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# Loyal Opposition and the political constitution

Grégoire Webber\*

**Abstract**—In studying Parliament, special attention is regularly awarded to the interactions between government and Commons, with the Commons identified as a singular body, united in its claims against or in support of the government. These and other commonplace understandings trade on an insufficiently *political* study of the constitution, highlighted by the relative neglect of the Official Opposition in public law thought. With the aim of rehabilitating the place of Her Majesty’s Loyal Opposition in political and constitutional theory, this essay explores the historical rise and present day responsibilities of the opposition and highlights how government and opposition are carried on by agreement and how the Opposition’s critical function is channelled, facilitated, and complicated by its pursuit of office.

**Keywords:** Loyal Opposition, Parliament, public law, constitutional theory, political theory, political constitutionalism

## 1. *Political Public Law*

The great institutions of government are regularly said to be government, Parliament, and judiciary and the relationships between them, but less so within them, receive sustained attention by public lawyers and constitutional theorists. Special attention is awarded to ‘the action and reaction between Ministry and the Parliament’ or, as contemporary writers would say, between government and Commons.<sup>1</sup> When the functions of the Commons are interrogated, that institution’s constitutional responsibilities to maintain the government in office and to hold the government to account are said to yield ‘an obvious paradox’ insofar as they ‘may pull the institution in two diametrically opposed directions’.<sup>2</sup> An answer to the paradox is sometimes offered by insisting that ‘the Cabinet dominates the House of Commons, more or less by constitutional definition’,<sup>3</sup> with the consequential evaluation that the Commons fails in its responsibility to hold the government to account.

These commonplace understandings are simplifications that trade on an insufficiently *political* study of the constitution. I use *political* here in the way appealed to by Jeremy Waldron in his call for ‘*political* political theory’, that is, political theory devoted not only to questions of justice, freedom, and equality, but also to ‘questions

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<sup>1</sup> Walter Bagehot, *The English Constitution* [1867] (CUP, Cambridge 2004) 100 and Adam Tomkins, ‘“Talking in Fictions”: Jennings on Parliament’ (2004) 67 MLR 772, 782.

<sup>2</sup> Adam Tomkins, *Public Law* (Clarendon Press, Oxford 2003) 92.

<sup>3</sup> Jeremy Waldron, ‘*Political Political Theory*’ (2013) 21 *Journal of Political Philosophy* 1, 19, reprinted as the title chapter in Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, Cambridge, Mass 2016) 17.

about political process, political institutions, and political structures'.<sup>4</sup> This politically oriented study is, Waldron rightly insists, 'massively important' given the 'need to inquire into the structures that are to house and refine our disputes and the processes that are to regulate the way we resolve them'.<sup>5</sup> Our commitments to justice, freedom, and equality are widely shared, but the 'circumstances of politics' highlight how the need for a common framework or decision or course of action on these commitments confronts 'disagreement about what that framework, decision or action should be'.<sup>6</sup> Among the topics and principles in need of study to bring the political back to political theory are democratic representation, electoral competition, political parties, and even those 'fuddy-duddy topics' of constitutional structure like federalism, unicameral vs. bicameral parliaments, checks and balances, and—the focus of this essay—the *principle of loyal opposition*.<sup>7</sup> A study of the principle of loyal opposition is especially well-suited to interrogating how a legislative assembly can be organised so as to settle upon a common framework or decision on some matter of public concern notwithstanding disagreement on its merits; that is, how 'to structure an institutional environment to house and accommodate the rival views'.<sup>8</sup>

Waldron argues that *political* political theory would be well pursued by an interdisciplinary partnership with law.<sup>9</sup> Among the branches of law, public law might well be thought to be an obvious partner for 'theory addressing itself to politics and to the way our political institutions house and frame our disagreements about social ideals and orchestrate what is done about whatever aims we can settle on'.<sup>10</sup> And yet, large aspects of public law thought and scholarship are themselves in need of greater attention to political institutions, structures, and processes. As a case in point, consider the relative neglect of the Loyal Opposition, a neglect not exclusive to public law scholarship and constitutional theory. Even political scientists and historians who study the rise and role of political opposition in Britain and beyond make a point of reminding their readers of the novelty of their subject matter of study.<sup>11</sup> To be sure, legal scholarship is not altogether ignorant of the principle of loyal opposition, but much of the literature is dated. Since Ivor Jennings, who wrote about the Opposition in near all of his great works, John Griffith and Rodney Brazier are two of only a few

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<sup>4</sup> Waldron, 'Political Political Theory' (n3) 6. This passage is omitted in Waldron, *Political Political Theory* (n 3).

<sup>5</sup> Waldron, *Political Political Theory* (n 3) 5 = Waldron, 'Political Political Theory' (n3) 8.

<sup>6</sup> Jeremy Waldron, *Law and Disagreement* (OUP, Oxford 1999) 102.

<sup>7</sup> Waldron, *Political Political Theory* (n 3) 6 = Waldron, 'Political Political Theory' (n 3) 8.

<sup>8</sup> Waldron, *Political Political Theory* (n 3) 7 = Waldron, 'Political Political Theory' (n 3) 9.

<sup>9</sup> Waldron, *Political Political Theory* (n 3) 15 = Waldron, 'Political Political Theory' (n 3) 17. Waldron adds 'empirical political science'.

<sup>10</sup> Waldron, *Political Political Theory* (n 3) 6 = Waldron, 'Political Political Theory' (n 3) 9.

<sup>11</sup> See, e.g., Anthony King, 'Modes of Executive-Legislative Relations: Great Britain, France, and West Germany' (1976) 1 *Legislative Studies Quarterly* 11, 20; Thomas A. Hockin, 'The Roles of the Loyal Opposition in Britain's House of Commons: Three Historical Paradigms' (1971) 25 *Parliamentary Affairs* 50, 50-51; Ludger Helms, 'Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies' (2004) 39 *Government and Opposition* 22, 22-23; Eva Kolinsky, 'Introduction' in Eva Kolinsky (ed.), *Opposition in Western Europe* (Croom Helm, London 1987) 1; Archibald S Foord, *His Majesty's Opposition 1714-1830* (OUP, Oxford 1964) 2-3; David E Smith, *Across the Aisle: Opposition in Canadian Politics* (University of Toronto Press, Toronto 2013). Robert A. Dahl's edited collection *Political Oppositions in Western Democracies* (YUP, New Haven 1966) continues to earn the title of the last great comparative work on political opposition: see, e.g., Jean Blondel, 'Political Opposition in the Contemporary World' (1997) 32 *Government and Opposition* 462, 462: 'A number of comparative studies did appear after the 1966 seminal work, admittedly [but] . . .'.

public lawyers of late who have devoted scholarly attention to the Opposition.<sup>12</sup> Even their work is some decades old and, like Jennings', predates the proliferation of parties, including parties destined to aspire to no more than the opposition benches at Westminster.

Now, the need for a *political* public law is highlighted in much of the political constitutionalist scholarship. Adam Tomkins' study of ministerial responsibility resisted the scholarly consensus that modes of political accountability had waned and should be dismissed; his patient study of the political workings of the Commons exposed the simplifications of an insufficiently political study of the constitution.<sup>13</sup> In turn, Richard Bellamy has highlighted the dangers of speaking of 'the majority' as a unified, permanent group, showing how majorities are 'shifting coalitions of minorities', and his work on political parties has helped illuminate their role in institutionalising contestation and inclusiveness.<sup>14</sup> More generally, it is said that without a *political* study of the constitution, 'public lawyers are liable to lose sight of the practical knowledge necessary to evaluate the workings of the constitution'.<sup>15</sup> In this way, Waldron's call for *political* political theory is well paired with the invitation made by some students of the constitution.

By examining an understudied, but central part of Britain's constitutional arrangements, this essay seeks to make a contribution to *political* public law and *political* political theory. In awarding special attention to HM Loyal Opposition at Westminster, my intention is not to narrow the scope of inquiry, but rather to inform more general appeals to the principle of loyal opposition by tracing the historical rise and present day constitutional responsibilities of that British institution that has done more than any other to inform the principle. After a brief note explaining the focus on the Official Opposition and its relationship to the other parliamentary opposition parties (sec. 2), this essay situates the present day Opposition as the contingent outcome of historical developments (sec. 3) before exploring the significance of the Opposition's dignified titles—*Her Majesty's* and *Loyal* (sec. 4). Next, a somewhat contradictory idea is examined: government and opposition are carried on by agreement, whereby each facilitates the tasks of the other, all the while they oppose each other (sec. 5). This frames the opposition's reluctance to carry its criticism of the government's programme too far and highlights the two main tools of opposition available under parliamentary procedure: time and argument (sec. 6). The use of argument is especially important and trades on the promise that Her Majesty's Opposition is also Her Majesty's Alternative Government. This provides the gateway to examine the idea that the Opposition's critical and office-seeking functions provide both opportunities and limitations on their mutual pursuit. All of this, I aim to show, amounts to a significant constitutional achievement: Responsible Opposition, an idea analogous to the more familiar idea of Responsible Government (sec. 7). The essay

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<sup>12</sup> See JAG Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin, London 1974), JAG Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, London 1989), and Rodney Brazier, 'The Constitutional Role of the Opposition' (1989) 40 N.I.L.Q. 131, reprinted with modifications in *Constitutional Practice* (3rd edn, OUP, Oxford 1999) ch 8.

<sup>13</sup> See Tomkins, *Public Law* (n 2) 131-169.

<sup>14</sup> Richard Bellamy, *Political Constitutionalism* (CUP, Cambridge 2007) 95, 230-231.

<sup>15</sup> Graham Gee and Grégoire Webber, 'Rationalism in Public Law' (2013) 76 MLR 708, 731.

concludes with reflections on the significance of the rise of parties in opposition with no prospect of forming government (sec. 8).

## 2. *Opposition and opposition*

Before proceeding, a note on this essay's special, not exclusive focus: the Official Opposition, rather than the parliamentary opposition as a whole or political opposition generally. There is much opposition to government beyond Parliament and a fuller account of political opposition would include media, pressure groups, unions, the courts, and the range of other actors who also exercise the critical function of holding the government to account. With the fragmenting of political authority to devolved assemblies and local administrations, some opposition may be said now to develop to *any* government at Westminster, rather than only or especially to the government of the day.<sup>16</sup> In turn, there is much opposition to government *in* Parliament beyond what the Official Opposition contributes. Intra-party dissent from government backbenchers, critical reports from select and public bill committees, and delaying tactics in the House of Lords all stand, in differing ways, in opposition to the government.

Within Parliament, the privileging of opposition by a single-party—the biggest losers<sup>17</sup>—is achieved by awarding to one but not the other opposition parties official standing as the 'Official Opposition'. This privilege is based on what are now dated assumptions about a two-party Parliament, an assumption challenged during the Parliaments when the Liberal Democrats secure important popular support and challenged again with the rise of the Scottish Nationalist Party, claiming near all of Scotland's seats in the 2015 general election. Nonetheless, the pendulum swing between Conservatives and Liberals between 1859 and 1918 and between Conservatives and Labour since 1923, with the exception of the wartime and the 2010 peacetime coalitions, go some way to justifying special status to the biggest losers. Doing so, as we will see, empowers the capital 'O' Opposition in its relations with the government and, for some, '*this single function*, without qualification, without obscurity, without the trading of votes between minor parties' is one of its great virtues.<sup>18</sup> I aim to show how the Official Opposition differs from the other political formations in opposition not only by virtue of numbers, but also by virtue of constitutional position and responsibilities, including readiness for and expectation of office. To mark the distinction, I capitalise 'Opposition' when referring to HM Loyal Opposition and employ lower-case 'opposition' when referring to the opposition benches generally.

Calls for a different electoral system, which could expand the representation of smaller parties in the Commons, have their merit, but to appreciate the full impact of a

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<sup>16</sup> See David Denver, 'Great Britain: From "Opposition with a Capital 'O'" to Fragmented Opposition' in Eva Kolinsky (ed), *Opposition in Western Europe* (Croom Helm, London 1987) 78-115. The idea of understanding federalism through the lens of loyal opposition is explored (more or less successfully) in Heather K Gerken, 'The Loyal Opposition' (2014) 123 Yale LJ 101.

<sup>17</sup> The label is Waldron's, who frames his study of loyal opposition around the distinction between winners and losers: Waldron, *Political Political Theory* (n 3) c. 5 ('The Principle of Loyal Opposition').

<sup>18</sup> Henry Fairlie, *The Life of Politics* (Methuen & Co, London 1968) 195. See further Denver (n 16) 82 and Giovanni Sartori, 'Opposition and Control Problems and Prospects' (1966) 1 Government and Opposition 149, 153.

differently constituted Commons is to appreciate how this would change the constitutional roles of the Official Opposition. To gain that appreciation, one must first come to understand the place of Her Majesty's Loyal Opposition, an understanding facilitated by assuming a majority government. In sec. 8, I examine the role of the opposition absent that assumption.

### 3. *From Treason to Standing Opposition*

How did the British constitution 'stumble onto' the practice of Loyal Opposition?<sup>19</sup> Without a sense of history, one cannot fully appreciate the significance of Jennings' confident claim that the constitution 'not only does not expect conformity, it demands the opposite'.<sup>20</sup> When situated in historical perspective, that demand signals something of an achievement.

The idea of Parliament as a High Court recalls the medieval practice of bringing petitions to the attention of the King. Parliaments would assemble for supply and for the redress of grievances on matters local and private, matters over which the Monarch would not otherwise attend.<sup>21</sup> On the Great Matters of State over which the Monarch did exercise prerogative powers—among them, the 'royal succession, the church, and foreign policy'—no grievance could be entertained and no member of Parliament could 'presume with safety' to criticise.<sup>22</sup> The only safe criticism was on matters local and private; to be loyal was to support the Crown in those matters under the jurisdiction of the prerogative and to bring to the attention of the Crown other matters for redress. Constitutional arrangements did not allow for opposition as the practice is understood today: against that standard, one could be loyal or in opposition, but not both. The boundaries of criticism were demarcated by a jurisdictional divide: the 'Crown represented the national interest and Parliament [the] special and local interest' and to venture opinion and commentary beyond the local to the national was to approach treason.<sup>23</sup> *Eliot's Case* (1629) captures the risk confronting those who would engage in 'disloyal' speech in the Commons: the dissidents were charged with conspiracy to resist the King.<sup>24</sup> They who dared to criticise the Crown on matters public and general 'effectively could be called leaders of "the Opposition"', but no one, not least the Monarch, would have thought them a loyal opposition.<sup>25</sup>

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<sup>19</sup> Dahl would write that the 'system of managing the major political conflicts of a society by allowing one or more opposition parties to compete with the governing parties . . . [is] one of the greatest and most unexpected social discoveries that man has ever stumbled onto': 'Preface' in Robert A. Dahl (ed), *Political Oppositions in Western Democracies* (YUP, New Haven 1966) xvii-xviii.

<sup>20</sup> Ivor Jennings, *The British Constitution* (5th edn, CUP, Cambridge 1971) 87.

<sup>21</sup> The pairing of these functions was carried forward symbolically until 'supply days' were relabelled 'opposition days' in the Standing Orders of the House.

<sup>22</sup> Hockin (n 11) 52.

<sup>23</sup> *ibid.* 56. Hockin adds at 55: 'There was no recognition in theory or in fact that local grievances or petitions were intrinsically "in opposition" or in tension with the Crown.'

<sup>24</sup> (1629) 3 St.Tr. 294. Eliot was one of the authors of the Petition of Right 1628, which challenged the King on many Great Matters of State.

<sup>25</sup> Hockin (n 11) 54. It bears emphasising that because supply could be denied, space for disagreement between King and Parliament, including on the Great Matters of State, was possible, even if it was a treacherous undertaking.

Following the English civil war, a convention Parliament, summoned without sovereign decree, invited William and Mary to take the throne on the conditions laid out in the Bill of Rights 1689. The many denials of 'regal authority' and references to the 'pretence of prerogative' in that constitutional instrument affirmed that the Great Matters of State were no longer solely of the Crown's concern. The Monarch was denied sole responsibility for representing the community and public good: that task was now to be shared, in uncertain ways, between the three estates of the realm. The constitution was to be 'balanced' by the interactions of Crown, Lords, and Commons, no one of which could claim to represent the public good to the exclusion of the others.<sup>26</sup>

By expanding the jurisdiction of parliamentary debate into the traditional realm of prerogative, the problem arose of relating the Crown's administration to parliamentary opinion. In time, constitutional arrangements evolved to provide that the King's council would have to command the confidence of the Commons.<sup>27</sup> During the eighteenth century, 'the king was effectively required to appoint as ministers only those who could manage Parliament'.<sup>28</sup> It would be premature to conclude that this resolved the question of loyalty in opposition. The King's councillors remained, for some time yet, very much of the King's choosing and whilst a distinction between King and councillor could negotiate around the injunction that the King can do no wrong, two challenges persisted: first, so long as the King continued to rule through his councillors, 'opposing the measures supported by Ministers was regarded as unconstitutional because they were, very largely, the King's measures',<sup>29</sup> and second, even the idea of opposing ministers rather than the measures they carried 'involved a repudiation of the King's prerogative to choose his own servants'.<sup>30</sup>

The slow decline in these understandings in the course of the reign of George I can be attributed, in part, to the King's absence from the meetings of cabinet. Although it is said that his absence was the consequence of his lack of command of English, it also maintained the constitutional principle that the King can do no wrong: by acting on the advice of his councillors as recorded in cabinet, the King could avoid accusations of wrongdoing, imputing wrongdoing to his ministers.<sup>31</sup> With the rise of cabinet government and the growing distance between the King and the management of cabinet affairs, opposition could be contemplated without imputing disloyalty to the King. It is in this light that the full significance of Bagehot's insight can be appreciated: 'critical opposition is the consequence of cabinet government'.<sup>32</sup> Others have captured the idea by recalling how opposition is a 'dependent concept', such that 'the character of the opposition is tied to the character of the government'.<sup>33</sup> With the rise of cabinet government separable from the King, opposition to government could

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<sup>26</sup> *ibid* 57.

<sup>27</sup> Allen Potter, 'Great Britain: Opposition with a Capital "O"' in Robert A. Dahl (ed), *Political Oppositions in Western Democracies* (YUP, New Haven 1966) 6; Martin Loughlin, *Foundations of Public Law* (OUP, Oxford 2010) 246-247, 263-264.

<sup>28</sup> Loughlin (n 27) 264.

<sup>29</sup> Ivor Jennings, *Party Politics, vol. II: The Growth of Parties* (CUP, Cambridge 1960) 3.

<sup>30</sup> *ibid* 3.

<sup>31</sup> Loughlin (n 27) 264.

<sup>32</sup> Bagehot (n 1) 14.

<sup>33</sup> Blondel (n 11) 463. See also Ghita Ionescu and Isabel de Madariaga, *Opposition: Past and Present of a Political Institution* (Pelican 1972) 10: parliamentary opposition is 'the *altera pars* of government'.

be separated from opposition to the Crown. The historical tension between the King's government and Parliament was to be replaced with a new tension, a tension *within* Parliament.

In the years between the premierships of Sir Robert Walpole in 1721 and Pitt the Younger in 1784, parliamentary opposition gained recognition as 'a feature of normal political life'.<sup>34</sup> However, the propriety of critical opposition was nonetheless bounded by the political fact that the King remained responsible for selecting his government. Parliamentarians could oppose measures and sometimes ministers, but opposition to His Majesty's Government was not in keeping with the practice of the House.<sup>35</sup> To propose systematic, standing opposition to the government was contrary to constitutional practice in two ways: first, it was tainted with disloyalty in questioning the King's judgment in selecting his council;<sup>36</sup> and second, it was unparliamentary to prejudge the government's measures, to be a 'party man' opposed to government whatever the measures and whoever the men. The good parliamentary man, the 'man with no faction sworn',<sup>37</sup> would exercise judgment on measures and men, but would not surrender that judgment by opposing the government indiscriminately.

By 1784, the King's control over the selection of his ministers was giving way to the Commons.<sup>38</sup> The King's discretion would dwindle to the point that Bagehot could write, less than a century later, that the first function of the House of Commons is to elect the Prime Minister.<sup>39</sup> The removal of the King from the task of selecting the ministry made it possible to contemplate an expression unthinkable earlier in the history of the constitution. During parliamentary debate in 1826, Sir John Cam Hobhouse spoke to the government's proposal to separate the offices of President of the Board of Trade and Treasurer of the Navy:

The right hon. Secretary for Foreign Affairs . . . could not conceive why they should now go back to the old system, and employ two persons to do those duties which were efficiently performed by one. It was said to be very hard on his majesty's ministers to raise objections to this proposition. For his own part, he thought it was more hard on *his majesty's opposition* to compel them to take this course.<sup>40</sup>

Prompting laughter in the House, the phrase was immediately taken up in debate, first by the Foreign Secretary and then by George Tierney who said that Hobhouse 'could not have invented a better phrase to designate us than that which he has adopted, for we are certainly to all intents and purposes, a branch of his majesty's government'.<sup>41</sup>

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<sup>34</sup> Nevil Johnson, 'Opposition in the British Political System' (1997) 32 *Government and Opposition* 487, 488.

<sup>35</sup> Hockin (n 11) 61. See also Potter (n 27) 6.

<sup>36</sup> Hockin (n 11) 61.

<sup>37</sup> *ibid* 61.

<sup>38</sup> Johnson (n 34) 488.

<sup>39</sup> Bagehot (n 1) 94.

<sup>40</sup> Hansard vol. XV, p. 135 (10 April 1826) (emphasis added).

<sup>41</sup> As reported in HJ Hanham, *The Nineteenth Century Constitution 1815-1914: Documents and Commentary* (CUP, Cambridge 1969) 114 and Edward Porritt, *The Unreformed House of Commons, vol. 1* (CUP, Cambridge 1903) 510. Tierney explained the meaning of his phrase by adding: 'Its



We need not follow Tierney in claiming that the Opposition is a branch of His Majesty's Government to appreciate the significance of the informal title awarded to members critical of the government's men and measures. Now that the royal prerogative to select the government had weakened, it became possible to claim that neither those in nor those out of government were 'more or less the Queen's Friends than the other'.<sup>42</sup>

The rise of party would occur more or less contemporaneously and would help settle the new practice of standing, systemic opposition, with two parties in more or less indiscriminate disagreement with each other, vying for the responsibilities of office. By 1855, an essayist on 'Parliamentary Opposition' could write that 'the peculiar mark of the professed oppositionist is . . . that his objections are indiscriminate, his opposition general and systematic'.<sup>43</sup> For the party in opposition, there is a 'universal and conclusive presumption against all propositions coming from a certain quarter' with the only question confronting the Opposition being not whether but how to oppose, 'by what arguments, in what manner, and what time, and to what extent'.<sup>44</sup>

Taken together, the rise of party and of standing opposition to measures, men, and ministries made it possible to understand Her Majesty's Opposition as Her Majesty's Alternative Government. In the general election of 1841, Sir Robert Peel's Tory Opposition returned more members than the Liberal Government and, on Queen Victoria's invitation, Peel became Prime Minister in what is generally considered to be the first example of a party in opposition elected to assume the office of government.<sup>45</sup> The elections of 1868, 1874, and 1880 further established the practice and expectation that government and Opposition would succeed each other in office.<sup>46</sup> The swing of the pendulum between political formations within the Commons allowed for the idea of a standing, systemic opposition to government, formed of a body of members ready and able to assume office. The virtue of balancing the constitution around the three estates of Monarch, Lords, and Commons had been substituted by the virtue of balancing the constitution around two political formations.

The transition from the verb 'to oppose' to the noun 'the Opposition' tracks the transition from opposition as treason on all but private and local matters to opposition on measures and ministers but not ministries and, finally, to opposition to government—from tactical to targeted to standing opposition. When Parliament, in 1932, came to define the Opposition for the purposes of awarding its Leader a salary, it preferred the simple statement that the Leader of the Opposition is the leader of 'the party in opposition to Her Majesty's Government having the greatest numerical strength in the House of Commons'.<sup>47</sup> Even so simple a statement is significant for the emphasis placed on party and on standing, indiscriminate opposition. Also

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proceedings from some time past have proved that, though the gentlemen opposite are in office, we are in power.'

<sup>42</sup> Potter (n 27) 7.

<sup>43</sup> Anonymous, 'Parliamentary Opposition' (1855) 101 *The Edinburgh Review* 1, 8. Some have attributed this unsigned essay to Sir George Cornwall Lewis: see, e.g., Rodney Barker, 'Introduction' in Rodney Barker (ed), *Studies in Opposition* (MacMillan Press, London 1971) 11-12.

<sup>44</sup> Anonymous (n 43) 8.

<sup>45</sup> Johnson (n 34) 489.

<sup>46</sup> HJ Hanham, 'Opposition techniques in British politics (1867-1914)' (1966) 2 *Government and Opposition* 35, 36; Ivor Jennings, *Cabinet Government* (3rd edn, CUP, Cambridge 1959) 37.

<sup>47</sup> Ministers of the Crown Act 1937, s. 2.

significant is the emphasis placed on the House of Commons as the site for the confrontation between government and Opposition. The Commons was the engine for democratic, party politics and the site for the confrontation between governments and governments-in-waiting. The balance of the constitution was very much now primarily located *within* the Commons.

#### 4. *Dignified Opposition*

The Opposition's dignified titles—*Her Majesty's* and *Loyal*—signal the standing of the Opposition within the constitution. Although the etymology of the first of these two titles ('Her Majesty's') can be traced to Hobhouse, the history of the second designation ('Loyal') is rather more difficult to track. It is sometimes claimed that Hobhouse used the full expression 'His Majesty's Loyal Opposition' in parliamentary debate, but Hansard does not support the claim. What is more, official parliamentary publications do not employ the second dignified title, preferring instead 'Her Majesty's *Official* Opposition'.<sup>48</sup> And yet, despite its uncertain history and the absence of official endorsement in Westminster publications, it is the idea of *loyal opposition* that sustains so much scholarly attention, within the United Kingdom and beyond.

Some have claimed the pairing of 'loyal' with 'opposition' to be 'an eternal paradox'<sup>49</sup> or at least to have 'the appearance of a paradox';<sup>50</sup> others have sought to answer the paradox by searching for an *object* of loyalty that would allow opposition to the government whilst maintaining loyalty to something more fundamental. To this end, it has been suggested that the Opposition is loyal to 'the Crown',<sup>51</sup> 'the institutions of the state',<sup>52</sup> 'the established constitutional framework',<sup>53</sup> 'the basic features of the Constitution' or 'constitutional essentials',<sup>54</sup> 'parliamentary democracy',<sup>55</sup> or, simply, 'the rules of the game'.<sup>56</sup> There may be truth captured by each proposal, but it is only a partial truth, deflected by searching for a singular object of loyalty owed *by* the Opposition. There are, I aim to demonstrate, other and truer ways to approach the question.

Consider how no government, no matter the popularity of its actions, escapes dissent and the attention of those who think they could do better. *Quot homines, tot sententiae*

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<sup>48</sup> See, eg, the UK Parliament's webpage 'Government & Opposition', online: [www.parliament.uk/mps-lords-and-offices/government-and-opposition1](http://www.parliament.uk/mps-lords-and-offices/government-and-opposition1) (last accessed 2 March 2016).

<sup>49</sup> Otto Kirchheimer, 'The Waning of Opposition in Parliamentary Regimes' (1957) 24 *Social Research* 127, 127.

<sup>50</sup> Waldron, *Political Political Theory* (n 3) 123.

<sup>51</sup> RM Punnett, *Front-Bench Opposition: The Role of the Leader of the Opposition, the Shadow Cabinet and Shadow Government in British Politics* (Heinemann, London 1973) 399; Jennings, *Cabinet Government* (n 46) 363-364.

<sup>52</sup> A Lawrence Lowell, *The Government of England, volume I* (new edn, MacMillan Company, New York 1920) 451.

<sup>53</sup> Punnett (n 51) 13 (emphasis removed); Richard Rose, *Do Parties Make a Difference?* (2nd edn, Macmillan Press, London 1984) 23.

<sup>54</sup> *ibid.* 13 (emphasis removed). In *Justice as Fairness: A Restatement* (Belknap Press 2001) 49, John Rawls suggests that 'government and its loyal opposition agree on . . . constitutional essentials', one of which is the principle of loyal opposition. For discussion, see Waldron, *Political Political Theory* (n 3) 118-119.

<sup>55</sup> Brazier, *Constitutional Practice* (n 12) 167.

<sup>56</sup> KC Wheare, *Legislatures* (2nd edn, OUP Oxford 1967) 80; Smith (n 11) 6.

(There are as many opinions as there are men). For Waldron, disagreement attributable to the complexities of the public good is the ‘premise of everything’ for thinking about the principle of loyal opposition.<sup>57</sup> The question for those who protest government decisions is how to manifest their disapproval. Are they to be revolutionary, engaged in rebellion and the overthrow of constitution and government, or are they to be committed to make known their discord and discontent but only to replace the government at the next constitutional opportunity? The answer is informed *not only* by the dispositions of those who dissent, *but also* by the dispositions of those against whom that dissent is manifested.

Recalling the seventeenth century view that opposition to the Crown on the Great Matters of State was treasonous (sec. 3) helps us see this. The full significance of the Opposition’s dignified title ‘Loyal’ is grasped by recalling its history, which highlights the slow change in the government’s disposition to the Opposition: from opposition as treason against the King (*disloyal* opposition) to standing opposition carried on in the Queen’s name (HM *Loyal* Opposition). On this view, I argue, loyalty is to be measured not principally as something owed *by* the Opposition to some object (Crown, state, constitution, etc.), but rather is to be measured by what is owed *to* the Opposition. The Opposition is not to be labelled treasonous or subservice by the government it criticises and opposes. It’s constitutional standing is not to be questioned on that basis. Waldron arrives at this same conclusion without appealing to history: ‘Instead of saying that the word “loyal” in “Loyal Opposition” refers to a stipulated focus of allegiance, we should say that it indicates to the way in which the opposition party *must be regarded* in a constitutional system.’<sup>58</sup> The convention that the Opposition is recognised as both *Her Majesty’s* and *Loyal* (or *Official*) is, thus, a double reminder to the government and its supporters that they are to view the opposition as political adversaries, not enemies.<sup>59</sup> ‘War is the continuation of politics by other means’, said Clausewitz, but politics, on this understanding of *loyal* Opposition, is not war by other means. Government and opposition are bounded together as a ‘fraternity of adversaries’;<sup>60</sup> theirs is, in Burke’s imagery, a ‘regulated rivalry’.<sup>61</sup> It is an obvious, but nonetheless important point to recall how peaceful changes of government ‘could not take place if vengeance followed dismissal’.<sup>62</sup>

It may be thought that the ‘loyal’ designation may be withheld, with good reason, for ‘anti-system’ parties who do question the constitution, its essentials or fundamental features, or the place of the Crown in the constitution. Would this not, then, suggest that loyalty is indeed owed not only *to*, but also *by*, the Opposition? Without resisting the invitation, we should be hesitant before too readily welcoming it. Canada’s 35th Parliament (1993-1997) welcomed the leader of the separatist Bloc Québécois, Lucien Bouchard, as Leader of the Official Opposition. During his tenure, Quebec held its

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<sup>57</sup> Waldron, *Political Political Theory* (n 3) 94.

<sup>58</sup> *ibid* 122 (emphasis in original). See more generally Helms (n 11).

<sup>59</sup> See Sartori (n 18) 151. The same point is made by Rose (n 53) 78 on the basis of a study of British MPs: ‘Even though British MPs tend to disagree about specific political issues, they do not see themselves engaged in confrontation between forces of good and evil.’

<sup>60</sup> Michael Ignatieff, ‘On Partisanship: Enemies and Adversaries in Politics’, Public Lecture at Stanford University (15 October 2012), reproduced with modifications in Michael Ignatieff, *Fire and Ashes* (Random House, Toronto 2013) ch. 13.

<sup>61</sup> See Nancy Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton UP, Princeton 2008) 119-126.

<sup>62</sup> Foord (n 11) 8.

second referendum on Quebec independence in 1995, with the Prime Minister of Canada and the Opposition Leader confronting each other not only within the Commons, but also in the course of the referendum. Notwithstanding its political purpose, Bloc Québécois MPs fulfilled their parliamentary duties as the Opposition, which may give one pause before withdrawing the qualifier ‘loyal’ to even this example of Official Opposition.

Understanding ‘loyalty’ as, in part, owed *to* the Opposition *by* the government, it is significant that the 1937 Act providing for a salary to the Leader of the Opposition was proposed by the government and that the salary is charged not to the party in opposition, but to the Consolidated Fund.<sup>63</sup> Some years later, it would be the government again that would commit itself in the Queen’s Speech of 1974 to ‘consider the provision of financial assistance to enable Opposition parties more effectively to fulfil their Parliamentary functions’,<sup>64</sup> a commitment it fulfilled when, on a motion proposed by a government minister, the Commons resolved to fund ‘any Opposition party in this House to assist that party in carrying out its Parliamentary business’.<sup>65</sup> In these two ways, the government sought financial support to facilitate the work of its adversaries.<sup>66</sup>

There are other ways in which the government signals the constitutional standing of the Opposition. For example, the Leader of the Opposition and some members of his shadow cabinet will, at the request of the government, be sworn in as Privy Councillors and, from time to time, will be entrusted by the Prime Minister and cabinet colleagues with state secrets and other confidential information ‘on Privy Councillor terms’.<sup>67</sup> The Prime Minister will stand shoulder-to-shoulder with the Leader of the Opposition in representing the Commons at the Bar of the House of Lords at the State Opening of Parliament. The government will see to it that the schedule of visiting foreign dignitaries allows for a meeting with the Opposition Leader. And Prime Ministers since Douglas-Home have authorised the civil service to meet with and advise the Opposition on its electoral programme so as to facilitate its transition to office in the event that it should secure victory at the polls.<sup>68</sup>

The dispositions of Opposition and government members to regard each other as *constitutional* actors—not enemies in a civil war—are facilitated and encouraged by the swing of the pendulum. The alternation of office between two main political

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<sup>63</sup> Ministers of the Crown Act 1937, s. 2; see now Ministerial and Other Salaries Act 1975, s. 2. The Parliament of Canada was the first Commonwealth parliament to introduce a salary for its Leader of the Loyal Opposition, in 1905: for discussion and references, see Dean E McHenry, ‘Formal Recognition of the Leader of the Opposition in Parliaments of the British Commonwealth’ (1954) 69 *Political Science Quarterly* 438.

<sup>64</sup> HC Deb vol. 870 col. 47 (12 March 1974).

<sup>65</sup> HC Deb vol. 888 col. 869-870 (25 March 1975). The House of Lords adopted a similar scheme in 1996.

<sup>66</sup> There is a third way, though the benefits are not exclusive to the Opposition. In 2000, Parliament adopted legislation to provide funding to parties to assist ‘with the development of policies for inclusion in any manifesto’: Political Parties, Elections and Referendums Act 2000, s. 12.

<sup>67</sup> For examples, see Punnett (n 51) 203.

<sup>68</sup> See Cabinet Office, *The Cabinet Manual* (1st edn, October 2011) 16. A number of Acts of Parliament highlight the need for cooperation between government and Opposition on certain appointments: see House of Commons (Administration) Act 1978, s. 1(2)(c); Intelligence Services Act 1994, s. 10(3); Constitutional Reform and Governance Act 2010, s. 2(4); and Justice and Security Act 2013, s. 1(5).

parties promotes the understanding that the Opposition is the government-in-waiting and, correspondingly, that the government is the Opposition-in-waiting. This feature of parliamentary government helps situate what Waldron identifies as the ‘challenging idea’ that the constitution actively ‘empowers’, ‘sponsors’, and ‘facilitates’ those that are defined, for the time being, as ‘losers’.<sup>69</sup> Waldron’s ‘losers’ are, it is true, losers in the context of the grand electoral clash of parties vying for office, but that need not obscure from view how they are winners in local contests and in receiving important, even if insufficient, popular support. They have secured their seats in the House of Commons even if in insufficient numbers to form government. Some regional parties (e.g. the Scottish National Party) signal to the ‘winners’ the very qualified nature of their win so far as the region is concerned.

### 5. *Opposition by Agreement*

The art of opposition is far more subtle than ‘to oppose everything and propose nothing’, a thesis attributed to Sir George Tierney and repeated by others since.<sup>70</sup> The thesis captures how the primary function of the Official Opposition and the opposition generally is critical: given the government’s agenda-setting role in parliamentary affairs, it is to react to government legislation and administration.<sup>71</sup> The Opposition accepts its present station as the unchosen alternative to the government. But what is it ‘to oppose’? And to what end is opposition pursued? In failing to acknowledge the complexity of these questions, the Tierney thesis fails to situate the Opposition’s critical function within the long-standing responsibility of the House to hold the government to account.

Her Majesty’s Loyal Opposition now carries the greater part of the House of Commons’ constitutional responsibility to realise ministerial responsibility. What was once the role of the House as a whole to a government *external* to its membership has evolved to become the critical function of the opposition *within* the House. That is not to suggest that ministerial responsibility is owed to the members opposite; it is owed to the Commons, but primarily demanded and scrutinised by the opposition. The opposition members are rightly said to be ‘the most vigilant public parliamentary check on the misuse of power by the Government’,<sup>72</sup> to be ‘critics by profession’,<sup>73</sup> and to be ‘*ex-officio* judges of the existing administration’.<sup>74</sup> They assume primary responsibility for the duty of the House as a whole.

As early as 1855, it could be said that ‘it is by the leaders of the Opposition that the detailed criticism of the measures of the Government is carried on’.<sup>75</sup> It is for this reason surprising that so careful and informed a student of the constitution as Adam

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<sup>69</sup> Waldron, *Political Political Theory* (n 3) 104.

<sup>70</sup> See Anonymous (n 43) 8; Hanham (n 46) 35; King (n 11) 18. See further Ivor Jennings, *Parliament* (2nd edn, CUP, Cambridge 1969) 167 and Griffith, *Parliamentary Scrutiny of Government Bills* (n 12) 338.

<sup>71</sup> For a defense of how the government’s agenda-setting role assists, rather than frustrates, Parliament’s legislative function, see Richard Ekins, *The Nature of Legislative Intent* (OUP, Oxford 2012) ch 6.

<sup>72</sup> Hockin (n 11) 63.

<sup>73</sup> Jennings, *The British Constitution* (n 20) 86.

<sup>74</sup> Anonymous (n 43) 3.

<sup>75</sup> *ibid* 3. See also Wheare (n 56) 79; LS Amery, *Thoughts on the Constitution* (OUP, Oxford 1964) 31: ‘it is the [Opposition] upon which has devolved most of the original critical function of Parliament.’

Tomkins continues to insist that the ‘Government and Opposition thesis . . . cannot explain this most basic of Parliament’s functions: namely, to hold the Government to constitutional account’.<sup>76</sup> Tomkins’ concern is that the government and Opposition dynamic, with its emphasis on ‘the cloak of party’, risks ‘deceiv[ing] us into thinking that the House of Commons has now forgotten’ how to hold the government to account, and so risks concealing from view the role of the good parliamentarian.<sup>77</sup> The ‘more venerable and deeper dynamic’, for Tomkins, is that between Crown and Parliament.<sup>78</sup>

Tomkins is right to insist that, if carried too far, the government and Opposition thesis obscures from view the role played by the good parliamentarian, who will jealously guard the House from transgressions by ministers of whatever political colour. But in counselling against taking the government and Opposition thesis too far in one direction, Tomkins fails to acknowledge how the Opposition is the body through which the Commons now fulfils the greater part of the responsibility to hold the government to account. That is not to say that the Opposition carries the whole of the burden: the other opposition members, the committees of the House, and the government’s backbenchers—never mere yes-men and yes-women—share the constitutional responsibility and have taken measures to increase their ability to carry it out.<sup>79</sup> The management of a government majority is no easy feat and government ministers need their backbenchers: they ‘need their moral support’ and ‘need them not to cause rows and to make hostile speeches that will attract publicity’; above all, they need their votes.<sup>80</sup> But the government backbenchers’ duty is also to support the government, a duty that qualifies the way in which they hold the government to account. The other opposition parties are awarded some status in debate and on committees to hold the government to account. But despite all this, it is fair to say that, with respect to the Commons’ critical functions, the Opposition is the loudest, even if not the only, critical voice in the chamber. Tomkins’ Crown and Parliament dynamic may have been venerable, but it is no longer, nor has it been for some time, the dynamic of the constitution.<sup>81</sup>

The Commons’ checking function is exercised in parliamentary debate. As a ‘speaking place’, Parliament and its debating chambers will hear more than one side; in this respect, the constitutional role of the Opposition in Parliament can be said to formalise the principle of *audi alteram partem*. In parliamentary debate, the Speaker will recognise, in turn, a member from the government benches and a member from the opposition benches. Because the country is not unanimous on the requirements of public good, so the House will not be unanimous in voice or vote. It will hear much that need be said (and it will hear much else besides). When the question is put, the House will record its division. Opposition members will go into the division lobbies ‘not because they expect to be successful but because they consider that a formal

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<sup>76</sup> Tomkins, ‘Talking in Fictions’ (n 1) 783 (footnote omitted).

<sup>77</sup> *ibid* 782.

<sup>78</sup> *ibid* 782.

<sup>79</sup> For a review of the Backbench Business Committee, see House of Commons Political and Constitutional Reform Committee Report, *Revisiting Rebuilding the House: the impact of the Wright Reforms*, Third Report of Session 2013–14 (HC 82, 18 July 2013).

<sup>80</sup> King (n 11) 15.

<sup>81</sup> See, eg, *ibid* 26: ‘it is hardly too strong to say, with regard to Britain, that there is no such thing as “the relationship between the executive and the legislature.” The language simply does not fit the facts.’ See also *ibid* 11.

protest is necessary'.<sup>82</sup> The House of Commons' expressive, teaching, and informing functions are realised neither by government nor by Opposition, but by debate in the House. Together, though without implying partnership, the two sides of the House set out to 'express the mind' of the people on all matters, to 'teach the nation what it does not know', and to inform the nation of 'what is wrong'.<sup>83</sup>

In carrying out the Commons' scrutiny of government legislation and administration, the Opposition participates in the law-making process initiated by the government and criticises government administration. It accepts JS Mill's insistence that there is a 'radical distinction between controlling the business of government, and actually doing it' and that 'the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable'.<sup>84</sup> The minority accepts the right of the majority to govern on the understanding that the majority recognises the right of the minority to criticise. This reciprocity grounds the idea that both Opposition and government are carried on by agreement. Now, this may not hold for those opposition parties that have no hope for office. The SNP, for example, may resist a government programme in a way that the Loyal Opposition would not. But even here, the smaller opposition parties will accept some measure of reciprocity. This idea can be approached by contemplating the struggles both sides of the House would face if either failed to facilitate the other.

Consider how the government, with its majority, could suspend all opposition time under the Standing Orders and seek a programme motion (previously: a guillotine) to complete the parliamentary stages of its bills by a certain date and within a fixed number of sittings. The government, with its majority, could amend the Standing Orders to fulfil the oft-quoted simplification that the government controls the House and can thereby deny a voice to the opposition in debate. In turn, consider how the opposition can frustrate the progression of government business in a large number of small ways,<sup>85</sup> including by disrupting speeches by government members, denying quorum in committee meetings, raising repeated points of order, and delaying the passage of even non-contentious bills by proposing amendments in committee and on the floor of the House that must be voted down. When government and opposition are carried on by *disagreement*, neither will be facilitated in fulfilling its responsibilities: government will not get its bills or anywhere near all of them and the opposition will not make known its criticism or present itself to the public as a responsible alternative. In turn, when both understand that the country and the Commons have preferred the party in government to the parties in opposition, and that the government must govern through the Commons and be responsible to it, both government and opposition are facilitated: the government will see the greater part of its programme through and the opposition will make known its criticism.

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<sup>82</sup> W Ivor Jennings, 'The Technique of Opposition' (1935) 6 *Political Quarterly* 208, 211.

<sup>83</sup> Bagehot (n 1) 95-96. Ionescu and de Madariaga (n 33) 70 put the point this way: the Opposition is 'the representative of opinions, interests and values not included in government'. This is not to say that they succeed: some find their representative in the other opposition parties; others find themselves unrepresented and without voice in the chamber.

<sup>84</sup> JS Mill, *Considerations on Representative Government* [1861] (CUP, Cambridge 2010) 89, 104.

Mill's quote assumes a government distinct from an assembly, but the idea holds even when the government is selected from amongst the members of the assembly.

<sup>85</sup> Griffith, *Parliamentary Scrutiny of Government Bills* (n 12) 21.

In this respect, both sides of the House share in governing the Commons and the country more generally, even if some on the opposition benches would seek to disrupt the government's programme come what may. Yet, on the whole, the opposition's active participation in parliamentary proceedings aims to make legislation better by improving government proposals and, thus, by improving the legislature's actions. By critically engaging with bills and serving on committees, the opposition participates in the work of Parliament, which the government leads but does not subsume or replace. Throughout, both government and opposition are 'conversant with the school-boy maxim, "two can play at that fun"',<sup>86</sup> and so are secure in the knowledge that a programme motion to secure time here may result in opposition obstruction to waste time there and vice versa. That is not to say that the government will not contract opposition time or exceptionally impose a programme motion or that the opposition will not on occasion obstruct the government's legislative programme to make known its deep discontent, but both strategies proceed against a shared understanding that the opposition is to be provided with opportunities for criticism and the government will fulfil the greater part of its programme.

This cooperation could be taken to be an illustration of *governing* by the opposition, but it should not be taken quite as far as David Fontana wishes to take it in his account of 'Government in Opposition'. That account conflates the role of the opposition 'to dissent [and] to note the problems with what the government is doing', on the one hand, with the inclusion of opposition members in cabinet or in key legislative or judicial roles, on the other.<sup>87</sup> In so doing, Fontana's analysis misfires by including the Official Opposition's chairmanship of the Select Committee for Public Accounts<sup>88</sup> and the standing practice of its Leader to examine the Prime Minister during Questions to the Prime Minister as examples of 'winners' powers' being given to 'losers'. In truth, these are examples of ways in which the opposition holds the government to account, checking and criticising the exercise of 'winners' powers' by ministers. Too generous an account of what to include as 'Government in Opposition' risks undermining the promise of Aristotle's good citizen, who is able and willing to rule and *be ruled* in turn.<sup>89</sup> The opposition's constitutional responsibilities are best captured precisely as being otherwise than the responsibilities of government.

The idea that both opposition and government are carried on by agreement is informed by more than reciprocal self-restraint. The government and Opposition's joint management of House affairs is also realised by active cooperation behind the Speaker's Chair. It is significant that the discussions between government and Opposition off the floor of the chamber and beyond the pages of Hansard have acquired the label 'the usual channels'.<sup>90</sup> When in the chamber, the opposition and government record their disagreement in debate and division; when beyond the glare of publicity, they seek agreement on parliamentary management. The two sides of the House can afford to disagree in public because they have already agreed so much in

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<sup>86</sup> Bagehot (n 1) 213.

<sup>87</sup> David Fontana, 'Government in Opposition' (2009) 119 Yale LJ 548, 556-557.

<sup>88</sup> The Standing Orders provide that the chairmanship of the Public Accounts Committee shall be held by an opposition member: S.O. 122B(8)(f).

<sup>89</sup> Aristotle, *Politics*, bk. III, ch. 13, 1283b42-1284a4.

<sup>90</sup> For an informative empirical study, see Michael Rush and Clare Ettinghausen, *Opening Up the Usual Channels* (Hansard Society, London 2002).



private. Even the exaggerated disagreement between the Prime Minister and the Leader of the Opposition during Questions to the Prime Minister rests on the prior agreement to meet for the occasion. The Leader of the Opposition will select topics for debate on 17 of the 20 opposition days set aside in the Standing Orders and the government will award priority in the parliamentary calendar to a motion of no confidence tabled by him.<sup>91</sup>

Through the usual channels, government and Opposition facilitate the fulfilment of each other's constitutional duties to govern and to oppose. They cooperate to secure those 'structures that are to house and refine our disputes and the processes that are to regulate the way we resolve them'.<sup>92</sup> The whips will jointly agree the attendance of members in the chamber, the order and amount of speaking time, the need for and timing of divisions, the pairing of members who must be absent from divisions, and other facets of good House management. The complicated set of arrangements settled by the usual channels allows the public face of the Commons to proceed in disagreement and in an orderly way; indeed, so orderly is the management of business that the notoriety of disagreement between Prime Minister and Opposition Leader can shield from view the consensus upon which it rests. In this frame, Jennings reconstructs a telling, even if fictional account of the negotiations behind the Speaker's chair:

*Chief Whip:* Well, I'll make you an offer. If you'll close down the debate on the Shrimp Industry Reorganisation Bill at seven on Monday and let us have a couple of small Bills that same evening, we'll let you move your vote of censure on Tuesday.

*Opposition Whip:* Will that mean suspending the ten o'clock rule on Monday?

*Chief Whip:* I'm afraid so, but I'll try to stop our men from talking if you'll do the same.

*Opposition Whip:* Very well, thanks very much.<sup>93</sup>

Come Monday, the Chief Whip moves to suspend the ten o'clock rule and, for 'form's sake' the Opposition objects, but the motion is carried without debate.<sup>94</sup> Once debate on the reorganisation of the shrimp industry has carried past seven o'clock, the Chief Whip moves to close debate, which is again opposed, for form's sake, but carried again without debate. The small bills are discussed, opposed, but not obstructed. On Tuesday, the House proceeds to consider whether the government ought to be censured. The opposition loses the vote as both government and Opposition expected it to.

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<sup>91</sup> The effect of a motion of no confidence has been qualified by the Fixed-term Parliaments Act 2011, s. 2.

<sup>92</sup> Waldron, *Political Political Theory* (n 3) 5 = Waldron 'Political Political Theory' (n 3) 8.

<sup>93</sup> Jennings, *Parliament* (n 70) 158. This same theme is carefully explored in Rose (n 53) c. 2 ('Adversary or Consensus Politics?') and c. 5 ('Adversary Parliament and Consensus Legislation').

<sup>94</sup> *ibid* 158.

Be it through the exercise of mutual restraint or active cooperation in managing conflict in the House, the competition between government and Opposition trades on the understanding that the government, with its majority, will realise the greater part of its programme and that the Opposition, with its minority, will be empowered to make known its criticism. With the conventions that bind it in defeat between general elections, the Opposition will appeal to two tools of responsible opposition: time and argument.

### 6. *Time and argument*

The cases for and against government proposals are communicated in the regular conflict between government and opposition. But for debate and questions put and answers demanded, government business would be carried far more quickly and far more business would be concluded. Parliamentary procedure delays what would otherwise be the unobstructed passage of the government's programme.<sup>95</sup> A telling illustration of the delay occasioned by parliamentary opposition is how between '1 and 7 September 1939 Parliament passed enough legislation to occupy two or three sessions, because the Opposition agreed not to oppose'.<sup>96</sup> Yet, the constitution, save in the most exceptional circumstances, is designed to facilitate the Opposition. In this light, it has been said that time spent debating government business ought to be considered Opposition time: 'they are the participants that want the debate and spend time on it'.<sup>97</sup> Given that the Opposition is entitled to its time to criticise the government and to examine and to comment on proposals brought before the House, the question arises: how is that criticism to be formulated and to what end is it to be pursued?

The complexities of the public good suggest that the government will never have an unanswerable case in favour of its programme. As a result, it is sometimes suggested that the end sought by Opposition criticism is to oppose indiscriminately and excessively. The clever 'oppositionist' will always be in a position to locate some ground for censure. He will question the motivation for the measure, pairing any virtue with vice—courage with rashness, caution with timidity, firmness with obstinacy, confidence with arrogance—and so, 'by a slight deflection of the ethical nomenclature', will taint the minister responsible for the measure with 'unfavourable associations'.<sup>98</sup> He will question the timing of the measure, arguing that it is premature or that it is too late; he will maintain that it should first be studied by a committee of experts or, if it has been, that the government in so doing has delegated the responsibilities of office.<sup>99</sup> The able critic will argue that even if the proposal is desirable in principle, in its design it is too timid or it is being carried too far.<sup>100</sup> The

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<sup>95</sup> In 'Playing by the Rules: The Constraining Hand of Parliamentary Procedure' (2001) 7 *Journal of Legislative Studies* 13, Philip Norton (Lord Norton of Louth) reviews the staying power of procedure notwithstanding that a majority government 'has the political resources to change procedure': *ibid* 25. Among the reasons identified by Norton for the persistence of procedure are 'consensus' between government and Opposition and how '[e]ach accepts the legitimacy of the other in what it seeks to do': *ibid* 28.

<sup>96</sup> Jennings, *British Constitution* (n 20) 88.

<sup>97</sup> Griffith, *Parliamentary Scrutiny of Government Bills* (n 12) 13.

<sup>98</sup> Anonymous (n 43) 9.

<sup>99</sup> *ibid* 12.

<sup>100</sup> *ibid* 11.

indiscriminate opposition member will always be able to locate an argument against the government's case.

Indiscriminate and excessive criticism, however, is not the strategy of a good opposition. That is not to say that it is ineffective or unwarranted. An important opposition duty is to remind the governing majority of Cromwell's injunction: 'I beseech you, in the bowels of Christ, think it possible that you are mistaken'.<sup>101</sup> However, the Official Opposition's critical responsibilities are not its only responsibilities and an appreciation of those other duties informs the end of its criticism: the Opposition seeks the office of government and that pursuit of office through persuasion (not revolution) channels its critical function, facilitating it in some respects, complicating it in others.

An Official Opposition insufficiently attentive to its role as the government-in-waiting will approximate Tierney's thesis and the argumentative tactics of the indiscriminate critic. It will fall foul the excesses of critical opposition, seeking artificial disagreement and divisions, engaging in a 'disguised civil war',<sup>102</sup> opposing what is good and defending the opposite because of the source rather than the merits of the measures. This complication does not afflict those minority opposition parties without expectation of office. But even here, caution in criticism is warranted. When parliamentary opposition is understood to be no more than 'shame warfare',<sup>103</sup> to be no more than pursued in the interests of party, not country, the government may escape criticism by dismissing it as empty partisanship and the opposition will lose credibility in holding the government to account. In this way, the Opposition's office-seeking function and the other opposition parties' desire to maintain popular support facilitate their critical roles: it encourages the opposition benches to relate public opinion outside to political criticism inside and, so, to seek to make a better claim to represent the electorate than the government. The opposition seeks to make itself 'a focus for the discontent of the people'<sup>104</sup> and to present itself not only as critical of the government of the day but also, in the case of the Official Opposition, as the alternative government of tomorrow.

When the questions put to the government by the opposition are the questions asked by the everyman and everywoman, an able minister will know to answer not the member opposite but those who ask the same questions beyond the chamber. The minister will know that whilst the composition of the Commons is determined on election day, the public opinion that carried the government to office does not await the next general election before expressing itself again. In this way, the opposition, no matter the size of its minority, can augment its authority in the House by capturing public opinion better than the government. Through debate between government and opposition in the chamber, 'the appeal to the people is not an occasional ceremony, but a process which goes on daily and hourly in the parliamentary session'.<sup>105</sup> The opposition's appeal to the better argument is not always voiced with the hope of defeating government policy (although the government's majority does fracture and

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<sup>101</sup> As cited in Jennings, *The British Constitution* (n 20) 87.

<sup>102</sup> Punnett (n 51) 27, citing Disraeli.

<sup>103</sup> *ibid* 28.

<sup>104</sup> Jennings, *Cabinet Government* (n 46) 16. As illustration, consider how many opposition parties campaign on a promise of 'change'.

<sup>105</sup> Jennings, *The British Constitution* (n 20) 88.

the opposition will aim to fracture it from time to time),<sup>106</sup> but with the aims of defeating the government at the next election and weakening it until then.

In channelling its criticism, the opposition must be selective in its strategy and, in the case of the Official Opposition, constructive in making a case for office. Here is an important way in which the pursuit of office complicates the Opposition's critical function. The Tierney thesis that the Opposition is 'to propose nothing' cannot be carried too far, lest the electorate conclude that the rightful place of the party in Opposition is as a parliamentary check on government. It is true that the Opposition, with few exceptions, does not propose measures with the aim of seeing them adopted. But the Opposition will nonetheless be compelled, from time to time, to answer the Minister's retort to criticism: 'I welcome suggestions for improvement, if you have any.' In pairing criticism of the government's proposal with an alternative proposal, the Opposition faces the challenge of giving the appearance of being ready for office without determining its governing policy before encountering the realities of office. An able Opposition will set out an alternative proposal 'without presenting too many clear targets for the government to ridicule as "dangerous Opposition star-gazing"' and will condemn the government's present action without pledging itself to reversing every government decision.<sup>107</sup> If the Opposition misplays its hand, it will find itself defending its proposals from government criticism and so lose the advantage of keeping the government on the defensive. Even if it successfully deflects government criticism, the Opposition may nonetheless find itself, on coming to power, to be like 'a speculative merchant whose bills become due'.<sup>108</sup> The question—'What did the Prime Minister say when in Opposition?'—is a question that will be put by many in the chamber, including by many who welcomed the Opposition into office in the hope that it would undo what it had argued needed to be undone. It would be unreasonable for the Opposition to pledge itself to undo all that the government does. Some laws will be 'well settled and ground good states of affairs';<sup>109</sup> more generally, the Opposition-turned-government takes office at the helm of a continuous enterprise adjusted to past acts, which a new government should not undo merely because it would have done different.

The Opposition's office-seeking function channels its critical function and can facilitate it, but, as just reviewed, it can complicate criticism of government as well. Wheare was right to warn that the expectation of office can make 'an opposition too well behaved to make the government behave'.<sup>110</sup> A popular government measure, even if misguided, will be difficult to challenge by an Opposition seeking that same popularity. In this respect, the Commons is well served by having parties in opposition with no hope of office.

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<sup>106</sup> Four recent examples: Thatcher's government exceptionally lost the second reading vote on the Shops Bill 1986; Blair's government lost the vote on the proposed 90-day detention in his Anti-Terrorism, Crime and Security Bill 2001; and Cameron's government delayed a July 2015 vote on the Draft Hunting Act 2004 (Exempt Hunting) (Amendment) Order 2015 after concluding that it did not have the numbers to support it and, at the time of writing, is reported to have abandoned its proposal in the Enterprise Bill 2015-16 to extending Sunday shopping opening hours after losing a Commons vote.

<sup>107</sup> Punnett (n 51) 214.

<sup>108</sup> Bagehot (n 1) 126.

<sup>109</sup> Ekins (n 71) 140 (footnote omitted); more generally on 'legislative integrity', see 139-142.

<sup>110</sup> Wheare (n 56) 95. See further Bertrand de Jouvenel, 'The Means of Contestation' (1966) 1 *Government and Opposition* 155, 161: 'the essential value of the [Roman] Tribune was that the people were defended by those who did not aspire to become masters.'

The art of opposition is thus a selective art. It appeals to political judgment in knowing how to attend to the tension between criticism of the present government and aspiration to become the next government; between facilitating the management of government business in the House and opposing it by voice and vote; between opposing the government's measures and being compelled to propose alternative measures; between promoting itself for office and not appearing to care only for office; and between securing quiet concessions on bills in the corridors outside the chamber and maintaining public and publicised criticism of the government's proposals in the chamber. A successful opposition strategy cannot afford to care only for one half of the equations just outlined.

### 7. *Responsible Opposition*

It is said to be an organising principle of the constitution that Her Majesty's government must be carried on. That principle can be seen at work in the Official Opposition's practice of criticising without obstructing the present government and in its readiness to form the next government. The Opposition is committed to facilitating government business by sharing in the management of the House and makes known its criticism on the understanding that, should it be successful in making a determinative case against the government in the Commons or at the next election, it is ready and willing to assume the fruits of that success. In fulfilling its duty to hold the government to account and to make real the conventions of *responsible government*, the Official Opposition sustains a convention that receives rather less attention than it warrants: *responsible Opposition*.<sup>111</sup>

This responsibility is realised in fulfilling the many constitutional roles attributed to the Opposition, roles that do more than facilitate its passage from opposition to government: to criticise the government's measures but, on the whole, not to seek to realise its own measures; to oppose but not to obstruct government business (unless government conduct releases it from the reciprocal duty of forbearance); to fulfil the greater part of the Commons' constitutional responsibility to scrutinise the government's legislative proposals and administration; to ask questions, to scrutinise, and to publicise government failures; to facilitate the management of the House with the government's Chief Whip and to populate select and public bill committees; to accept the conventions that bind it in defeat and acknowledge that the government is entitled to see the greater part of its programme through; to collaborate with the government from time to time on aspects of constitutional and foreign policy where consensus is called for; to join the Prime Minister in representing the Commons at the State Opening of Parliament; to assume office following the next election victory and to measure its criticisms to that end; and, in time, to award to the outgoing government the respect and standing owed to a political opponent under the constitution.

In fulfilling and coordinating these roles and responsibilities, the Opposition organises itself in a manner that tracks the conventions of responsible government. The practice of organising opposition members into a *shadow cabinet* began in the nineteenth

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<sup>111</sup> Rose (n 53) 22 suggests that the Opposition's strategy is to navigate between being 'irresponsible' and 'too responsible'.

century when the ex-cabinet continued to meet as a collegiate body in order to coordinate opposition strategy. It was, as it now continues to be, an ‘off-shoot from the institutions of government’,<sup>112</sup> including the decision of shadow cabinets past and present to endorse the conventions of cabinet solidarity and confidentiality. The shadow cabinet helps present the Opposition as the government-in-waiting, a role now so central to the position of the Opposition that, in its absence, it was thought that there could be no Opposition. On the formation of Churchill’s wartime coalition cabinet in 1940, the Speaker was confronted with the question who should be recognised as the Opposition to the Conservative-Labour-Liberal ministry. The Speaker’s reply: no one. ‘It cannot be said’, he ruled, ‘that there is now an Opposition in Parliament in the hitherto accepted meaning of the words; namely, a party in Opposition to the Government from which an alternative Government could be formed’.<sup>113</sup> The conventions of responsible Opposition informed the Speaker’s understanding of what could count as the Official Opposition.

It was perhaps only a matter of time before the shadow cabinet, mandated to coordinate Opposition strategy, would evolve into a *shadow government* so as better to realise that strategy. It is to the Labour Party’s opposition in the long years of Conservative rule between 1951 and 1964 that is credited the standing practice of identifying Shadow Ministers to be opposition spokespersons on specific ministerial files.<sup>114</sup> The decision to award to certain opposition members special responsibility on policy questions would result in a sharper distinction between the Opposition frontbench and backbenches, tracking the distinction between the government frontbench and backbenches. The Opposition spokesman ‘shadows’ her ministerial counterpart, developing expertise in the portfolio and criticising the minister for her policy decisions and indecision and the administration of her department. Through the exercise of her critical function, the shadow minister develops an understanding of the portfolio and readies herself for office. Indeed, so prominent is the role of the Opposition frontbench that it can be said that the responsibility to hold the government to account has passed, over time, from Parliament as a whole to the opposition specifically and, since the mid-twentieth century, from the opposition as a whole to the shadow government especially.

That specialisation and the corresponding burden on a shadow minister to challenge her opposite number necessitated the assistance of others. The financial support awarded to the Opposition by House resolutions is in part devoted to sustaining what might be termed a *shadow administration*.<sup>115</sup> That administration does not mirror the government’s civil service in every respect: it is neither permanent nor impartial. It is wholly within the control of the party and its aims are primarily critical. But it supports the shadow minister as a department supports the minister on the understanding that responsible Opposition, like responsible government, necessitates more time and skill than can be found on the frontbenches. In organising itself as a

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<sup>112</sup> Punnett (n 51) 8. That off-shoot is less direct in the case of the Labour shadow cabinet, which emerged not from the loss of office, but from years in opposition.

<sup>113</sup> HC Deb. vol. 361 col. 27 (21 May 1940). For certain business purposes, a Labour MP – a supporter of the Government – was appointed Leader of the Opposition. (I thank an anonymous referee for this point.)

<sup>114</sup> Punnett (n 51) 36. In other countries, the title awarded to an opposition spokesperson is ‘critic’. Taken together, ‘Opposition critic’ and ‘Shadow Minister’ capture the Opposition’s two important functions: to criticise the government of the day and to prepare itself for office.

<sup>115</sup> The term ‘shadow administration’ is owed to Brazier, *Constitutional Practice* (n 12) 174.

cabinet, government, and administration, the Opposition can be said to adhere to the conventions of responsible government.

## 8. Conclusion

*Political* public law and *political* constitutional theory invite a re-questioning of some commonplace understandings of the constitution. A study of the opposition within political institutions, structures, and processes complicates accounts of Parliament—and the Commons especially—by inviting reflection on how the institution is not singular in its claims or composition, but rather the site of confrontation between Her Majesty’s Government and Her Majesty’s Loyal Opposition. It allows for the reformulation of the primary actors engaged in action and reaction: in the place of government and Parliament or Cabinet and Commons, political life may be said to revolve around the action and reaction of government and opposition. In turn, it allows one to dissolve the ‘obvious paradox’ of the Commons’ constitutional responsibilities by assigning to the government’s backbenchers the primary responsibility to maintain the government in office and to the opposition the primary responsibility to hold the government to account. By highlighting how the Commons is managed jointly by government *and* opposition, it resists the idea that the Cabinet dominates the Commons by constitutional definition.

I conclude with thoughts on the consequences for the idea of the Official Opposition as a government-in-waiting should the proliferation of parties, aided or not by electoral reform, challenge the assumption of majority governments. The possibility that the Commons will evolve such that no one party in opposition will stand out as the likely successor to those now in office may weaken the ability of the opposition to hold the government to account. Absent the threat to replace the government, the idea of an *Official* Opposition may lose its significance, as it did during Churchill’s wartime coalition government. The shift in the balance of the constitution from the three estates of the realm to the swing of the pendulum between HM Government and HM Loyal Opposition would be lost and perhaps be relocated within the dynamics of a new normal of coalition governments, with a balance *internal* to a government coalition.<sup>116</sup> Some will see merit in that possibility, but its merits do not include an open and transparent confrontation of ideas, given the likelihood that coalition partners would resolve their differences elsewhere than on the floor of the House. Nor do the merits include the ability to provide the electorate with an unambiguous ability to ‘throw the rascals out’. Whatever the failings of the constitution’s continuing privileging of a single party in opposition as the Official Opposition, one of its great merits is ‘to structure an institutional environment to house and accommodate the rival views’,<sup>117</sup> all the while maintaining an important, but less privileged place to the other opposition parties. Being Leader of the Opposition is often said to be ‘the worst job in British politics’, but in playing a primary role in holding the government to account, in managing the business of the House, and in seeking office as the next Prime Minister, it is a job that has well served the constitution and our understanding of the principle of loyal opposition within it.

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<sup>116</sup> Commenting on the West German example of ‘coalition government in a Westminster system’, King (n 11) 29 would that the inter-party mode—rather than the government and opposition mode or the government frontbench and backbench mode—‘is undoubtedly the most important ... in general political terms’.

<sup>117</sup> Waldron, *Political Political Theory* (n 3) 7 = Waldron, ‘*Political Political Theory*’ (n 3) 9.