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## Book review: eulogy for the constitution that was

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# *Eulogy for the constitution that was*

Grégoire Webber\*

Martin Loughlin. *The British Constitution: A Very Short Introduction*. Oxford: Oxford University Press, 2013. Pp. 135. £7.99. ISBN: 9780199697694.

## 1. Introduction

On the understanding of some, the United Kingdom has no constitution. The absence of a written constitution troubles those who look for certitude in things settled and, with the exception of some so-called constitutional statutes thought now too important to repeal, nothing within the British constitution is settled because everything is liable to change. On this understanding, the United Kingdom has what may be called “politics without a constitution”—nothing (or, rather, too little) binds the various constitutional actors in their undertakings and relations with each other. Compounded by the doctrines of parliamentary sovereignty and government dominion over Parliament, it is thought that nothing is permanent because change, even radical change, is all too possible. On this view, the activity of constitutional actors is the pursuit of a purely empirical activity—it is, simply, “what happens” in the pursuit of wants and desires. It is not, for that reason, an inconsequential activity, but it is quickly dismissed as “politics”, with the many sinister connotations associated with the term. The United Kingdom has politics, but not a constitution, and anything goes.

On the briefest inspection, this understanding of the British constitution is difficult to sustain. The various constitutional actors do not awake each morning with the “blank sheet of infinite possibility” laid before them.<sup>1</sup> They do not pursue their wants and desires (if that is what they are best understood as doing) without direction. They understand that certain things are the “done things” and certain others the “not done things”. What the first understanding of the constitution is missing is an account of what sets politics to work; that is, why, despite the claim that just anything can happen, politics does not surprise us every day. So what, then, guides the activity of constitutional actors? On one view, the “done thing” is the pursuit of principle or a programme of principles; the “not done thing” the frustration of that pursuit. These principles precede political activity so as to set it to work. They supply in advance of such activity ends to be pursued—peace, order, good government; economic stability; social equality—and set empirical activity to work by cabining politics *within* a constitution. The United Kingdom has, on this view, a constitution—it is not written, but it is what guides constitutional actors, just as written constitutions in other places and at other times have guided political activity there and then.

Understanding the British constitution as politics *within* a constitution of principles is more plausible than understanding it as *politics without a constitution*. It is, after all,

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<sup>1</sup> Michael Oakeshott, *Political Education*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 45 (new edn, 1991). This introduction is inspired by how Oakeshott frames his study of political education, wherein he contrasts “empiricism” and “ideology”.

**Comment [F1]:** That sounds a bit strange I find: understanding the constitution as politics without a constitution. Do you really intend to say this?

GW: I do and recall that expression as developed and explained in the first paragraph. I accept that the expression is a bit strange, but given the contrast (*within*, *without*) I think it works.

familiar to hear constitutional actors—Prime Minister, Secretary of State, Lord Justice, Speaker—appeal to principles to account for what they do and refrain from doing. Yet, despite this difference with the first understanding, this second understanding of the British constitution builds on the first, for it, too, looks upon political activity as without compass and dependent on some external force to motivate its direction. It shares with the first understanding the thought that anything can happen, but seeks to respond to the risk. Principles precede political activity and the latter is to be in the service of principles.

These two understandings and their permutations within public law thought suggests that it is difficult to understand political activity otherwise than as the pursuit of desire or principles. The special burden carried by Martin Loughlin in *The British Constitution: A Very Short Introduction* is to interrogate another understanding of political activity and constitution. This alternative understanding of the British constitution is only partially developed in opposition to the other two. There will be times when activity within the Palace of Westminster—Loughlin’s primary, though by no means exclusive focus<sup>2</sup>—may well warrant appeals to the pursuit of desire or principle, but to suppose that this is true of all such activity is to deny an understanding of political activity within the British constitution that is not the pursuit of principle or want, but rather a critically reflective understanding of “the done” and “the not done” things. On this view, to understand the British constitution is to understand political activity in a way that resists divorcing it from the constitution—that is, in a way that invites an understanding of politics as not quite *without* or *within* but, in important respects, *as* the British constitution.

To develop this idea, this review essay explores Loughlin’s invitation to study the British constitution historically, an invitation that pays special attention to evolving relationships between constitutional actors and the practices inherent to those relationships. This understanding resists attempts to reduce such relationships to simple propositions as to what is done and not done; rather, it invites one to appreciate the debt of such propositions to the historical practices they account for. It follows that, as the practices change, so too will the constitution, which is not to say that the constitution is without identity. The invitation is to orient the study of the constitution to its traditions of behaviour and to see within them the exercise of practical judgment.

To interrogate this understanding of the constitution, this essay draws on Walter Bagehot, F.W. Maitland, Ivor Jennings, and others—writers who situated the changing practices of the constitution at the forefront of their accounts. Jennings would write, in the preface to his *Cabinet Government*, that it is “the accumulation of precedents, each with its different environment, which enables one to say what, in new circumstances, ought to be done; and the precedent which proves most useful is often not the ‘leading case’ but the case which at first sight seems relatively unimportant”.<sup>3</sup> My aim in drawing on these writers is not to present their accounts of the constitution, but rather to present an understanding of the constitution within their style, a style combining political activity and constitution. It is significant that, to situate Loughlin’s account of the constitution, this essay appeals to scholars of days past. The thesis of this “very short introduction” to the British constitution is captured by its

<sup>2</sup> In the book under review, Loughlin writes (at 43): “Parliament is the key to understanding the peculiar character of both the British constitution and the British state.”

<sup>3</sup> IVOR JENNINGS, *CABINET GOVERNMENT* ix (3rd edn, 1961).

**Comment [F2]:** Maybe rather: the objective pursued by?

I’ve opted to keep this formulation after trying out some alternatives.

closing chapter's title: "Whiter the constitution?". The question mark suggests a more tentative reading than the balance of the book warrants—as Loughlin puts it in the book's first pages: "during the modern era [the British constitution] has veered from being a major source of pride to an arrangement that provokes dissatisfaction" (at\_xi). *The British Constitution* does not seek to praise, but rather seeks to understand the present state of malaise. To this reader, it reads like a eulogy for a constitution that was, one that is not only to be understood historically, but that may now be relegated to history. To understand why requires an appreciation for Loughlin's special reference to traditions of behaviour and how they bind and evolve and, also, how they whither.

## 2. An evolution of decline

To write about the British constitution is a treacherous affair. Many of the giants referred to by Loughlin prefaced their own study by dismissing previous attempts to capture the constitution. A.V. Dicey, for example, introduced his treatise on *The Law of the Constitution* by rejecting William Blackstone's *Commentaries on the Laws of England*, which he described as having "but one fault", namely: "the statements it contains are the direct opposite of the truth".<sup>4</sup> So, too, do we find in Bagehot's 1867 collection of essays on *The English Constitution* the reflection that "an observer who looks at the living reality [of the constitution] will wonder at the contrast to the paper description" for "[h]e will see in the life much which is not in the books" and, in turn, will not find "in the rough practice" many of the "refinements" of theory.<sup>5</sup> In Maitland's 1908 *Constitutional History of England*, we are warned how "the more we study our constitution whether in the present or the past, the less do we find it conform to any such plan as a philosopher might invent in his study".<sup>6</sup> And, again, in the scholarship of John Griffith we find despair in how the "theory of the Constitution is full of ghosts striving to entangle us with their chains".<sup>7</sup> Loughlin himself has not shied away from such critical evaluations of constitutional scholarship: in his review of Adam Tomkins' *Our Republican Constitution*,<sup>8</sup> he would deplore that "the constitution is what any commentator desires it to be".<sup>9</sup>

To write even a very short introduction to the British constitution is therefore no small feat. How, then, to undertake the task? There are, for Loughlin, two general ways in which the British have sought to capture their constitution. Before the 20th century, works on the constitution "were mainly works of history" (at 24), attempts to capture the workings of the British constitution that, in the estimation of scholars past, was "matchless".<sup>10</sup> The attempt to *describe* Britain's constitutional arrangements should not be taken to imply the absence of ambition. Given the view that the constitution was "the inheritance of a long tradition in the practical art of governing", constitutional understanding was to be acquired "through experience" and could not be "easily expressed in books or conveyed through formal instruction" (at 23). Any

**Comment [F3]:** You might already indicate here whether these are the two referenced above.

GW: a very welcome suggestion. I have done so, not here, but a couple of paragraphs down (para. beginning with "Since the 20th century...")

<sup>4</sup> A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxxx (1885).

<sup>5</sup> WALTER BAGEHOT, THE ENGLISH CONSTITUTION 5 (2001).

<sup>6</sup> F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 197 (1908).

<sup>7</sup> J.A.G. Griffith, *The place of Parliament in the legislative process: Part II*, 14 MODERN L. REV. 425, 436 (1951).

<sup>8</sup> ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

<sup>9</sup> Martin Loughlin, *Towards a republican revival?*, 26 OXFORD J. LEGAL STUD. 425, 434 (2006).

<sup>10</sup> James Thomson's poem *Liberty* (1736), as quoted in the book under review (at 6).

description risked misrepresentation, either in its selection of constitutional materials or in its attempted summary of matters selected for inclusion. And yet, the task was important: both domestic and foreign scholars attempted to “unlock[] the secret of the constitution” that, unlike other European systems of government, had “managed to make the transition to modernity without undergoing violent revolution” (at 24).

That the British constitution was considered to have any virtue come as a surprise to some. After all, having been not so much made as “stumbled upon”, it is, said Bagehot, “full of every species of incidental defect” and “of the worst workmanship”.<sup>11</sup> And yet, despite these failings, so many political developments of good government are owed to it. Among those developments are the Westminster model of parliamentary government and the efficient secret that keeps executive and legislature in agreement;<sup>12</sup> an impartial and permanent civil service, said to be “the one great political invention in nineteenth-century England”;<sup>13</sup> and a Loyal Opposition, whereby a party out of power is not only tolerated but encouraged to challenge the government and to appeal for support between and at general elections with the aim of unseating those now occupying the Treasury bench.<sup>14</sup>

**Comment [F4]:** Could you shortly explain this?

GW: the efficient secret is Bagehot's expression for how, in a Westminster parliamentary system, government and Commons are in agreement. I've added a quote from Bagehot in the footnote.

What was the secret that allowed for these developments? No less an Anglophile than Charles de Gaulle, speaking in Westminster in April 1960, would surmise that, even if the British lacked “meticulously worked out constitutional texts”, “by virtue of an unchallengeable general consent, [they] find the means, on each occasion, to ensure the efficient functioning of democracy without incurring excessive criticism of the ambitious”.<sup>15</sup> As we will see, that sense of “general consent” animates Loughlin's account of the constitution and its traditions of behaviour, although it is no longer one that can be said to be as “unchallengeable” in the present as it was in the not so distant past.

Since the 20th century, constitutional scholarship is no longer concerned with description and it has “become almost impossible to write about the British constitution without explicitly advocating the need for reform” (at 39). The British pride and foreign jealousy in Britain's constitutional arrangements have been abandoned and in their place have arisen the two understandings of the constitution with which this essay began. Foreigners and citizens now question whether the British even have a constitution and seek to cabin political activity by appealing to a programme of principles. Loughlin reports that, “[c]onstitutionally speaking”, the British “are living through a period of considerable uncertainty” (at 7). What was once the source of British constitutional success—“the idea of a constitution that has grown organically in response to economic, political, and social changes”—is now said to be “rather puzzling” (at 1). The customary constitution, one based on traditions of behaviour that bind even as they evolve, “has become so corroded that it no longer provides a coherent account of the nature of British government” (at 116). The

<sup>11</sup> BAGEHOT, *supra* note 5, at 8 (emphasis omitted).

<sup>12</sup> *Id.* at 8-9. Bagehot accounted for this efficient secret as follows: “The efficient secret of the English constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers” (*id.* at 9).

<sup>13</sup> GRAHAM WALLAS, HUMAN NATURE IN POLITICS 263 (1921).

<sup>14</sup> For a review of the relationship between Government and Opposition between elections, see Grégoire Webber, *Parliament and the Management of Conflict*, [2014] PUBLIC LAW 100.

<sup>15</sup> As quoted in VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 4 (2009).

writings on the British constitution today all read, for Loughlin, as blueprints for reform, unconcerned with history except to overcome it. The “politics of repair” that animated traditions of behaviour have been replaced “by that of destruction and creation” following the loss of direction offered by those traditions (at 108).

In contrast to both the pre- and the post-20th century writings on the constitution, Loughlin’s account is neither a work of history nor a programme for reform. Instead, he seeks to capture the malaise in the current state of constitutional affairs. The trajectory of the book as a whole and of each one of its chapters is to report a decline, in confidence and in sense of direction. In his review of parliamentary government (ch. 3), Loughlin charts the historical rise of Parliament in its representative function as an instrument for taxation, through to the assertion of its plenipotentiary power under Henry VIII in breaking with the Holy See in Rome, establishing a new religion for England, and affirming parliamentary sovereignty in the constitutional settlement of the 17th century. The conflicts between “crown and Parliament were replaced in the 18th century by tensions within Parliament itself” (at 52), as political factions turned parties vied for control of government. From the high water mark of Parliament’s supreme jurisdiction, Loughlin charts its decline in legislative authority (yielded to the government: “[s]ince the 19th century, Parliament has rarely made any major impact on the content of legislation” [at 57]), in ministerial authority (yielded to the civil service: “[t]his is the “efficient secret” of the contemporary constitution” [at 61]), and in the rise of the party machinery (“governmental decisions are now made through party mechanisms rather than in accordance with received constitutional understandings” [at 62]). Parliament’s one “saving feature” is said by Loughlin to be its ability to test “Ministers through debates, questions, and other forms of scrutiny” (at 64).

A similar arc of rise and decline animates the historical review of the “expansion and contraction of the English state” (ch. 4). The expansion of the English state to Wales and then Scotland and then Ireland, coupled with the Empire-building ambitions of “Greater Britain”, reached their apex late into the 19th century. The story since has been the loss of Empire, the Ireland Act 1920, and the Statute of Westminster 1931, to name but some of the markers of decline, all of which put the European Communities Act 1972 and the devolution measures of 1998 in a less distinguished light. Loughlin’s review of this rise and fall frames his account why none of the modern concepts of “state”, “nation”, and “citizen” “easily fits the British experience” (at 83). His review of citizenship captures well the currently confused state of mind. The traditional incidents of citizenship—the rights to vote, to stand for election, and to work in the civil service—are given not only to British citizens, but also “to citizens of the Republic of Ireland and the British Commonwealth”, with the former, but not the latter, also having a right of abode (at 85). Remnants of Greater Britain remain even in a less confident Kingdom.

The third substantive chapter—on civil liberty (ch. 5)—recounts a similar narrative of loss. It begins with the affirmation of civil liberty, a Hobbesian concept of freedom from law, guaranteed not by formal declarations but by a watchful Parliament, trial by jury, and the strict construction of statutes by the common law judges. The great “landmark documents”—the Magna Carta 1215, the Petition of Right 1628, and the Bill of Rights 1689—are reported to have “conferred no new rights”, but instead to have “merely restated their existence” (at 87), thereby affirming how liberty is

ingrained in a tradition and way of being. The canonical statement capturing this deep commitment to liberty is Dicey's third sense of the rule of law, which affirms that the law of the constitution is "not the source but the consequence of the rights of individuals",<sup>16</sup> meaning that the freedom of the individual is not *deduced* from a declaration of rights so much as *induced* from "various court rulings on personal rights" (at 90). The price of liberty, on this account, is "eternal vigilance", by Parliament and by the courts (at 91). That vigilance has not been unwavering. Loughlin finds fault with both Parliament and the judiciary. The 20th century marked not only an expansion of legal regulation, but also of administration and discretion, all of which challenged traditional understandings of the scope of parliamentary and judicial jurisdiction. The result has been a decline in traditional understandings of civil liberty, replaced with "human rights", adopted "off-the-peg" (at 107) from the European Convention on Human Rights and understood to be, *contra* Dicey, "not the consequence but the source" of the rights of individuals. In the place of a watchful Parliament has arisen an increasingly watchful and confident judiciary, making claims of a "common law constitution" and a concomitant "shift away from constitutional protection of civil liberty by way of parliamentary restraint and strict judicial construction towards a framework in which the judiciary perform a leading role as guardian of enumerated rights" (at 103). Parliament's decline continues.

Nowhere in *The British Constitution* does Loughlin purport to identify a single cause for this decline and loss of self-understanding. Several possible causes are suggested in passing—among them, a loss of "club government" (at 36), "the institutionalization of ideological politics" (at 36), "the emergence of party discipline as a key determinant of political conduct" (at 36), and "a general sense of decline in political conduct" (at 40)—but none is awarded pride of place in Loughlin's interpretation. Rather, one orienting theme of the book is the loss of the constitution's traditions of behaviour and their haphazard and tentative substitution with a rational programme of modernization. The outcome is neither promising nor uplifting for Loughlin, who concludes the book on this melancholy note: "[a]s one chapter of constitutional development draws to a close, we look forward with a mixture of anxiety and anticipation to the prospect of reading the new" (at 118).

To understand the loss that Loughlin attempts to capture, a sense of traditions of behaviour must be appealed to. Michael Oakeshott, identified by Loughlin as "[t]he 20th-century philosopher who did most to explain the constitutional implications" of the (now declining) British pragmatic, anti-rationalist temperament (at 19), offers the account of such traditions alive in *The British Constitution*, a debt acknowledged by Loughlin in writing that the rise of rationalism "has distorted the legacy of the evolutionary British constitution" (at 20).<sup>17</sup>

### 3. Traditions of behaviour

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<sup>16</sup> Cited in the book under review at 89.

<sup>17</sup> Oakeshott's influence on Loughlin's scholarship can also be traced in many of his other works, including *PUBLIC LAW AND POLITICAL THEORY* 64-83 (1992) and *LEGALITY AND LOCALITY: THE ROLE OF LAW IN CENTRAL-LOCAL GOVERNMENT RELATIONS* 369-378 (1996). One also finds many references to Oakeshott in Loughlin's recent major contributions: *THE IDEA OF PUBLIC LAW* (2003) and *FOUNDATIONS OF PUBLIC LAW* (2010).

A “tradition of behaviour is a tricky thing to get to know”, reported Oakeshott in his inaugural lecture as Professor of Political Science at the London School of Economics.<sup>18</sup> This is true of all traditions of behaviour—“the Christian religion, modern physics, the game of cricket, shipbuilding”—and is no less true of that tradition which Oakeshott invited his reader to reflect upon, that “activity of attending to the general arrangements of a set of people whom chance or choice have brought together”; in other words, politics.<sup>19</sup> Inevitably, politics is an activity undertaken by all communities of persons—“families, clubs, and learned societies”—but this “manner of activity” is pre-eminent in the governing relationship.<sup>20</sup>

How are we to understand political activity within this relationship? Oakeshott’s invitation is to proceed, not by asking “what information we should equip ourselves with *before* we begin to be politically active”, but rather to “inquire into the kind of knowledge we unavoidably call upon whenever we are engaged in political activity”.<sup>21</sup> Political activity must be engaged in to be known. The suggestion is not that only politicians can know political activity; rather, “[w]ith us it is, at one level or another, a universal activity” even if, for many of us, it is a “secondary activity”.<sup>22</sup> Like one’s native language, knowledge of political activity is acquired in the enjoyment of a tradition: “[w]e do not begin to learn our native language by learning words, but by learning words in use”.<sup>23</sup> And just as the learning of a language cannot be said to have begun at a given moment or ever to be complete, “perhaps the only certainty” about how a tradition of behaviour is learned is that “there is no point at which learning can properly be said to begin” or to end.<sup>24</sup>

In these ways, Oakeshott’s invitation is to understand political activity as *attending to* the arrangements of a political community rather than as *making* those arrangements. To attend to arrangements is to be situated within an existing set of arrangements, to recognise how one is already in a context of political activity. To purport to make arrangements, on this understanding, is to attempt to set the stage before entering. This latter disposition is “ideological”: the claim to supply knowledge *in advance* of engaging in political activity. Those who profess an ideology suppose it to be “the product of intellectual premeditation” and, thinking their “body of principles” to be without debt to the activity of attending to the arrangements of their political community, they think themselves “able to determine and guide the direction of that activity” rather than themselves being guided and directed (not determined) by it.<sup>25</sup>

Even those who profess to *make* are, in truth, *attending to* arrangements, albeit without sufficient care for or commitment to that tradition of which they are inescapably a part. At any point in time in a tradition of behaviour, “the new is an insignificant proportion of the whole”: even for the self-professed reformer who would destroy and rebuild rather than mend and amend, “the arrangements which are

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<sup>18</sup> Oakeshott, *Political Education*, *supra* note 1, at 61.

<sup>19</sup> *Id.* at 61, 61 fn 8, 44.

<sup>20</sup> *Id.* at 44.

<sup>21</sup> *Id.* at 45.

<sup>22</sup> *Id.* at 45, 44.

<sup>23</sup> *Id.* at 62.

<sup>24</sup> *Id.* at 62.

<sup>25</sup> *Id.* at 51. See further Michael Oakeshott, *Conduct and Ideology in Politics* in WHAT IS HISTORY? AND OTHER ESSAYS (Luke O’Sullivan ed, 2004).



enjoyed always far exceed those which are recognized to stand in need of attention”.<sup>26</sup> Those who promote an “ideology” and seek to bring political activity in line with its principles fail to realise how the “pedigree of every political ideology shows it to be the creature, not of premeditation in advance of political activity, but of meditation upon a manner of politics”.<sup>27</sup>

What of those great revolutionary moments like the French Declaration on the Rights of Man and of the Citizen of 1789? Therein one finds, “in a few sentences”, a political ideology: “a system of rights and duties, a scheme of ends—justice, freedom, equality, security, property, and the rest—ready and waiting to be put into practice for the first time”. “For the first time?”, asks Oakeshott. “Not a bit of it.”<sup>28</sup> What of Locke’s *Second Treatise of Government*, read by revolutionaries as “a statement of abstract principles to be put into practice, regarded there as a preface to political activity”. A preface? No, answers Oakeshott: “so far from being a preface, it has all the marks of a postscript”.<sup>29</sup> In both instances, the power of the written word is “derived from its roots in actual political experience”.<sup>30</sup> For Oakeshott, “*what* we do, and moreover what we want to do, is the creature of *how* we are accustomed to conduct our affairs”.<sup>31</sup>

On this understanding, there is no alternative but to turn to the traditions of political activity and to commit oneself to knowing them. So why is politics—like every tradition of behaviour—a tricky thing to get to know? In short: because political activity is never settled. It is “neither fixed nor finished; it has no changeless centre to which understanding can anchor itself”, or, as Oakeshott would otherwise put it in arresting terms, because “[e]verything is temporary”.<sup>32</sup>

Now, without more, this does not capture the practices of traditions of behaviour. As all practitioners of politics (of the family, the club, the society) know even if only unselfconsciously, a tradition of behaviour may be “flimsy and elusive” but, despite this, is not “without identity”.<sup>33</sup> Political activity is “a possible object of knowledge” because, whilst no one part of a tradition is “immune from change” and all parts are liable to being otherwise, “all its parts do not change at the same time”.<sup>34</sup> A tradition is never made in a moment, never created in an act, never founded—it is “diffused between past, present, and future; between the old, the new, and what is to come” and, with this studied ambiguity, one can say, without a hint of contradiction, that its “principle is a principle of *continuity*” alongside the assertion that everything is temporary.<sup>35</sup>

To know a tradition is to see stability in its movement, to understand how it is “steady because, though it moves, it is never wholly in motion; and though it is tranquil, it is

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<sup>26</sup> Oakeshott, *Political Education*, *supra* note 1, at 45.

<sup>27</sup> *Id.* at 51.

<sup>28</sup> *Id.* at 53.

<sup>29</sup> *Id.* at 53.

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.* at 53.

<sup>32</sup> *Id.* at 61.

<sup>33</sup> *Id.* at 53.

<sup>34</sup> *Id.* at 61.

<sup>35</sup> *Id.* at 61 (emphasis in original).

never wholly at rest”.<sup>36</sup> This knowledge of political activity can be achieved only by understanding politics as an inheritance passed down and to be passed on, to see how the changes a tradition undergoes are potential within it. Everything within a tradition of behaviour “figures by comparison [...] not with what stands next to it, but with the whole” and, in this way, whilst everything is temporary, “nothing is arbitrary”.<sup>37</sup> Political activity is known, not as “an abstract idea, or a set of tricks, not even a ritual”, but rather as “a concrete, coherent manner of living”.<sup>38</sup> In short, when understood as a manner of activity, politics is a tradition of behaviour—not the pursuit of desire or principle, but of intimations.

#### 4. Relationships of constitutional actors

In responding to those who would find “some mystical qualities” in this account of tradition, Oakeshott confessed to being puzzled by the reaction: his account, as he understood it, was “an exceedingly matter-of-fact description of the characteristics of any tradition”, including the common law of England and the British constitution.<sup>39</sup> This analogy between the common law tradition and the British constitution is also drawn by Loughlin, who writes that “the British constitution is an extension of the methods of the common law”, in that the common law’s practical method is acquired “not by scholastic education but by apprenticeship to a pupil master” (at 21, 20). On this view, the constitution “is, at heart, an assemblage of customary practices, with the ‘rules’ often amounting to no more than cribs distilled from such practices” (at 21).

The British constitution’s traditions of behaviour are shaped by and expressed in the relationships of its various actors: the House of Commons to the House of Lords, the cabinet to the Prime Minister, the Queen to the cabinet and its chairman, the government to the opposition, the Leader of the Opposition to the parliamentary opposition, the backbenches to the frontbenches, the House committees to the House, the Ministers to the chamber, all of which, and more, are united in uncertain ways in the Palace of Westminster. But lest one think that the political activity that is the constitution is confined to this Palace, consider the relationship of Westminster to the administration in Whitehall, the relationship of them both to the seats of devolved governments in Holyrood, Cardiff, and Stormont, and the relationships of the Supreme Court of the United Kingdom to them all. For Loughlin, “British constitutional practice works by holding governmental institutions and practices in a relationship of mutual tension” (at 109). Understanding these relationships means understanding the tensions within them.

In an effort to understand this commitment to exploring relationships historically and with an eye to their mutual tensions, consider the requirement that the government enjoy the confidence of the House of Commons. Public law scholars are quick to summarise this requirement as no more than the numerical support the majority party enjoys by definition. This fails to attend to the mutual tensions between the Commons and the government, tensions that a historical perspective helps illuminate. That historical perspective, for Loughlin, highlights how the “peculiar strength of

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<sup>36</sup> *Id.* at 61.

<sup>37</sup> *Id.* at 61.

<sup>38</sup> *Id.* at 61.

<sup>39</sup> *Id.* at 61 fn 8.

**Comment [F5]:** Could you explicate how Oakeshott figures in Loughlin’s book? Possibly already above where you write that Oakeshott offers the background account. Is this acknowledged by Loughlin or is this your interpretation?

GW: I have done so above, including by adding a footnote outlining the influence of Oakeshott on Loughlin’s other writings.

parliamentary government lies in the complexity and ambiguity of its institutional arrangements” (at 42).

On Loughlin’s reading, the “practices of parliamentary government are products of a rich historical struggle between the crown and the communities of the realm” (at 43). That struggle did not cease with the 17th century constitutional settlement and it is significant that the parliamentary form managed to absorb the many permutations of that struggle since. For example, consider how the modern day cabinet began as the King’s Privy Council, developed to guide, if not to control the work of Parliament. After Parliament had successfully asserted itself within the mixed constitution as a necessary player for the enactment of laws, the Privy Council had to find a way to secure the ready agreement of parliamentarians. On Loughlin’s interpretation, “the most effective way of achieving this was to appoint parliamentary leaders as the king’s Ministers” (at 51). In time and without a change in form, the cabinet changed from the King’s Privy Council delegates in Parliament to Parliament’s delegates in the King’s Council, and a controlling committee at that. The Sovereign now chooses as ministers only they who the House of Commons will accept. As with so much within the practices of the British constitution, that which was created overtook its creator.

The story of cabinet is true of the more encompassing story of Parliament: “[h]aving come into existence as an act of royal will, Parliament – by invoking the principle of popular sovereignty – now assumed the power of self-creation” (at 48). Once Parliament determined, by enactment, the line of royal succession, the power of self-creation was complete. The modern day manifestation of the struggle between Crown and Parliament is captured by the tradition according to which Her Majesty’s government maintains office only so long as it enjoys the confidence of the Commons. That confidence is evaluated in the various ways in which the Commons scrutinise, regulate, frustrate, come into conflict with, and ultimately approve the cabinet’s policies. Confidence is measured, augmented, lessened and lost when the leader of the opposition spars with the leader of the government during Questions to the Prime Minister, when a select committee of the Commons critically reports on the departmental activities of the Secretary of State, and when a public bill committee amends and reports on a public bill. Parliament does not stand idly by as cabinet pursues the business of government; rather, having expressed confidence in the government following the Queen’s Speech, the chamber—and the official opposition especially—tests its confidence in government on a quotidian basis.

True to Loughlin’s emphasis on “mutual tensions”, neither Commons nor government can be understood without the other and, when the confidence between them is lost, one or the other must go, and sometimes both: either the Commons calls for a new government (a practice now less current than in times prior<sup>40</sup>) or the government calls for a new Commons or, as happens from time to time, a new Commons calls for a new government. With secure support in the Commons, the government may be said to control the House whose function it is to control the government. But lest simplifications overtake understanding, such support is itself contingent on the government continuing to warrant confidence and, no matter how large the

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<sup>40</sup> But none the less situated at the core of the Fixed-Term Parliaments Act 2011, s. 2(3): “An early parliamentary election is also to take place if—(a) the House of Commons passes a motion [of no confidence] and, (b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion [“That this House has confidence in Her Majesty’s Government.”]”.

government's majority, the House of Commons will recognise, at two swords' length from the seat of the Prime Minister, the Leader of Her Majesty's Loyal Opposition. The passage of government bills through the chambers and their committees, the government submission of estimates and financial debates, the questions—oral and written—replied to and not by government ministers, and the tabling of opposition and backbench motions each and all contribute to testing the Commons' confidence in the cabinet.

The many relationships of ministerial responsibility to Parliament—that tradition which gives expression to the ministry's dependence on the continuing confidence of the Commons—cannot be completely captured in neat formulations, except by way of stating that “Ministers generally do or should do X in circumstances Y (but with various exceptions)”.<sup>41</sup> What are the exceptions? They depend on the actors and the traditions of their relationships. If we state that the government resigns when it loses the confidence of the Commons, we must immediately add “except when it remains in office” (which it almost invariably does); so, too, in affirming that ministers must offer their resignations upon serious personal or departmental error must we add the qualification: “except when they retain their posts or are given peerages”.<sup>42</sup> The exceptions vary over time and sometimes overtake the general proposition. To understand the constitution is to resist appeals to “simplicity and homogeneity, a sea without tides, seasons without variety” and to embrace the complexity of the practices of political activity that are heterogeneous, coherent and incoherent at once.<sup>43</sup> None of this suggests that one is incapable of formulating precise, rule-like accounts of ministerial responsibility. The Ministerial Code issued by the Prime Minister to cabinet contains many such provisions, but the more important among them resist reducing the traditions of responsibility to settled rules. Consider the following: “Ministers of the Crown are expected to behave in a way that upholds the highest standards of propriety”; “When Parliament is in session, the most important announcements of Government policy should be made in the first instance, in Parliament”; “The principle of collective responsibility, save where it is explicitly set aside, applies to all Government Ministers”.<sup>44</sup> Each proposition invites the exercise of judgment; each formulation is indebted to traditions of behaviour and, thus, is best understood by one who is familiar with such traditions.

Consider a second relationship within Westminster: the Commons to the Lords. Whilst the composition of the House of Commons is transitory—changing with each general election—the membership of the upper house is comparatively steady and the continuity of the Lords has been exercised past and present to frustrate the initiatives of the Commons. Not finding a majority in the Lords, the Commons—through the government it selects—may seek the appointment of a majority, saying: “Use the powers of your House as we like, or you shall not use them at all”.<sup>45</sup> With time, it came to be that the House of Lords, formally of near equal status and historically of far superior status to the House of Commons, assumed the role of a revising and

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<sup>41</sup> GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS* 54 (1987). For general criticism of the tendency of public lawyers to reduce complex relationships to simplified propositions, see Graham Gee and Grégoire Webber, *A Grammar of Public Law*, 14 *GERMAN L.J.* 2137 (2013).

<sup>42</sup> MARSHALL, *id.* at 54.

<sup>43</sup> MICHAEL OAKESHOTT, *THE POLITICS OF FAITH AND THE POLITICS OF SCEPTICISM* 10 (1996).

<sup>44</sup> CABINET OFFICE, *MINISTERIAL CODE*, sections 1.1, 1.2(a), and 9.1 (2010).

<sup>45</sup> BAGEHOT, *supra* note 5, at 83.

suspending chamber: revising and, at times, referring bills sent to it by the Commons back whence they came, but never standing in the way of a determined lower house. As Bagehot would capture the claim, the authority of the House of Lords came to be understood as no stronger than: “We reject your Bill for this once, or these twice, or even these thrice; but if you keep on sending it up, at last we won’t reject it.”<sup>46</sup>

When, in the early 1900s, the Lords did not stay true to its jurisdiction and denied the Commons its way on the finances of the realm, the Commons resolved that the defeat of the government’s Finance bill was “a breach of the constitution and an usurpation of the rights of the Commons”.<sup>47</sup> The remedy proposed to correct this change in the practices of the constitution was to change the constitution again by providing that the Lords could no longer do otherwise than that which they had by practice done: to revise and suspend, but not block. Emboldened by a promise from George V to appoint sufficient numbers of new peers to overcome opposition in the upper chamber, the Commons asked the Lords to assent to a bill which would allow future bills to become Acts of Parliament without their assent, and they promptly complied.<sup>48</sup> After the Lords had changed the practices of the constitution by rejecting the Finance bill, the Commons replied by changing the practices again, so as better to align constitutional actors to the traditions of behaviour animating their relationship.

In providing that a public bill could become an Act of Parliament without the assent of the House of Lords, did the Parliament Act 1911 amend the constitution? The lesson of traditions of behaviour is to offer a qualified reply. Whilst legislative changes are readily noticed by public lawyers, they tell but a small part of the history of the constitution, which is reforming itself everyday day, sometimes by statute, principally by practice. Having passed the Parliament Act, the fundamental question for the constitution remained: would it be used? In a sense, it had already been used to change the relationship between the two chambers: by its assent, the Lords explicitly consented to what had long been understood—that their status was inferior to the Commons. However, true to the lessons of traditions of behaviour, it is significant to note that the Act has been relied upon only seven times, including in 1949 to amend itself. Does this betray the simplified account according to which the Parliament Act 1911 “removed the Lords’ veto”? Yes and no. Whilst it is true that, even when the Parliament Act is not employed, the Lords proceed on the understanding that it could, the 1911 Act did not preclude the need to develop the Salisbury convention (according to which the Lords will not defeat manifesto bills) or, indeed, the move to amend the Parliament Act in 1949.

The relationships of the two chambers of Parliament are guided by the primacy of the Commons over the Lords and the judgment of the upper house to know when to resist and when not to. By a process of changing practices between the Houses of Parliament, the constitution has arrived at the “curious paradox” that an appointed House is able “to produce a revising chamber which simultaneously provides a greater measure of independent scrutiny of government than the House of Commons, without at the same time undermining the political supremacy of the House of Commons, or

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<sup>46</sup> *Id.* at 80.

<sup>47</sup> See HANSARD, 5th ser., 13: 546-581 (2 December 1909) (motion moved by Mr Asquith).

<sup>48</sup> See Parliament Act 1911, as amended by the Parliament Act 1949. Consider how these Acts mirror Bagehot’s account of constitutional practice, quoted in the last sentence of the preceding paragraph.

unduly impeding or frustrating the implementation of the government's programme".<sup>49</sup>

## 5. Proposition and practice

The British constitution has long been distinguished by the extent to which it rests on traditions of behaviour, traditions which may be said to be "more easily felt than analysed".<sup>50</sup> Consider how the House of Lords could force the House of Commons to rely on the Parliament Act before any bill it disagrees with becomes an Act of Parliament, but does not; how the opposition could introduce a motion of non-confidence in Her Majesty's Government at every opportunity, but does not; how the Queen could appoint as Prime Minister anyone of her choosing, but does not; how the Secretary of State could refuse to answer questions in the Commons, but does not. The uses of "could" in these preceding statements are receivable only when the relationships of the constitution are set out in propositional form. But when one attends to the constitution's traditions of behaviour and the judgments of its various actors, such propositions fail to capture how the actors continue the practices inherited and to be passed on. Their judgment is situated within that which is already underway and which, in turn, is not "susceptible of precise formulation".<sup>51</sup>

To know the constitution is to avoid reducing it to formulae: "knowledge of it is unavoidably knowledge of its details" and "to know only the gist is to know nothing".<sup>52</sup> The closest approximation to formulaic proposition is one that keeps traditions at the forefront of any reading of the constitution, as in the following accounts:

1. The prerogatives of the Crown are exercised on the advice of Ministers (except in such cases as they are not).
2. The Government resigns when it loses the confidence of the House of Commons (except when it remains in office).
3. Ministers speak and vote together (except when they cannot agree to do so).
4. Ministers explain their policy and provide information to the House (except when they keep it to themselves).
5. Ministers offer their individual resignations if serious errors are made in their Departments (except when they retain their posts or are given peerages).

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<sup>49</sup> A.W. BRADLEY AND K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 180 (footnote omitted) (15th edn, 2011).

<sup>50</sup> W. I. JENNINGS, THE BRITISH CONSTITUTION 113 (5th edn, 1971).

<sup>51</sup> Michael Oakeshott, *Rationalism in politics* 12 in RATIONALISM IN POLITICS AND OTHER ESSAYS (new edn, 1991).

<sup>52</sup> Oakeshott, *Political Education*, *supra* note 1, at 62.

6. Every act of a civil servant is, legally speaking, the act of a Minister (except those that are, legally speaking, his own).<sup>53</sup>

This tug-of-war between proposition and practice relates to what Oakeshott identified as the two sorts of knowledge involved in any practical activity: technical knowledge and practical knowledge.<sup>54</sup> The former may be “formulated into rules which are, or may be, deliberately learned, remembered, and, as we say, *put into practice*”; its “chief characteristic is that it is susceptible of precise formulation”.<sup>55</sup> Oakeshott gives the example of driving a motorcar, part of the technique of which is to be found in the Highway Code, just as “the technique of cookery is to be found in the cookery book, and the technique of discovery in natural science or in history is in their rules of research, of observation and verification”.<sup>56</sup> One could add that the technique of the English language is to be found in books on English grammar and syntax. But just as one cannot learn to speak English, to discover, to cook, or to drive from a study of technical knowledge alone, so too can one not know the constitution by learning only the various formulae just outlined. For one will ask: “When does the exception hold?”, and formulaic replies are not always available. Here one must appeal to knowledge of tradition and see within that tradition the exercise of practical judgment by political actors.

Practical knowledge “exists only in use, is not reflective and (unlike technique) cannot be formulated in rules”.<sup>57</sup> It is shared and becomes common not by the “method of formulated doctrine”, but by being “imparted and acquired”, a form of apprenticeship dispersed between a past, the present, and what is to come.<sup>58</sup> These traditions of behaviour are forever in motion and are distinguished by being temporary even as no change within them is arbitrary. Unlike the formulation of “rules, principles, directions, maxims”, which give the “appearance of certainty”, practical knowledge of “the done” and “the not done” things has the “appearance of imprecision” and of “uncertainty, of being a matter of opinion, of probability rather than truth”.<sup>59</sup>

But it is not necessarily so. Traditions of behaviour are undertaken *in concert with others* and practical knowledge of what is intimated by such traditions is not reducible to the whim of the one, but only to the various activities of the many, never acting wholly in concert, sometimes acting in opposition to each other, but always attending to the same constitutional arrangements. The thought is well captured by saying that the “extent to which one can be unconventional depends upon the strength of the convention”, which is never determined only by the actor who would depart from it.<sup>60</sup> Any one of the many relationships of the constitution will change only so far as its participants will allow. The situated judgment of constitutional actors allows us to understand that *what* they do and aspire to do is itself a creature of *how they already* conduct their affairs and carry on the arrangements of the constitution.

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<sup>53</sup> MARSHALL, *supra* note 41, at 54.

<sup>54</sup> For an extended review of this distinction and its special relevance for public law, see Graham Gee and Grégoire Webber, *Rationalism in Public Law*, 76 MODERN L. REV. 708 (2013).

<sup>55</sup> Oakeshott, *Rationalism in politics*, *supra* note 51, at 12 (emphasis added, footnote omitted).

<sup>56</sup> *Id.* at 12.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.* at 15.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> I. JENNINGS, PARLIAMENT 521 (1957).

Whilst technical and practical knowledge cannot be considered “identical with one another or able to take the place of one another”, neither—and “pre-eminently not in political activity”—can they be separated from one another.<sup>61</sup> One cannot commit technique to formula without knowing the activity of which it is a part, nor can one read and comprehend the formulation of technique without knowing the activity to which it is to be “put into practice”. Nevertheless, in keeping the different sorts of knowledge alive in one’s reading of the British constitution, one may interpret what Griffith was saying when he expressed the unsettling idea that the “constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also”.<sup>62</sup> When read as a formulation of technical knowledge (as many have read Griffith), it reduces the constitution to nothing: the technique of the constitution is the absence of technique, the mere happening (or not) of events. But when read as an expression (not a formulation) of practical knowledge, as a grasping at the practices of the constitution, one reads Griffith as appealing to traditions of behaviour, a difficult thing to get to know, one marked by continuity and change. Understood in this way, whilst everything that happens is constitutional, “*not just anything can happen*”.<sup>63</sup> The judgment of political actors attending to the arrangements of the constitution is bounded by the tradition they carry on. This tradition, whilst flimsy and arbitrary to the untrained eye, is for the participants the arbitrator of “the done” and “the not done” things.

In reflecting on “ordinary constitutional practice in Britain”, Lord Bingham explained how, under the British constitution, “matters of potentially great importance are left to the judgment either of political leaders [...] or, even if to a diminished extent, of the crown”, thus allowing for “a flexible response to differing and unpredictable events”.<sup>64</sup> This judgment is acquired in the practical art of governing; that is, through experience. It calls upon a pragmatic disposition and fixation, a matter-of-fact sense of what can and cannot be done given what has and has not been done. The political activity of the British constitution is diffused between the various relationships that give it shape, between being temporary and continuous, and between the exercise of judgment to maintain or change—all the while attending to—the arrangements of the constitution. The various actors of the constitution exercise judgment to continue traditions of political activity in the absence of the strictures of a constitutional court or written instrument with the stipulated status and force of supreme positive law. In this sense, one can follow Blackstone in understanding members of Parliament as “the guardians of the English Constitution”,<sup>65</sup> so long as we add: together with the various other constitutional actors.

This is a rich sense of constitution, one that Loughlin seeks to articulate. In so doing, he offers his reader a constant reminder that this is a sense of constitution that is waning. The traditions of behaviour that carried the constitution from absolute monarchical rule to democratic and representative parliamentary government and from a Kingdom United and far-reaching to independence for former colonies,

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<sup>61</sup> Oakeshott, *Rationalism in politics*, *supra* note 51, at 14.

<sup>62</sup> J.A.G. Griffith, *The Political Constitution*, 42 MODERN L. REV. 1, 19 (1979).

<sup>63</sup> Graham Gee, *The political constitutionalism of JAG Griffith*, 28 LEGAL STUDIES 20, 42 (emphasis in original) (2008).

<sup>64</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, para. 12 (Lord Bingham).

<sup>65</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, book I, 9 (1765).



devolution and membership in the European Union are no longer viable. “Unsure of our customs”, reports Loughlin, “we have been obliged to write down more and more of these practices in rules and regulations” (at 107). The question put by Loughlin (at 108) is existential: “Are we now at the stage at which customary practices are unable any longer to determine present behaviour or guide future conduct?”

## 6. Loss of tradition

If Loughlin is correct that, in the traditional understanding, “the better the constitution the fewer the written constitutional laws” (at 9), there is reason to suspect that traditions of behaviour are no longer being carried forth in the British constitution. Attempts to commit constitutional practice to written form disclose “a mode of conduct that has not been fully absorbed in the manners, traditions, and practices of a people” (at 9). The rise in such attempts of late suggests a dire diagnosis for the state of Britain’s constitution of tradition.

In October 2011, the Cabinet Office published *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government*, said by the Prime Minister to set “out the internal rules and procedures under which the Government operates” and to serve as “an authoritative guide for ministers and officials”.<sup>66</sup> The Cabinet Manual follows the promulgation of the Civil Service Code (1996), the Ministerial Code (first issued in 1992 as Questions of Procedure for Ministers), the Constitutional Reform Act 2005 and its distrust of traditions of behaviour surrounding the office of Lord Chancellor, the Constitutional Reform and Governance Act 2010 and its codification of traditions surrounding the role of Parliament in the ratification of treaties, and the Fixed-Term Parliaments Act 2011 and the elimination of the Prime Minister’s discretion in timing general elections. To this selective list of formal enactments could be added the impatience of parliamentary committees with ministerial prerogative powers and the privileges of both Houses.<sup>67</sup> If Loughlin is right that the better the constitution the fewer the written constitutional laws, this commitment to writing Britain’s constitutional traditions into law sustains his view that many, including many constitutional actors, now find the idea of a constitution of tradition “rather puzzling” (at 1).

Not only are the constitution’s traditions being committed to writing, they are being—in breach of longstanding practice—labelled “constitutional”. In the past, “whenever it has sought to change constitutional arrangements Parliament has done so indirectly and in purely technical language, such as in the Representation of the People Acts or the Parliament Acts” (at 115). Today, “we encounter legislation that explicitly states its intention to ‘reform the constitution’” (at 115), as do the 2005 and 2010 Acts just referenced. Loughlin’s conclusion seems inevitable: “[t]he entire political class seems to have lost faith in customary ways of government” (at 4). Instead of carrying on a tradition of behaviour inherited from their predecessors, constitutional actors have set out to reconstruct the constitution and, in so doing, have left behind the idea that the British constitution could be one wherein “the done” and “the not done” things are

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<sup>66</sup> CABINET OFFICE, *THE CABINET MANUAL: A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT*, Foreword by the Prime Minister (2011).

<sup>67</sup> PUBLIC ADMINISTRATION SELECT COMMITTEE, *TAMING THE PREROGATIVE: STRENGTHENING MINISTERIAL ACCOUNTABILITY TO PARLIAMENT* (HC 422, Fourth Report of Session 2003–2004); JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE, *FIRST REPORT* (HL 43, HC 214, Session 1998–1999).

identified by reference to traditions of behaviour and the tacit understandings inherent in them. “Today”, reports Loughlin, “the problem is not confined to grasping the meaning of these tacit understandings of the constitution: the question is whether they can be said still to exist” (at 1).

The book’s final pages confront the question with which we began: “does Britain possess a constitution?” The answer offered is subtle. On the one hand, the “traditional idea of a constitution which the British have long celebrated has become so corroded that it no longer provides a coherent account of the nature of British government” (at 116). Britain can no longer confidently be said to define its constitution in part by the activity of its constitutional actors. On the other hand, it cannot be confidently said that Britain possesses a constitution of the modern type: written, codified, and dignified with the status of supreme positive law. Although many tacit understandings have been committed to writing, many traditions of behaviour reformed in law, many relationships between actors re-regulated by rules, the exercise has been “undertaken in a thoroughly British manner: rather than starting afresh, we are creating a modern-style constitution in an incremental and pragmatic fashion” (at 118).

The storyline of Loughlin’s constitutional account might well have ended here, suggesting that the inevitable will come: Britain’s constitution of tradition will whither and eventually be replaced, in every respect, by a modern constitution guarded by a constitutional court. And yet, in his interpretation of the present state of constitution malaise, Loughlin suggests the possible persistence of the constitution of tradition and warns of the dangers of thinking that it can be done away with.

De Gaulle’s appeal to the “general consent” to explain the success of the British constitution over its long history was contrasted with “meticulously worked out constitutional texts”. The lesson offered by the French since their revolution of 1789 is that no matter how meticulous the text of one’s constitution, it cannot survive without some measure of general consent. Loughlin appeals to something similar in recalling that “drafting and adopting such a [modern] constitution does not make it a living reality” (at 12). The challenge ahead for the constitutional reformers is therefore great: can the constitution’s traditions of behaviour be reformed without losing the “general consent” which sustained them and which must sustain the new constitutional arrangements? Loughlin’s diagnosis is not promising: “the process of converting the informal practices of British government into formal rules [...] does not signal the emergence of a new constitution”; rather, it “marks the extent to which the old constitution has lost its guiding spirit and must now be shored up by formal rules” (at 41). But what will give those formal rules their authority? The absence of a ready answer to this question is what allows Loughlin to affirm that whilst “[t]he old is dead; the new is yet to be born” (at 41). We are, without doubt, in a period of considerable constitutional uncertainty.

## 7. Conclusion

The “very short introduction” series is described by Oxford University Press as promising to “change the way you think about the things that interest you” and to

**Comment [F6]:** I would like to suggest that in the conclusion you return once more to the book under review. Thus I think it would be good if you shortly addressed the genre of Hart’s “Very short introductions” and how Loughlin uses it

**GW:** I have done so with a new first paragraph under this section

serve as “the perfect introduction to subjects you previously knew nothing about”.<sup>68</sup> Martin Loughlin’s *The British Constitution: A Very Short Introduction* speaks to both audiences: to the students of the constitution, he provides a historically rich introduction to the rise and fall of the British constitution of tradition; to scholars of the constitution, he provides a welcome challenge to those who would accelerate the modernisation of the constitution and who fail to see how political activity can be more than either unbounded by the absence of or constrained by the presence of a constitution. To recall the theme with which this essay began, Loughlin has defended an understanding of political activity as not quite *without* or *within* but *as* the British constitution of tradition.

For the British constitution, there is no single, identifiable moment of constitution-making akin to a founding. The constitution is made every day, in the sense of being attended to, engaged with, mended and developed as its traditions of behaviour are carried on and whiter. Alexis de Tocqueville concluded from the practice according to which “the constitution may change continually” that, therefore, “it does not in reality exist”,<sup>69</sup> a sentiment echoed years earlier by Thomas Paine in affirming that “the continual use of the word *constitution* in the English parliament shows there is none”.<sup>70</sup> These indictments assume too much: no constitution is self-enforcing and the success of written constitutions rests not on “parchment barriers” but on a commitment and standing tradition to live according to their terms. That commitment and standing tradition serve as a ready reminder that the constitution will always be more than the modernisers would have it be. It will always, even if imperfectly, be indebted to a critically reflective understanding of “the done” and “the not done” things.

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<sup>68</sup> Oxford University Press, “Very Short Introductions”, online: <http://ukcatalogue.oup.com/category/academic/series/general/vsi.do> (accessed 25 March 2014).

<sup>69</sup> A. TOCQUEVILLE *DEMOCRACY IN AMERICA*, book I, ch VI (1835).

<sup>70</sup> T. Paine, *Rights of Man, Part I* 140-141 in PAINE: *POLITICAL WRITINGS* (B. Kuklick ed., 2000).