory.
[52] Gee and Webber (n 3) 293.

service on one hand; judicial review of administrative action, the Human Rights Act and an independent judiciary on the other. We can discuss the 'political' elements within the largely 'legal' US constitution, or 'legal' elements within the largely 'political' Australian constitution. When used in such a way, 'political constitutionalism' and 'legal constitutionalism' play the standard roles of ideal types in descriptive/comparative analysis.

However, while there may be a certain taxonomic value in being able to categorise constitutions along a political/legal spectrum, there is a drawback to this way of thinking. If we view political and legal constitutionalism as two extreme poles between which any sensible constitution must chart a course, the clash of ideas *between* political and legal constitutionalism becomes portrayed as entirely misguided, silly even. With each side of the divide presented in a caricatured form, the desirability of a sensible compromise between the two extremes appears obvious. We are left perplexed as to how there could have been a debate between political and legal constitutionalism in the first place.

Of course, some debates are phoney; sometimes is it possible for an insightful observer to discover that two seemingly implacably opposed sides have much more in common than they themselves believe.[53] But we should be slow to jump to this conclusion, and we certainly should not do so by the fiat of how we define our terms. Political and legal constitutionalism are not merely theorists' taxonomical categories, they manifest themselves in real, practical disagreement about how constitutions should be designed and operate. If we want to understand what truly divides political and legal constitutionalists, we cannot find the answer in simplified

[53] For an impressive attempt to do this in relation to debates over abortion and euthanasia see Ronald Dworkin, *Life's Dominion: an argument about abortion and euthanasia* (Harper Collins 1993).

models or exaggerated ideal types, we need to understand how the division stems from the way in which actors themselves view the world.

(iv) Styles

Within the public law literature, the idea closest to my thesis is Martin Loughlin's identification of what he calls 'styles of public law thought': 'functionalism' (roughly equatable with political constitutionalism) and 'normativism' (roughly equatable with legal constitutionalism).[54] He describes a 'style' as 'a spirit, culture or set of values that may be manifest in particular writings even though it is not made explicit'.[55] There are many similarities between styles and sets of imaginary understandings. Like imaginary understandings, styles cannot be pinned down to precise definitions: what links adherents of a style of thought is not a set of canonical beliefs or theoretical premises but a vaguer set of tendencies and viewpoints. The features of a style are not connected by logical implication but sit loosely together, reinforcing one another as much symbolically as rationally. Styles, like imaginary understandings, are nebulous, fluid, implicit ways of viewing the world.

However, Loughlin's subject of analysis is the work of public law scholars: 'styles' are styles *of academic scholarship*. But the political-legal constitutionalism divide is not merely an academic phenomenon: it can be found embedded within real-world practices. The academic styles that Loughlin identifies are grounded in more basic schemes of understanding. Styles sit somewhere between the imaginary and particular theories: theories are neatly defined sets of normative/explanatory claims; styles comprise more loosely defined sets of theories that share certain features; styles are themselves undergirded by sets of imaginary understandings that are

[54] See Loughlin (n 37) ch 4.
[55] ibid 58.

shared between theorists but also between ordinary citizens, many of whom will be committed to no particular theoretical position. The functionalist and normativist styles of public law thought can thus be seen as a manifestation of the political-legal constitutionalist divide in the academy. The divide itself is a broader phenomenon.

3. Imaginary Understandings in the Real World

If I am right that the political-legal constitutionalist divide at root concerns basic widely-shared understandings, then we should expect to see evidence of the political and legal constitutionalist imaginaries not just in the work of constitutional theorists, but also in the way in which constitutional systems function in practice. This section looks to provide such evidence, by reference to three examples. The first two examples are illustrations of what Alexander Somek has called 'the predicament that once a constitutional system embraces judicial review, the debate of constitutional questions becomes invariably "juridified"'.[56] The early history of constitutional review in the US and France shows an understanding of the constitution as essentially legal in nature becomes dominant *after* the practice of constitutional review is institutionalised. The reason for this, I suggest, is that the simplest way of making sense of constitutional review is to see it as exemplifying the legal constitution in action. Constitutional review thus provides a symbolic representation of the legal constitutionalist way of understanding the world, helping legal constitutionalism to become entrenched as the governing constitutional imaginary. The success of legal constitutionalism thus derives not from triumph in normative debate, but from the fact that it provides a stable arrangement of basic understandings

[56] Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 7.

that are able to explain the practice of judicial review in a way that makes sense to modern citizens.

The third example examines a recent set of innovations in constitutional design that might be interpreted as attempts to collapse the political-legal constitutionalism dichotomy: the 'new Commonwealth model of constitutionalism'.[57] Whatever other merits this model might have, it has failed to emerge as a genuinely distinctive alternative to political and legal constitutionalism: where it has been tried it has invariably collapsed into either one or the other. This illustrates the significance of political and legal constitutionalism as basic and incompatible ways of understanding the (legal-political) world. One cannot simply combine the best elements of each or try to balance one off against the other: without an overarching vision of the law-politics relationship capable of legitimating institutional practices, attempts at hybridisation will prove unstable.

A. The US Supreme Court as the 'Guardian of the Constitution'

The US Supreme Court is a powerful and prestigious institution. Over the last 230 years, its decisions have had a dramatic impact on American politics and society. Among the American public, it is far more well-respected than the 'political' branches of government: Congress and the presidency.[58] Its decisions on hotly-debated topics (such as abortion, capital punishment, campaign finance and same-sex marriage) are often controversial, but its authority is seldom

[57] See generally Gardbaum (n 4).
[58] See Gallup poll data on 'Trust in Government', available at <https://news.gallup.com/poll/5392/trust-government.aspx> accessed 15 July 2019.

seriously called into question. As guardian of the sacred text of the US Constitution,[59] its position at the centre of American political life is secure.

It was not always thus. In the early nineteenth century, the Court was 'a most fragile institution'.[60] When President Adams nominated John Marshall for the position of the fourth Chief Justice, two of the previous three holders of that post had resigned to take up more prestigious roles (Jay governor of New York, Ellsworth ambassador to France) and the third was forced to step down when he failed to gain senatorial confirmation. Adams only turned to Marshall after his attempt to persuade Jay to return to the post failed. Jay's reason for rejecting the offer was a damning indictment on the status of the Court at the time, which he described as:

> so defective it would not obtain the energy, weight and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess[61]

Jay's complaint was not groundless: the Court did not command the necessary respect to guarantee its political independence. In 1802, Congress cut short the Court's term to prevent it from declaring the Circuit Courts Act unconstitutional. Three years later the House of Representatives would vote to impeach Justice Chase on largely partisan grounds; while Chase was acquitted in the Senate, a majority of senators (but short of the required two-thirds) voted for

[59] The idea that the Constitution is treated as 'sacred' in American political life is a commonplace; see, for example, Edward S Corwin, 'The Worship of the Constitution' (1920) 4 Constitutional Rev 3; Max Lerner, 'Constitution and Court as Symbols' (1937) 46 Yale LJ 1290; Sanford Levinson, '"The Constitution" in American Civil Religion' [1979] Sup Ct L Rev 123; Thomas C Grey, 'The Constitution as Scripture' (1984) 37 Stan Law Rev 1.
[60] William W Van Alstyne, 'A Critical Guide to *Marbury v Madison*' (1969) 17 Duke LJ 1, 2.
[61] Letter from John Jay to President John Adams (2 January 1801) in Henry Johnston (ed), *The Correspondence and Public Papers of John Jay* (Putnam 1890).

impeachment. The US Supreme Court was on the peripheries of American politics and its status as an independent branch of government was precarious to say the least.

It is sometimes said that the status of the US Supreme Court as the guardian of the Constitution was established by *Marbury v Madison*,[62] which first recognised the authority of the judiciary to review the constitutionality of legislation.[63] This is doubly misleading. Firstly, *Marbury* did not invent judicial review: the practice had already been established by state courts,[64] and dicta in the federal courts had suggested that they possessed the same power.[65] Secondly, *Marbury* did not establish judicial *supremacy*: Marshall CJ's judgment does not hold that the Court enjoys a privileged position over the interpretation of the Constitution – the now commonplace view that it does is a consequence of later developments.[66]

In fact, *Marbury* is simply a reflection of the conception of the separation of powers prevalent in the American revolutionary period.[67] There was no sense that the courts in particular were guardians of the constitution; the constitution was seen as binding upon courts, legislature and executive alike, with all three branches obliged to refrain from unconstitutional acts. The power of the courts to refuse to give effect to unconstitutional legislation was grounded not in any notion that the courts were superior interpreters of constitutional norms, but simply in the

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[62] *Marbury v Madison* (1803) 5 US 137.
[63] See, for example, *Cooper v Aaron* (1958) 358 US 1, 18: '[*Marbury v Madison*] declared that the federal judiciary is supreme in the exposition of the law of the Constitution'; Erwin Chemerinsky, *Constitutional Law: principles and policies* (Wolters Kluwer 2015) §2.2.1: '*Marbury v Madison* is the single most important decision in American constitutional law. It established the authority for the judiciary to review the constitutionality of executive and legislative acts. Although the Constitution is silent as to whether federal courts have this authority, the power has existed ever since *Marbury*.'
[64] *Kamper v Hawkins* (1793) 3 Va 20 (Virginia); *Lindsay v The Commissioner* (1796) 2 Bay 38 (South Carolina); *Whittington v Polk* (1802) 1 Harris and Johnson 236 (Maryland).
[65] *Heyburn's Case* (1792) 2 Dallas 406; *Hylton v The United States* (1796) 3 Dallas 171; *Calder v Bull* (1798) 3 Dallas 386; *Ogden v Witherspoon* (1802) 3 NC 404.
[66] See David Engdahl, 'John Marshall's "Jeffersonian" Concept of Judicial Review' (1992) 42 Duke LJ 279.
[67] Andrew McLaughlin, *The Courts, the Constitution and Parties: studies in constitutional history and politics* (University of Chicago Press 1929) 50-62.

fact that each branch of government must determine for itself what the constitution required. This idea had deep historical antecedents traceable to the medieval English view that ancient rights comprised a fundamental law which bound rulers and subjects alike.[68] The shift to judicial supremacy involved a significant transformation in thinking. Insofar as *Marbury* can be seen as effecting this, it is not in the form of a sudden judicial power-grab, but rather in the creation of an new institutional practice (judicial review) which in turn led to a subtle but powerful shift in the prevailing constellation of basic shared understandings.

While *Marbury* did not effect this shift in one fell swoop, the seeds of the new way of thinking can be seen in Marshall CJ's opinion. The weaknesses in his reasoning have been well-documented:[69] it consists essentially of a false dichotomy ('The Constitution is either a superior, paramount law … or it is on a level with ordinary legislative acts')[70] followed by a *non sequitur* ('It is emphatically the province and duty of the Judicial Department to say what the law is').[71] The first argument ignores the alternative, *political* conception of constitution and the second simply begs the very question in issue. But while Marshall CJ's reasoning may fall short logically, it successfully invokes an association of ideas that resonate with the constitutional imaginary: by describing the Constitution as a form of law he manages to depict the role of the Court as impartial arbiter rather than partisan political actor.[72] The contrast between the Constitution and 'ordinary legislative acts' enables the Court to portray itself as above the fray of politics and hence not interfering with the proper province of the legislature. It is this vision of

[68] ibid 85-94; Charles Howard McIlwain, *The High Court of Parliament and its Supremacy: an historical essay on the boundaries between legislation and adjudication in England* (Yale University Press 1934) ch II.
[69] For example by Van Alstyne (n 60) 16-29.
[70] *Marbury v Madison* (n 62) 177.
[71] ibid
[72] Cf Paul W Kahn, *The Reign of Law:* Marbury v. Madison *and the construction of America* (Yale University Press 1997) 10: 'To study *Marbury* is … to study the historical origins of the American political imagination.'

the Court and Constitution that becomes embedded in the American political imagination. Once it becomes accepted that in judicial review cases the Court is simply following its usual role as the impartial arbiter of disputes, acceptance of judicial supremacy is not simply a small step but is in fact the most stable way of legitimising the practice. Any notion that Congress and/or the President have legitimate roles to play in constitutional interpretation will muddy the clear identification of constitutional adjudication as legal adjudication. Thus once the practice of constitutional judicial review is up and running, constitutional imaginary understandings militate in favour of the doctrine of judicial supremacy. The more prominent the political position of the Supreme Court, the more it is seen by officials and the public alike as occupying a unique position in relation to the Constitution, so that the legitimating narrative – Court as guardian of the fundamental law – grows ever stronger. The birth of judicial supremacy in the US can therefore be seen not so much as a development in legal doctrine but as a gradual crystallisation of a way of understanding the relationship between law and politics, viz., the development of legal constitutionalism as a stable arrangement of constitutional imaginary understandings.

B. The Birth of Judicial Politics in France[73]

The seeds of American legal constitutionalism fell on fertile ground. A society fresh from a revolution against an overweening government, infatuated with ideas of individual liberties and – as Alexis de Tocqueville noted – permeated with the 'spirit of the lawyer'[74] was prone to understanding its hard-won Constitution as a set of legal guarantees against the state. By contrast, my second example shows a legal constitutionalist understanding taking hold in less

[73] I take my account of this history, as well as the title of this subsection, from Alec Stone, *The Birth of Judicial Politics in France: the Constitutional Council in comparative perspective* (Oxford University Press 1992) chs 1-4.
[74] Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop eds and trs, University of Chicago Press 2000) vol 1, pt 2, ch 8, s 2 ('On the Spirit of the Lawyer in the United States and How it Serves as a Counterweight to Democracy').

propitious circumstances. The history of the French Constitutional Council shows that the imaginary association of law with impartiality has the potential to legitimate a practice of constitutional review even in a society traditionally wary of judicial interference in politics.

From the Revolution to the time of the Second World War, there were essentially two competing constitutional traditions in France. The governing tradition in the First, Second and Third Republics was Jacobinism, wherein the representative legislature is seen as the embodiment of the democratic people and can amend the constitution by simple majority vote. Jacobinism thus opposed any form of constitutional review, judicial or otherwise. Bonapartist ideology, on the other hand, was based on the supremacy of the *president*, and thus did not oppose the placing of limits around *legislative* authority. These limits were, however, thought of as inherently political rather than legal in nature. Jacobinism and Bonapartism were united in their trenchant rejection of the idea that judges might have a legitimate role in policing the limits of politics: 'the hostility to judicial review in France was institutionalised as a dominant ideological dogma of political life'.[75]

The Constitution of the Fifth Republic was intended to institute a kind of neo-Bonapartism, shifting power from Parliament to the executive.[76] It distinguished between *la loi* and *le règlement*, with the province of Parliament restricted to the former. A Constitutional Council was created to police the settlement, as a 'watchdog on behalf of executive supremacy'.[77] The Constitutional Council was designed as a political body rather than a judicial one. There is no requirement that members have any legal training, and its original members

[75] Stone (n 73) 23.
[76] Didier Maus, 'La Constitution Jugée par sa Pratique: réflexions pour un bilan' (1984) 43 RFSP 875.
[77] Jack Ernest Shalom Hayward, *Governing France: the one and indivisible republic* (Weidenfeld and Nicolson 1983) 139; see also Didier Maus (ed), *Textes et Documents sur la Pratique Institutionelle de la Ve République* (La Documentation Française 1978).

were all politicians supportive of the government. From 1959 to 1970, the Council served the executive's wishes as against Parliament, effectively allowing Prime Ministers to block Parliament's power of initiative.[78] This began to change following 1971, when, in a landmark decision, the Council took the view that it was empowered to examine whether bills are compatible with constitutional rights, despite lacking any clear constitutional mandate to do so, or even any enumerated constitutional rights.[79] Thereafter, the Council cast off its overt deference to the executive and began to conduct a robust system of constitutional review.

The Council's growth in confidence coincided with a shift in the way it was publicly perceived. Rather than being seen as a *political* entity, it began to be viewed as a kind of *court*. According to the traditional French paradigm, courts [*juridictions*] must be composed of judges, engaged in settling concrete disputes and follow fixed, legal procedures – features which the Council lacks.[80] Yet by the end of the 1970s, the Council was being commonly referred to as a court.[81] The old paradigm was swept away: the term *juridiction constitutionnelle* came to specify an institution charged with the power to determine the content and applicability of constitutional law – thus embracing the Constitutional Council perfectly.[82] At the same time, the Council began to justify its expanding role by asserting that its work was judicial and not political in nature.[83]

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[78] *The Birth of Judicial Politics in France*, n 73 above, 64.
[79] Constitutional Council Decision No. 71-44 DC, 16 July 1971.
[80] Stone (n 73) 96.
[81] See Marcel Waline, 'Préface' in Louis Favoreu and Loïc Philip (eds), *Les Grandes Décisions du Conseil Constitutionnel* (2nd ed, Sirey 1991) xi-xx.
[82] Stone (n 73) 96-7.
[83] In Decision No. 74-54 DC, 15 January 1975, the Council stated that 'la Constitution ne confère pas au Conseil constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement, mais lui donne seulement compétence pour se prononcer sur la conformité à la Constitution des lois déférées à son examen' (para 1); and in Decision No. 85-197 DC, 23 August 1985 it stated that 'l'objet de ce contrôle est non de gêner ou de retarder l'exercice du pouvoir législatif mais d'assurer sa conformité à la Constitution' (para 20). Most dramatically, in August 1986 it released a press statement in response to attacks made on it by government ministers, in which it publicly asserted its political neutrality: 'The Constitutional Council, having taken notice of the recent declarations concerning it, recalls that it possesses according to the constitution the *judicial* mission to verify the constitutionality of laws which have been referred to it. It refuses therefore to participate in the present debate, which is inherently *political*.' (quoted in Stone (n 73) 100 (Stone's emphasis)).

Its output became more 'legalistic' in nature: its decisions lengthened and developed into a technical jurisprudence. Alec Stone has interpreted this as the Council deliberately entrenching its new-found position as guardian of the Constitution.[84] Deliberate or no, it seems to have had a strong legitimating role, with attitudes to judicial review shifting from 'unmitigated hostility to virtually unanimous support'.[85]

This example shows the strength of the notions of 'law' and 'court' in the constitutional imaginary. By enrobing itself in the trappings of law, the Council gained widespread acceptance of its review functions. The remarkable thing here is that the idea of law as non-political, impartial reason was able to legitimate judicial review even in a profoundly hostile political culture. This demonstrates the ready availability of the legal constitutionalist understanding to those who share the modern constitutional imaginary, even in those societies where the traditional governing theories have been opposed to it. While the dominant understanding in France had previously been a form of political constitutionalism, the political constitutionalist vision lacks any clear way of legitimating any form of review of legislation. The French Constitutional Council was thus fated either to remain a weak and somewhat marginal institution, or else discover an alternative legitimating narrative. While there was nothing inevitable about its successful embrace of legal constitutionalism,[86] the conceptual landscape of modern constitutionalism – ideas of 'law', 'politics', 'representation' and so on – meant that a

[84] 'These statements are evidence that the Council recognised and actively sought the legitimating power of legal discourse and judicial function.' (ibid 100).
[85] ibid 115.
[86] A small number of countries, most notably in Scandinavia, have managed to maintain a practice of judicial constitutional review without the legal constitutionalist imaginary becoming dominant. In Scandinavia, there appears to be a stable constitutional imaginary, with longstanding historical roots, that is distinct from both political and legal constitutionalism as those ideas are presented here (Jaako Husa, 'Nordic Constitutionalism and European Human Rights – mixing oil and water?' (2010) 55 Sc St L 101). Hirschl has argued, however, that since the 1990s legal constitutionalism has begun to take hold (Ran Hirschl, 'The Nordic Counternarrative: Democracy, human development and judicial review' (2011) 9 ICON 449).

system of strong non-judicial constitutional review was always likely to be an unstable arrangement.

C. The New Commonwealth Model of Constitutionalism

If my argument is sound, political and legal constitutionalism present us with a stark contrast between incompatible alternatives. This is not revolutionary; indeed, it might plausibly be dubbed the 'conventional wisdom'.[87] In recent years, however, the exhaustiveness of this distinction has been challenged. Developments in Canada, New Zealand, the UK and some Australian jurisdictions have led some to suggest the emergence of a genuine alternative, which Stephen Gardbaum, its greatest champion, calls the 'new Commonwealth model of constitutionalism' (NCM).[88] The NCM, Gardbaum claims, 'promises to transcend the either/or nature of the existing choice'.[89]

The main distinctive feature of the NCM is its use of so-called 'weak-form' judicial review.[90] As with traditional judicial review, weak-form review involves courts assessing legislation against constitutional norms. Where it differs is that the courts' assessments are either not legally binding, or, if binding, may be overridden by ordinary legislative majority. For example, section 4 of the New Zealand Bill of Rights Act 1990 (NZBORA) prevents the court from invalidating any statute for inconsistency with the enumerated rights. UK courts similarly lack the power to set aside primary legislation, although they may, under section 4 of the Human Rights 1998 (HRA), issue a formal 'declaration of incompatibility'.[91] Canada has adopted a

[87] Janet L. Hiebert, 'Parliamentary Bills of Rights: an alternative model?' (2006) 69 MLR 7.
[88] See generally Gardbaum (n 4).
[89] ibid 25.
[90] The phrase was coined by Tushnet; see Mark V Tushnet, *Weak Courts, Strong Rights: judicial review and social welfare rights in comparative constitutional law* (Princeton University Press 2008).
[91] Courts in the Australian Capital Territory and the state of Victoria have similar declarative powers: see ACT Human Rights Act 2004, s 32; Victorian Charter of Human Rights and Responsibilities Act 2006, s 36.

different version of the model, in which, while laws that conflict with the Charter of Rights and Freedoms may be declared ineffective by the courts, section 33 of the Constitution Act 1982 enables provincial and federal legislatures to decree that incompatible legislation will apply 'notwithstanding' the provisions of the Charter. Weak-form judicial review, Gardbaum tells us, 'decouples judicial review from judicial supremacy', retaining the 'last word' on constitutional norms to the legislature.[92]

Alongside weak-form judicial review, the NCM also deploys a 'political' form of constitutional review, which is conducted in two stages. The first stage takes place prior to legislative enactment, with scrutiny of proposed legislation for potential violations of constitutional rights being conducted by both the executive and the legislature. This usually involves a requirement for a government minister or law officer to report to parliament on whether proposed legislation is compatible with constitutional norms.[93] The second stage takes place after a court has found legislation incompatible with constitutional rights, or has, in light of constitutional concerns, interpreted legislation in such a way that departs from its 'ordinary' meaning. At this stage, the legislature should consider whether its original view should prevail over the judicially expressed position.

[92] Gardbaum (n 4) 26.

[93] Under the Canadian Department of Justice Act 1985, s 4(1), the Minister of Justice is required to examine all government bills for consistency with the Charter of Rights and Freedoms and to report any perceived inconsistency to the House of Commons. In New Zealand, the Attorney-General is under a duty to 'bring to the attention of the House of Representatives any provision … that appears to be consistent' with human rights (NZBORA, s 7). Section 19 of the UK HRA requires the minister responsible for a bill either to make a statement that the bill is compatible with Convention rights or to declare that he is unable to make such a statement. In the Australian Capital Territory, each government bill must be accompanied by a statement from the Attorney-General as to whether the bill is consistent with human rights and if not, why not (ACT Human Rights Act 2004, s 37). In Victoria, any member of Parliament who proposes to introduce a bill into either House of Parliament must make a reasoned statement as to whether the bill is compatible with human rights (Victorian Charter of Human Rights and Responsibilities Act 2006, s 28).

Gardbaum presents the political-legal constitutionalism divide as a false dichotomy, in relation to which the NCM enables us to harness the best of each while mitigating their worst excesses.[94] He makes this case with such clarity of purpose that one might wonder how anyone could have thought of the issue as presenting a dilemma at all. Certainly, now the middle path has been discovered, one might expect to see a clamour for enlightened nations to adopt it.

In practice, however (as Gardbaum himself recognises), the middle path has been somewhat difficult to find.[95] Despite the distinctive legal structure, weak-form judicial review has not proved to have been as distinctive a process as its advocates had hoped, and instead has tended to collapse back to something close to judicial supremacy (as in Canada and the UK) or parliamentary supremacy (as in New Zealand, the ACT and Victoria). In Canada, the section 33 override power has been used on only 17 occasions since 1982, never by the federal government and only three times by states other than Quebec. In the UK, the courts have issued 27 final declarations of incompatibility, yet in only one case has government or parliament displayed any meaningful disagreement with the courts.[96] If in Canada and the UK we see something akin to *de facto* judicial supremacy,[97] in New Zealand, the ACT and Victoria the opposite is the case: the courts have shown themselves to be reluctant to declare statutes to be inconsistent with

[94] E.g. Gardbaum (n 4) 51: the NCM is 'a distinct and appealing third way in between two purer but flawed extremes'.
[95] In addition to the sources cited below, see generally Hiebert, 'Parliamentary Bills of Rights' (n 87).
[96] Figures accurate as of the end of July 2018: see Ministry of Justice, *Responding to Human Rights Judgments: 2017 to 2018* Cm 9728 (2018) Annex A. By 'final' declaration of incompatibility I mean one that has not been overturned on appeal and is not subject to ongoing appeal.
[97] Aileen Kavanagh has provided sustained argument along these lines: see Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) ch 10; 'What's so Weak about "Weak-Form Review"?' (2015) 13 ICON 1008; and 'A Hard Look at the Last Word' (2015) 35 OJLS 825. Gardbaum disagrees with the diagnosis of collapse into judicial supremacy in respect to the UK: see Gardbaum (n 4) ch 7; and Stephen Gardbaum, 'How Successful and Distinctive is the Human Rights Act? An expatriate comparatist's assessment' (2011) 74 MLR 195. In respect to Canada, Gardbaum accepts that 'the Charter system is currently operating in a way that is too close to judicial supremacy for it to be the most distinct or successful version of the new model' (Gardbaum (n 4) 128).

constitutional norms, creating a system which differs little from traditional (albeit relatively rights-respecting) legislative supremacy.[98]

Nor has political rights review lived up to its promise of remedying judicial blind-spots by combining 'legal and moral/political conceptions of rights, and… judicial and legislative rights reasoning'.[99] Nowhere do we see executives or legislatures conducting the kind of critical engagement with judicial decisions that would be necessary to provide a combination of 'legal' and 'political' forms of reasoning capable of combining the strengths, while avoiding the weaknesses, of both. Instead, political rights review has operated with 'a highly juridical orientation to constitutionalism',[100] treating the assessment of legislation against constitutional standards as a prediction of what would likely be decided if the provisions were to be tested in court. The idea of governments being entitled to challenge judicial interpretations of constitutional norms – in terms of 'rights disagreements' rather than 'rights misgivings'[101] – does not seem to have taken root. This is particularly the case in Canada, where the Charter has generally come to be seen as essentially a judicially-enforced bill of rights in the US mould.[102] In the UK support for the HRA is lower and politicians have not shied away from criticising it; but such criticisms have not manifested themselves in the form of an alternative, 'political' style of rights-deliberation. Rather, political rhetoric aside, we see a similar process as operates in Canada: pre-legislative review by government lawyers to check that legislation is unlikely to be declared HRA-incompatible by the courts, followed by ministerial reluctance to engage in

[98] See Claudia Geiringer, 'On a Road to Nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act' (2009) 40 *VUWLR* 612, 640-7; 'What's the Story? The instability of the Australasian bills of rights' (2016) 14 ICON 156. Gardbaum seems to agree with this diagnosis of collapse into *de facto* legislative supremacy in relation to the ACT and Victoria (see Gardbaum (n 4) ch 8), though disagree (at least in part) in relation to New Zealand (see ibid ch 6).
[99] ibid 35.
[100] Hiebert (n 87) 19.
[101] Jeremy Waldron, 'Some Models of Dialogue between Judges and Legislators' (2004) 23 Sup Ct L Rev 7.
[102] Hiebert (n 87) 20.

meaningful rights-deliberation in Parliament.[103] And while the work of the Joint Committee on Human Rights engages impressively with human rights issues, it is highly dependent on its expert legal advisors and its analysis tends to be legalistic in nature.[104] In New Zealand we also see a legalistic approach to political rights review, with the difference being that, rather than the government assiduously satisfying itself that its legislation is likely to pass judicial muster, statements of incompatibility from the Attorney-General are routinely made and ignored.[105] The exceptions to this 'juridical orientation' appear to be the two Australian jurisdictions,[106] although given the reluctance of the courts to robustly challenge the ACT and Victorian legislatures, these jurisdictions seem to embody more a rights-conscious form of legislative supremacy than the 'third way' envisaged by Gardbaum. All-in-all it is difficult to disagree with Janet Hiebert's conclusion that:

> when political debates are transformed into debates about rights, and the judiciary is given a role to interpret these and pronounce on the compatibility of legislation, it is difficult to maintain political will, or a sense of institutional competence, for public and political officials to do otherwise than to anticipate and emulate judicial interpretations[107]

The failure of the NCM to distinguish itself in practice from the 'extreme' poles of judicial and legislative supremacy shows the difficulty that arises in trying to craft roles for institutions that depart from constitutional imaginary understandings. It is not simply that for the new

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[103] Janet L Hiebert, 'Governing under the Human Rights Act: the limitations of wishful thinking' [2012] PL 27.
[104] ibid 38-42; Aileen Kavanagh, 'The Joint Committee on Human Rights: a hybrid breed of constitutional watchdog' in Murray Hunt et al (eds), *Parliaments and Human Rights: redressing the democratic deficit* (Hart Publishing 2015) 127-131.
[105] Hiebert (n 87) 26.
[106] See ACT Human Rights and Discrimination Commissioner, *Look Who's Talking: a snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) 12-14 <https://hrc.act.gov.au/resources/reports/look-whos-talking/> accessed 15 July 2019; Michael Brett Young, *From Commitment to Culture: the 2015 review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer 2015) 173-202.
[107] Hiebert (n 87) 28. Gardbaum agrees that 'the advice given [in political review processes] has been more legal in content than the ideal working of the new model suggests' (Gardbaum (n 4) 224).

Commonwealth model requires courts and parliaments to interact in ways to which they are unaccustomed. Rather, for the model to operate as envisaged by Gardbaum, we would need new understandings of what it is these institutions are doing when they go about their work. Simply put: if, in constitutional adjudication, courts are not issuing final, authoritative rulings on the law, it is difficult to conceptualise what they *are* doing. The legitimacy of courts relies upon our shared understandings that they are there to apply the law, and that the law represents the proper order of things that ought (in ordinary circumstances) to be obeyed. If Parliament is to have a space to legitimately depart from judicial interpretations of constitutional norms, there needs to be a significant shift in the narrative that justifies the courts in making those rulings in the first place.

As we have seen, the constitutional imaginary lends itself readily to conflicting visions: the legal constitutionalist understanding of 'higher law' and the political constitutionalist vision of the legislative assembly as the representative of the democratic public. By contrast, the NCM cannot find traction in the constitutional imaginary. In presenting the NCM as a sensible compromise between the two traditional alternatives, Gardbaum mischaracterises the nature of what is at stake in the legal-political constitutionalist divide. The divide is not simply between two forms of constitutional design, or two competing theories of democracy, but between two different ways of imagining the political world. The problem is especially acute because, while the visions are mutually incompatible, each is still intelligible to those who see things the other way. I noted above that, like the 'duck-rabbit' drawing, we can see things one way or the other, but we cannot see things both ways at the same time. Gardbaum's insistence that we walk a middle path between political and legal constitutionalism is like suggesting that we should see neither a duck nor a rabbit, but a creature that shares some of the features of each.

4. Conclusion

My goal in this essay has not been to give a complete account of political and legal constitutionalism, but, more abstractly, to describe what *kind* of things political and legal constitutionalism are. I have argued that they are not competing academic theories, nor exaggerated ideal types, but contrasting ways of imagining the political world. While relying on the same basic constitutional notions, they understand the relationship between law and politics in very different ways, yielding incompatible visions of the constitutional order of a democratic political community.

If sound, this thesis yields some important conclusions for constitutional theory. One is that we cannot expect to respond to the question 'What is a Political [or Legal] Constitution?' in terms of a clear definition. Political and legal constitutionalism are characterised by a largely implicit sense of how basic ideas, institutions and practices relate to one another, rather than any canonical beliefs or theoretical premises. Of course, it is possible to proffer a political or legal constitutionalist *theory*, in the form of a refined account that one takes to be of particular normative and/or explanatory value. But such theories should not be confused with the very *ideas* of political or legal constitutionalism, which are embedded in everyday political practices, forming part of the general fabric of meaning that makes it possible for a society to engage in collective practices.

My argument might seem to doom us to the sceptical conclusion that, since political and legal constitutionalist arguments are premised on incompatible frameworks, we are unable to make meaningful evaluations of their competing claims. The idea of the constitutional imaginary does entail a kind of relativism: it is only within certain kinds of society that it will make sense to

appraise actions as promoting or violating constitutional values.[108] But it does not follow that such values are not genuine; instead we may conclude that it is a virtue of modern societies that they make such values available. Similarly, we can sensibly consider whether a political or a legal constitutional vision opens up space to realise certain goods that the other closes down. Our answer cannot have recourse to any neutral, Archimedean perspective (for none exists), but we may draw on the moral fabric that both positions share, and ask which provides richer, more satisfying accounts of what is valuable about democracy, citizenship, political equality, the rule of law etc..[109] To do this, however, we will need to recognise that political and legal constitutionalism are broad constellations in which various concepts are differently aligned. Progress cannot be made by attempting to reduce the debate to, say, the question of whether non-interference is more valuable than non-domination, or whether positivism or non-positivism accurately captures the nature of law. The political-legal constitutionalism debate would, I suggest, benefit from its protagonists taking a step back to look at the broader picture.[110]

A further conclusion is that analysis of political and legal constitutionalism cannot simply take the form of an exchange of theoretical ideas, but must be grounded in an examination of how actors understand the legal and political practices that they participate in. In particular, the

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[108] See Bernard Williams, 'Realism and Moralism in Political Theory', in *In the Beginning was the Deed: Realism and moralism in political argument* (Geoffrey Hawthorn ed, Princeton University Press 2005) 10: 'one can imagine oneself as Kant at the Court of King Arthur if one wants to – but [such judgments] are useless and do not help one to understand anything'.
[109] There is a certain affinity between my position here and Dworkin's account of conceptual interpretation (in Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) ch 8), although Dworkin does not explicitly recognise the dependence of our concepts on the shared understandings of the social imaginary. In a few tantalising comments, Dworkin acknowledges that social context is relevant for moral judgment (e.g.: 'There is indeed no reason to expect that the concrete conclusions we reach about what justice requires for us will apply as well to the ancient Babylonians.' (Michael Walzer and Ronald Dworkin, '"Spheres of Justice": an exchange' *New York Review of Books* (New York 21 July 1983); 'A life of chivalrous and courtly virtue might be a very good one in twelfth-century Bohemia but not in Brooklyn now.' (Ronald Dworkin, *Sovereign Virtue: the theory and practice of equality* (Harvard University Press 2000) 258). But too often he writes as if his own interpretations of moral and political concepts are of universal application.
[110] In this respect, the 'reflexive wave' identified by Goldoni and MacCorkindale (n 40) 82-5 is to be welcomed.

debate between legal and political constitutionalists needs to consider how social imaginary understandings are transmitted, sustained and developed through symbolic representation. Tacit recourse to symbolic arguments is present in some of the contributions to the debate. Richard Bellamy, for example, tells us that 'constitutional judicial review seems premised on an unjustified assertion that those on the bench are more equal than the rest'.[111] It is tempting to dismiss this as simply a straw man argument – clearly the defenders of constitutional review make no such claim.[112] But perhaps Bellamy's point could be restated: constitutional review *symbolically expresses* an inequality of status between citizens and the judiciary. Thus interpreted, the claim is not untenable, but nor is it supported by a developed argument.[113] This reticence to pursue arguments grounded in symbolism might be explained by an assumption that symbolic representation is an epiphenomenal aspect of constitutional practice, or else that symbolic meaning is a purely subjective matter. If the thesis of this essay is correct, then neither of these assumptions is true – since the constitutional imaginary is 'carried in images, stories and legends',[114] a firm grasp of the meanings symbolically conveyed by our political practices and institutions is key to understanding constitutional reality.

Finally, I have sought to show that, while we might sensibly be able to see benefits and pitfalls in both sets of understandings, we cannot hope to combine the best of both ideas simply by designing some institutional scheme to achieve a compromise between the two. This is not a criticism of constitutional innovation. Nor does it suggest that constitutional design is irrelevant

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[111] Bellamy (n 29) 166.
[112] See Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 UTLJ 591.
[113] On the other side of the divide, Dworkin does acknowledges the significance of symbolic representation when he says that 'in a society like our own, in which the vote has traditionally been an emblem of responsibility, weight, and stake, any violation of equal vote would reflect a denial of the symbolic attachment equal vote confirms' (Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987) 22 USFL Rev 1, 19). But at no point does he consider that judicial review of legislation might suffer from a similar symbolic deficiency. (For critique of Dworkin on this point, see Alexander Latham, 'Dworkin's Incomplete Interpretation of Democracy' (2018) 10 Wash U Jur Rev 155.)
[114] Taylor, *Modern Social Imaginaries* (n 2) 23.

to a society's constitutional imaginary – as my historical examples make clear, new political institutions and practices can catalyse shifts in constitutional understanding. It is merely to point out that if legal and political constitutionalism are to be superseded, it will require a new way of understanding the relationship between law and politics capable of legitimating constitutional practices in the eyes of both officials and citizens. So long as those searching for a 'third way' think of their task as simply one of 'balancing'[115] or 'blending'[116] the legal with the political, progress is unlikely to be made, for it is divergence over the meaning and significance of these very concepts that has given rise to the dispute in the first place. Unless some new way of understanding the relationship between law and politics can capture the public imagination, the imaginary opposition between political and legal constitutionalism is here to stay.

[115] See the quote from Gardbaum at (n 4).
[116] Gardbaum (n 4) 34: 'the new model can be said to create a distinct blending of legal and political constitutionalism across the board'.