Why common law constitutionalism is correct (if it is)

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Why Common Law Constitutionalism is Correct (If It Is)

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I. Introduction

How can we establish that one account of a constitution rather than some other is the *correct* one – in the sense that it provides an accurate statement of fundamental propositions of legal and constitutional rights, duties, powers, etc? That is the methodological question I shall attempt to answer in this chapter. Call it the 'motivating question'. I shall use two paradigmatic accounts of the British Constitution as vehicles for my arguments: the positivist, 'orthodox' one put forward by Jeffrey Goldsworthy, and the interpretivist, 'common law constitutionalist' one propounded by Trevor Allan.[1] I shall tentatively conclude that Allan's account is a better one than Goldsworthy's – and is therefore arguably the correct one – on the interpretative basis that Allan offers *the more morally attractive model of British constitutional practice*. From that narrow conclusion about one constitution, I shall extrapolate to a broader conclusion about all constitutions: that it is only by use of the interpretative method that we can establish that one account of a constitution rather than some other is the correct one.

My narrow conclusion, if correct, has all sorts of far-reaching implications for the nature and functioning of the British Constitution. It suggests that popular beliefs about (for instance) the relative powers of Parliament and courts, the nature of statutory interpretation, and the correctness or incorrectness of particular judicial decisions, may be mistaken. But that it not my primary interest in

* Thank you to Ana Cannilla and Jeffrey Goldsworthy for very thoughtful comments and discussions on an earlier draft.

[1] See J Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford, Clarendon Press, 1999); J Goldsworthy *Parliamentary Sovereignty, Contemporary Debates* (Cambridge, Cambridge University Press, 2010); TRS Allan, *The Sovereignty of Law*; *Freedom, Constitution and Common Law* (Oxford, Oxford University Press, 2013).

this chapter. Instead, I want to explain and defend the interpretative method itself, and to think about its implications for constitutional theory and practice. I shall do this by way of a critique of positivist methods of the sort exemplified in Goldsworthy's work, but widely adopted or assumed both by British constitutional lawyers and in constitutional law writing around the world. According to these methods, we can only understand a constitutional practice by reference to *empirical* facts about selected constitutional actors' beliefs, intentions, utterances and other observable practices. This is to say that constitutional analysis is a *descriptive* exercise. To bring controversial questions of morality into this domain, say positivists, is to blur the descriptive question of how the constitution *does* work, with the evaluative question of how it *should* work.

In section II, I begin by setting out the two accounts of the Constitution described above. I then lay out the sense in which the two accounts represent rival *models* of British constitutional practice: models of which types of facts, configured in which way, are constitutive of the content of the law and the Constitution. The important and inescapable challenge presented by the motivating question, I explain, is to demonstrate which of these (or some other) model gives the *correct* understanding of the practice. In section III, I consider a range of positivist approaches to that question. These approaches, I contend, share a common flaw: they each, in different ways, *assume* the correctness of the orthodox model rather than provide some independent argument in its defence. In section IV, I defend the interpretative method as the right type of argument by which to resolve disagreements between rival models. This method correctly approaches the motivating question as speaking to the *political legitimacy* of a constitutional practice. It is in virtue of this method, I argue, that common law constitutionalism is (probably) correct.

II. Two Accounts of the British Constitution

We begin with a summary of Goldsworthy's orthodox account of the Constitution (GO) and Allan's common law constitutionalist account (CLC). I have divided this summary into four distinct, non–exhaustive, propositions, each mirroring the other in their coverage. These propositions will serve as a reference point throughout the chapter.

A. Goldsworthy's Orthodoxy (GO)

GO(1) Every constitution possesses a Rule of Recognition. This rule sets out the criteria of legal validity in the constitution, and it identifies political institutions and their respective legal powers. The content of the rule of recognition is the 'public, common standard of correct judicial' that most officials, in all three branches of government, in fact accept.[2] Evidence of what most officials accept is taken from '...[their] actual practice: [] the way in which courts identify what is to count as law, and [] the general acceptance or acquiescence in these directions'.[3] Some aspects of this rule (and rules of recognition in general) may be indeterminate.[4] The rule of recognition may also change if, and only if, most officials accept such change.

GO(2) Most officials in Britain presently accept, and have historically accepted, that Parliament has the power to make or unmake any law, and that courts do not have the power to strike down primary legislation. The precise rule of recognition in Britain is 'What the Queen in Parliament enacts is law.'[5]

GO(3) The legal content of a statute is the legislative intention communicated through the text of that statute. Ascertaining these intentions may depend on clear rules or canons of statutory interpretation. Applying such intentions and rules is the primary adjudicative role of courts. If no clear parliamentary intention or rule is available, judges must fill the 'gaps' in the law using extra-legal discretion. Judges must use their discretion to enable statutes 'to achieve their purposes without damaging the background principles that Parliament is committed to'.[6]

GO(4) The rule of recognition 'What the Queen in Parliament enacts is law' may be morally defensible, but a rule of recognition may exist even if most officials think that it is an unjust rule, or

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[2] HLA Hart, *The Concept of Law* 2nd edn (Oxford, Clarendon Press, 1994) 116.

[3] ibid 108.

[4] ibid. See, generally, chs VI and VII.

[5] ibid 102.

[6] Goldsworthy, *Contemporary Debates* (n 1) 8 and, generally, ch 9. See further Goldsworthy's discussion of the 'principle of legality' in this chapter, section III.

that there should be some better rule. If a particular law is unjust, but legally valid under the prevailing rule of recognition, then judges and citizens may have a moral duty to disobey it.[7]

B. Allan's Common Law Constitutionalism (CLC)

CLC(1):

> [T]he content of the law... is a product of normative judgment in which we attempt to make good moral sense of an array of such familiar legal 'sources' as Acts of Parliament, judicial precedent and influential dicta. An account of English law on any specific subject is always a theory of how best to read the relevant legal materials, guided by notions of justice and coherence: we assume that law, correctly interpreted, should as far as possible serve the interests of justice, rather than injustice, and be broadly coherent rather than confused and contradictory. And this is true even when we disagree about what justice requires, or about what would make the law more coherent overall.[8]

CLC(2) Parliament does not possess absolute, sovereign legislative power. Legislative supremacy 'may [only] operate within the constitutional framework of the rule of law'.[9] 'Parliament's authority is confined by the limits of our ability (in any concrete context) to interpret its enactments as contributions to the public good.'[10]

CLC(3) Statutes do not mean what Parliament intended, in the sense of communicating a 'speaker's meaning'; the interpretation of a statute instead requires us to construct the intent of the 'ideal or representative legislator' who seeks to reconcile 'current policy and overarching legal principle'.[11] There is then no conflict between parliamentary supremacy and the rule of law. These ideas are interdependent, embodying the twin imperatives of democracy and respect for individual dignity and autonomy.[12]

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[7] Goldsworthy, *History and Philosophy* (n 1) 18–19.

[8] Allan, *The Sovereignty of Law* (n 1) 5.

[9] ibid 133.

[10] ibid 12.

[11] ibid 193–4.

[12] ibid 168 and, generally, ch 5.

CLC(4) Given that the content of the law depends on notions of justice and coherence, the laws that obtain in a constitution are, perhaps with rare exceptions, necessarily legitimate.[13] A statute is only recognisable as such if it can be read in a way that is compatible with the principle of equal citizenship.[14]

C. Are GO and CLC Commensurable?

Having laid out Goldsworthy's and Allan's account of the Constitution, let us restate our motivating question: how can we establish which of these accounts (if either) is correct? I want to begin by confronting a pre-emptive challenge to that question. In so doing, I hope to lay the groundwork for the rest of the chapter. The objection is that GO and CLC are *incommensurable* in that they pursue different aims and sit within different intellectual disciplines. As such, the objection runs, it makes no sense to ask which account is correct: correctness means entirely different things from one account to the other.

This objection takes many different forms and runs in both directions. Supporters of GO sometimes contend that they are describing the Constitution 'as it is in practice', 'in reality', 'on the ground', and other such expressions and sentiments.[15] Those who support CLC, they say, are theorising abstractly about how law and a constitution ought, ideally to function.[16] What proponents of CLC present as an account of the Constitution, say GOists, is, in truth, 'revisionist', 'dogmatic

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[13] Whether law or a law can be unjust or morally sub-optimal is a matter of intense debate among interpretivists. Compare, for instance, M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288–1342, and TRS Allan 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65(1) *The American Journal of Jurisprudence* 1–17.

[14] Allan, *The Sovereignty of Law* (n 1) 33 and, generally, ch 4.

[15] The seminal argument that there is a gap between CLC and constitutional reality is found in J Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1. See further, M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford, Hart Publishing, 2015), 30; D Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament' in A Horne, G Drewry and D Oliver (eds), *Parliament and the Law* (Oxford, Hart Publishing, 2013), 309.

[16] See, for instance, J Griffith, 'The Brave New World of Sir John Laws', (2000) 63 *Modern Law Review* 159.

liberalism' reflecting the moral convictions of the (purported) interpreter.[17] From the other direction, CLCists sometimes argue that the interpretative method reflects how judges and lawyers truly reason about law and the Constitution.[18] Those who support GO, they argue, adopt the detached perspective of a sociologist surveying the beliefs of officials and other constitutional actors, rather than 'internal perspective' of a constitutional lawyer working out the content of the law and constitution.[19] What GOists present as an account of the Constitution, say CLCists, is in truth no more than the misapplication of abstract, positivist legal theories.[20] The conclusion of objectors on both sides is that their propositions and no others are apt for explicating the content of the contemporary British Constitution.

In my view, this objection from incommensurability is flawed and unconstructive. It looks past common assumptions and concerns that both accounts very plausibly share, and which open the way for genuine disagreement and competition.[21] The propositions in GO(1)–(4) and CLC(1)–(4), I suggest, plausibly address the same type of questions in relation to the same objects of explanation. As if to respond to Barber's challenge, these questions give us 'some sense of what counts as a successful exercise in constitutional theory, a set criteria against which accounts can be tested [so that we can] judge the merits of any particular piece of work'.[22]

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[17] T Poole, 'Dogmatic Liberalism? T.R.S Allan and the Common Law Constitution' (2000) 65 *Modern Law Review* 463; J Raz, 'Dworkin: A New Link in the Chain' (1986) 74 *California Law Review* 1103.

[18] Allan, *The Sovereignty of Law* (n 1) 9, 22.

[19] ibid 32.

[20] ibid 38, 156–157.

[21] For the possibility of rapprochement between positivists and anti-positivists, see, for instance, D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017) 18–20; D Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Oxford, Hart Publishing, 2014) 19–20; G Letsas, 'The DNA of Conventions' (2014) 33 *Law and Philosophy* 535.

[22] N Barber, *The Constitutional State* (Oxford, Oxford University Press, 2010) 1.

First, they each address the *constitutive* question: how do the decisions and practices of institutions and officials in Britain impact on the legal and constitutional rights, duties, powers etc?[23] How, for instance, are the enactments of Parliament, the judgments of courts, and – what are usually referred to as – constitutional conventions relevant to the content of the law and constitution? Locked within propositions GO(1)–(4) and CLC(1)–(4) are two different sets of answers to those questions. These propositions ascribe law-making or constitution-making significance to different aspects of these same practices and decisions. As I shall explain in detail below, for GOists the content of the law and the Constitution depends on *empirically determinable* aspects of those practices and decisions. For CLCists, this content depends on a *combination of the empirical and moral aspects of the practice*. Second, each account responds to – or at least lays the ground for – the *doctrinal* question: which rights, duties, powers, etc do obtain within the British Constitution? For instance, GO(2) and CLC(2) advance contrasting propositions about the powers of Parliament vis-a-vis courts in the British Constitution. A fuller statement of each account might include any number of doctrinal claims about the powers and duties of institutions and the rights of individuals in Britain. Importantly, the answer to any doctrinal question about the content of the law or the Constitution *depends on* one's answer to the constitutive question. To put this same point more fully, the correctness of any doctrinal proposition of law or constitutional practice must depend on some constitutive account of what makes any doctrinal claim true or correct.[24] It follows that *incorrect* constitutive claims cannot be the basis of true doctrinal claims. As I shall explain below, establishing *what makes* a constitutive claim (and the doctrinal claims that flow from it) correct or incorrect is the central aim of this chapter and the thrust of our motivating question.

Let us now consider the contrasting relations between the constitutive and doctrinal claims in GO and CLC. This will help to build a picture of the precise points of disagreement between the two accounts.

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[23] What I describe in this chapter as 'constitutive' and 'doctrinal' questions correspond to Ronald Dworkin's 'doctrinal' concept of law. See, R Dworkin, *Justice in Robes* (Cambridge, Mass, Harvard University Press,) 2006, chs 1 and 8.

[24] See R Dworkin, *Law's Empire* (London, Fontana, 1986), 109–110; N Stavropoulos, 'Legal Interpretivism', *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/law-interpretivist/.

For Goldsworthy, the doctrinal proposition GO(2) is true, and the parallel doctrinal proposition CLC(2) is false, in virtue of the *empirical* and *historical* constitutive proposition (or propositions) GO(1). This is to say that the powers of Parliament and courts depend on an accurate description of what most officials accept and have historically accepted. The corollary of the GO(1) is GO(4) and the rejection of CLC(4).[25] Since Parliament's powers depend on the empirical fact of what most officials accept and have historically accepted, those powers do not depend on a justificatory moral theory. Thus, Parliament (or, for that matter, any other law-making body) could have absolute legal power, even if there were no moral justification for such power.[26]

For Allan, by contrast, the doctrinal proposition CLC(2) is true, and the parallel doctrinal proposition GO(2) is false in virtue of the *interpretative* constitutive proposition CLC(1). The powers of Parliament and the courts depend on the moral theory that best justifies their practices and decisions. For Allan, those powers depend, for instance, on substantive conceptions of democracy and the rule of law, and on deeper values of equal citizenship and freedom.[27] As he sees it, Parliament does not possess the legal power to legislate contrary to these types of principles and values.[28] Importantly, this limitation on parliamentary power arguably holds for CLCists *even if* it can be shown that most officials accept absolute, unlimited parliamentary power.[29] Here as elsewhere, the different constitutive claims in GO and CLC generate divergent – and potentially radically divergent – doctrinal claims. The corollary of CLC(1) is CLC(4). Since the powers of institutions depend for CLCists on the moral justification for those powers, it follows that those powers – if not every exercise

[25] This is the relationship that legal positivists describe as the Separation Thesis. See Hart, *Concept of Law*, (n 2) 293; HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

[26] See, eg, Gordon, *Parliamentary Sovereignty* (n 15) 21.

[27] Allan, *The Sovereignty of Law* (n 1) 89 and, generally, ch 3.

[28] ibid 37.

[29] See the discussion of history in section III below.

of those powers – are necessarily morally legitimate.[30] To the extent that absolute parliamentary power is morally indefensible, Parliament does not legally possess such power.

Next, we have in both GO and CLC a constitutive-doctrinal pairing in relation to the meaning of statutes. It will be clearest if we work with a concrete proposition of English law. Take the following proposition from the *Privacy International* decision: *PI* It is the law that courts may not review the exercise of power by the Investigatory Powers Tribunal.[31]

For Goldsworthy, whether *PI* is true or correct depends on the *empirical* constitutive proposition GO(3). *PI* is true, either: a) if it was Parliament's clearly communicated intention in section 67(8) of the Investigatory Powers Act to oust the jurisdiction of the High Court; or b) if, in the absence of any clearly communicated parliamentary intention, judges created a new legal rule *PI*. Again, the corollary of GO(3) is the truth of GO(4) and the falsity of CLC(1) and CLC(3). The fact that the legal content of a valid statute depends, for GOists, on what the legislature has communicated entails that the meaning of that statute cannot depend on a justificatory moral theory.[32] Thus, a legally valid statute may nonetheless be unjust or morally sub-optimal. In that case, judges and citizens may have a moral duty, or may otherwise decide, to disobey the statute, or to lie about its content and effect.[33]

For Allan, by contrast, whether *PI* is true depends on the *interpretative* constitutive proposition CLC(3) (which is a more concrete application of CLC(1)). *PI* is true if it reflects the intent of the 'ideal or representative legislator' who seeks to reconcile 'current policy and overarching legal principle'; and it is false if it does not. For CLCists, the text of a statute has no legal meaning independent of the correct reconciliation of all relevant principles and policies.[34] Thus, even where the ordinary language meaning of a text clearly supports one doctrinal claim, that may not be the

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[30] For intra-interpretivist debate on this point, see above n 13.

[31] *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

[32] See J Raz, *Ethics in the Public Domain* (Oxford, Oxford University Press, 1994) ch 10.

[33] See J Goldsworthy, ch 2 in this volume, section III.

[34] Allan, *The Sovereignty of Law* (n 1) 173–174.

correct legal meaning.[35] The corollary of CLC(3) is again CLC(4). For interpretivists, law is a moral concept.[36] It only makes sense to say that a community is governed by law if its legal and constitutional practice can be understood in a morally defensible way.[37] Hence, if it were not possible to read *PI* in a way that honours the fundamental moral principles of the Constitution, then *PI* would not be law at all.

Having set out the constitutive-doctrinal relations in GO and CLC, the incommensurability objector might feel even more confident in his views. He may comment that Goldsworthy and Allan advance radically different constitutive claims, which will likely generate opposing doctrinal claims. Goldsworthy's empirical, constitutive claims GO(1) and GO(3) sit squarely within the legal positivist tradition. Allan's interpretative, constitutive claim CLC(1) sits squarely within the anti-positivist, interpretivist tradition. Allan rejects GO(1) and GO(3); Goldsworthy rejects CLC(1). Allan's doctrinal claim CLC(2) fails by the lights of GO(1). Goldsworthy's doctrinal claim GO(2) fails by the lights of the CLC(1). From this untidy tangle, he might conclude that there is simply no basis on which to assess the two accounts against each other. Empirical and interpretative arguments, he might say, are apples and oranges.

This conclusion again unhelpfully listens for dissonance rather than consonance between the two accounts. It misses the important sense in which the two accounts speak both to the moral *and* empirical parts of the Constitution. Both accounts assume in common, we may suppose, that British constitutional practice is characterised by a range of fundamental constitutional moral principles: parliamentary sovereignty, parliamentary accountability, democracy, the rule of law, the separation of powers, individual liberty and so forth. Similarly, both accounts must recognise the plethora of local, moral principles relevant to discrete areas of law and constitutional practice, for instance, the principles of judicial review or the law of negligence. At the same time, both accounts assume in common that British constitutional practice is characterised by numerous empirical facts: the text of statutes and judgments, the intentions of legislators, the beliefs of officials and citizens about what

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[35] ibid 214–223.

[36] See R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) ch 19.

[37] Dworkin, *Law's Empire* (n 24) ch 6.

statutes and judgments mean, the beliefs of officials about their constitutional duties, and so on. What we see in our analysis of the contrasting constitutive claims in GO and CLC above, I suggest, is two rival *models* or configurations of the moral and empirical parts of British constitutional practice taken together.[38] GOists tell us that the moral principles and values of the Constitution, correctly understood, do not determine the powers of institutions and the legal content of statutes, but provide a (contingent) justification for such content as obtains as a matter of empirical fact. CLCists put things the other way round: the moral principles and values of the Constitution, correctly understood, are among the determinants of the power of institutions and the meaning of statutes. The moral parts of the Constitution determine how and why particular empirical facts make law.

The philosophical disagreement I have just described, I suggest, is busy at work beneath the surface of many familiar debates about the UK Constitution. It explains the (now quite mainstream) view that there is a tension between different visions of the Constitution.[39] Take for example the role and meaning of the rule of law in Britain. For GOists, the rule of law is a formal concept comprising a set of formal and procedural standards.[40] Its (limited) role within the Constitution is to enable lawmakers better to communicate their legislative intentions or judge-made rules in legislation and judgments.[41] But rule of law standards, on this view, do not determine or condition the meaning of parliamentary intentions or common law rules;[42] and there are occasions where law works better

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[38] As Greenberg puts it a model is, 'a counterpart at the metaphysical level of a method of interpretation at the epistemic level. (A model's being correct in a given legal system is what makes the corresponding theory of interpretation true'. See M Greenberg, 'How Facts Make Law' in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford, Oxford University Press, 2006) 245. For - what I think is - a similar use of the device, see G Gee and GCN Webber 'What is a Political Constitution?' (2010) 20 *OJLS* 273, 290–291. Compare A Young's classification of models in ch 3, this volume.

[39] See, for instance, RB Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism' [2018] *Public Law* 500; A Latham-Gambi, 'Political Constitutionalism and Legal Constitutionalism - an Imaginary Opposition?' (2020) 40 *Oxford Journal of Legal Studies* 737.

[40] See J Raz, *The Authority of Law* (Oxford, Clarendon Press, 1979) ch 11; R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, Cambridge University Press, 2007) ch 2.

[41] Raz, *The Authority of Law* (n 40) 224–226.

[42] For a clear explanation of the positivist distinction between law and the rule of law, see J Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 207–211.

without heeding these standards (as for instance, when officials require discretionary powers). For CLCists, by contrast, the rule of law is the central value in the Constitution around which all other constitutional principles and values orbit.[43] It insists that the state may only deploy coercive force in accordance with the scheme of moral principles underlying the past enactments of Parliament and the past decisions of courts.[44] These principles determine and condition the content of the law; and they explain the general political obligation to obey the law.[45]

We might give similar contrasting stories about any of the constitutional principles mentioned above: whether, for instance, parliamentary sovereignty is an extra-legal convention at the apex of the Constitution as in GO(2), or shorthand for a set of legal principles that determine the distribution of powers between Parliament and courts CLC(2).[46] Whether democracy is a majoritarian concept that justifies the fact of absolute legislative power,[47] or a constitutionalist, rights-based concept that imposes a legal limit on legislative power.[48] Whichever view one holds on the role and importance of these types of big constitutional principles, I suggest, belongs to a broader model of the relationship between the moral and empirical parts of constitutional practice.

Perhaps the most visible manifestation of these competing models – if not necessarily the most constitutionally important – of the moral and empirical parts of British constitutional practice is case law. Whether, or the sense in which, one deems a judicial decision to be correct or incorrect will depend on which model one espouses. One could choose almost any case to illustrate this point. The

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[43] Dworkin, *Justice in Robes* (n 23) 168–186; Allan, *The Sovereignty of Law* (n 1) ch 3; S Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 *Oxford Journal of Legal Studies*, 709, 728–734.

[44] Dworkin, *Law's Empire* (n 24) 227.

[45] ibid 110.

[46] For the latter view, see J McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32 *Legal Studies* 577.

[47] Bellamy, *Political Constitutionalism* (n 40) ch 3; Gordon, *Parliamentary Sovereignty* (n 15) chs 7 and 8.

[48] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford, Oxford University Press, 1996); J Laws, 'Law and Democracy' [1995] *Public Law* 72.

Anisminic and *Privacy International* decisions are an obvious place to start.[49] For GOists, the decision by the House of Lords in *Anisminic* can be explained in two possible ways. Either it was an ordinary case of statutory interpretation: the court gave effect to the empirically determinable background assumption that Parliament did not intend to remove all legal control from the Commission.[50] Or it was an instance of extra-legal judicial pragmatism and dissembling: judges pretended to be giving effect to Parliament's intentions, when in truth, they were (say) making furtive moves to reform the Constitution in line with their moral preferences or other goals.[51] Similarly, the reasoning by the Supreme Court in *PI* about the paramountcy of the rule of law, says Goldsworthy, is 'more consistent with legal pragmatism than common law constitutionalism'.[52] Any suggestion in the reasoning of judges that the rule of law places a limit on parliamentary sovereignty was necessarily incorrect or obiter dicta. For CLCists, by contrast, both *Anisminic* and *PI* epitomise the operation of CLC(3). The different effects of the ouster clauses in the two cases resulted from the proper and consistent interpretation of relevant constitutional principles, policies and facts – for instance, democracy, parliamentary sovereignty and the rule of law.[53] In their disagreements about the interplay between

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[49] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R (Privacy International)* (n 31).

[50] Goldsworthy, *Contemporary Debates* (n 1) 286.

[51] Goldsworthy, *History and Philosophy* (n 1) 252; HWR Wade and CF Forsyth, *Administrative Law* 7th edn (Oxford, Oxford University Press. 1994) 737. See further Goldsworthy's discussion of judicial pragmatism, ch 2 in this volume, section III.

[52] Goldsworthy, ch 2 in this volume text accompanying n 143. I gratefully adopt Goldsworthy's GOist analysis of the judgments in both *PI* and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. For different models of the Supreme Court decision in (*R (Miller) v Prime Minister; Cherry and Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373 approximating to CLC and GO, see in this volume Arvind and Stirton, ch 4, section III.D, Young, ch III, section IV.

[53] On *Anisminic*, see TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1995) 111 *Cambridge Law Journal* 127; Allan, *Sovereignty* (n 1) 214–15. On *Privacy International*, see HJ Hooper, 'Balancing Access to Justice and the Public Interest: *Privacy International* and Ouster Clauses in the Broader Constitutional Context', U.K. Const. Law (12 Feb. 2018) (available at https://ukconstitutionallaw.org/) (accessed 17 July 2021). Hooper's blog relates to the Court of Appeal reasoning, but it captures perfectly the CLC interplay between moral principles and statutory text.

these different standards, judges were engaging in the moralised constitutional theory characteristic of CLC.

B. The Motivating Question

I have attempted to show above that GOists and CLCists are not talking past each other from the perspectives of different disciplines. To the contrary, they are engaged in a common set of inquiries. They are each attempting to answer the constitutive question: how do the decisions and practices of institutions in Britain determine legal and constitutional rights, duties and powers? On the back of their answer to that question, they are trying to answer the doctrinal question: which rights, duties and powers do obtain. Their answers to these questions, I have suggested, represent two competing models of the moral and empirical parts of British constitutional practice.

To view GO and CLC in this way focuses the mainstream idea that there is a tension between these accounts of the Constitution. It helps us to understand that, behind the familiar disagreements about the Constitution found in law journals, judgments and debates, is a baseline of agreement about the object and aims of that disagreement.[54] This is the key, I suggest, to a genuine contest between the two models. That realisation only gets us so far, however. It is one thing freely to elaborate one's favoured model of the Constitution, happily ensconced in one's own thought world. It is another to defend that model against other models that reject its premises and details. This is the challenge that I have set up in our motivating question *viz.* how can we establish which account of a constitution is correct? We can now reformulate that question as follows: what makes it the case that either an empirical model of British constitutional practice (and the doctrinal claims that flow from that model) or an interpretative model (and the doctrinal claims that flow from it) is correct? This is a challenge that anyone seeking to give the *correct* account of the Constitution – or indeed, the correct answer to any given question of law or the Constitution – must confront. To adapt Dworkin, the challenge is '...silent prologue to any decision at law'.[55]

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[54] Dworkin, *Justice in Robes* (n 23) especially 169.

[55] Dworkin, *Law's Empire* (n 24) 90.

Before I consider the details of possible methodological arguments in favour of GO or CLC, I want to lay down some aspirational parameters for this inquiry. This is in a determined bid to rescue the promise of genuine disagreement between GO and CLC from an impasse. First, and most importantly, the correct method must enable an objective and unprejudiced comparative appraisal of different models, such either GO or CLC (or something else) could emerge as the correct model. It must not give a priori weight to one or another model. For instance, one cannot *build into one's method* the claim that law and morality are separate and that, in consequence, the adjudicative role of courts is necessarily to give effect to the intentions of Parliament. This is a method in name only. In substance, it is something like the GO model of the Constitution masquerading as a method.[56] Far from enabling a comparative appraisal between GO and CLC, it crowns GO the victor before the contest begins.

At least one such objective measure of comparison, GOists and CLCists can agree, is the extent to which a model *fits* the practice.[57] A model must be able to account for, for instance, most of the judicial decisions widely held to be correct in the Constitution, most of the statutes widely held to be valid, most of the constitutional conventions widely held to be in force, and most of the constitutional principles widely thought to characterise the Constitution. Importantly, it must also account for the fact that people *disagree* about how to understand these decisions and practices. We have seen above that disagreement is a fundamental feature of British constitutional practice, both on the part of academics analysing the practice, and on the part of practitioners (judges, lawyers, citizens, officials) participating in it. A model that either fails to account for this and other key features of the Constitution, or which explains features in a way that is entirely alien to the participants in the practice, will likely fail for these reasons. Indeed, it would hardly be a model *of* the practice at all.

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[56] For criticism to this effect of M Gordon's 'positivist and political' constitutional method, see S Lakin, 'The Manner and Form Theory of Parliamentary Sovereignty: A Nelson's Eye View of the UK Constitution?' (2018) 38 *Oxford Journal of Legal Studies* 168 (a review of Gordon, *Parliamentary Sovereignty* (n 15)). For Gordon's reply, see his conclusion in ch 9, this volume.

[57] See Dworkin, *Law's Empire* (n 24) 255. For the meeting of minds between CLCist and GOists on this point, see Goldsworthy's ch 2 in this volume notes and accompanying nn 124–128.

But satisfying the requirement of fit as a mere threshold requirement of plausibility will not suffice to decide between GO and CLC.[58] As I have demonstrated above, *both* models plausibly fit the decisions and practices of the British Constitution (as, arguably, do other models). GOists and CLCists must, second, give some additional argument(s) as to why their model gives a superior understanding of British constitutional practice than other models. Again, I think we can safely rule out some familiar techniques. It will not do simply to keep hammering the details and implications of one's favoured model, explaining how that model explains this or that case or feature of the Constitution, and how other explanations fail by the light of that model. Proponents of GO or CLC can do this endlessly. But this style of argument-by-bombardment cannot settle the deep disagreement between GOists and CLCists as to which types of facts, configured in which way, are constitutive of which doctrinal content. The resolution of this disagreement requires a *metric* by which to establish that empirical facts, moral facts, or some combination of the two determines content. That metric, I shall argue below, must be independent of the very facts of British constitutional practice of which GO and CLC are rival models.

Finally, GOist and CLCists must adopt a suitably conciliatory attitude to the inquiry. If, as I have suggested, British constitutional practice can plausibly support both the GO and CLC models, then proponents of each model must be open to the correctness of the other model (and other models besides). I have described GO and CLC at various points in this chapter as rivals and competitors, but I have also tried to emphasise that both models are joined in a common endeavour: to understand the British Constitution correctly. Truth rather than victory is the aim. In that spirit, I suggest that GOists and CLCists must employ a principle of charitable interpretation, making each model as good as it can be. If there are apparent gaps or deficiencies in one or other model, then we should think about how, consistently with that model, they might be rectified.[59] By extension, name-calling, caricaturing or rhetorical bigging-up of models cannot advance this inquiry. For instance, I have followed the trend in this chapter of referring to GO as the 'orthodoxy'; but it is for GOists to establish whether,

[58] See Kyritsis, *Shared Authority*, (n 21) ch 3.

[59] That charitable attitude, I shall argue in section IV, is built into the interpretative method.

and in what sense, its orthodox status counts in its favour. Objective, methodological argument alone can resolve the complex tension between GO and CLC.

III. What Makes GO or CLC Correct?

I now propose to examine what are arguably the dominant approaches to the motivating question: descriptive (positivist) and interpretative (anti-positivist). These are the more abstract methodological counterparts of the constitutive propositions GO(1) and (3) and CLC(1) and (3). To begin with, I shall explain and critique two descriptive methods found in the work of Goldsworthy. I shall argue that these methods display a philosophical flaw common to all descriptive methods. As such, they cannot support GO, and they cannot refute CLC. In section IV, I shall argue that the very flaws in descriptive methodology gesture towards the correctness of the interpretative method.

In a bid to establish the correctness of GO(2) and (3), Goldsworthy advances two methodological arguments, a 'philosophical' one, and an historical one.[60] The philosophical argument targets the following three-step argument made by (some) CLCists: that there are only two sources of law in Britain, statute and common law; that the source of Parliament's legislative powers cannot logically be statute; and that Britain must therefore have a common law Constitution.[61] In response to these claims, Goldsworthy argues that the common law can no more be the source of Parliament's powers than Parliament (or statute) can be the source of judges' powers. In each case, he says, an explanation is needed, independent of common law and statute, as to how the supposed power-conferring institution came by its powers. As he puts it: '[t]he authority of either Parliament, or the judges, or both, must be based on laws that neither was solely responsible for creating...'.[62] That

[60] Goldsworthy, *History and Philosophy* (n 1) chs 1, 2 and 10.

[61] ibid 238–242. For this version of CLC see, for instance, Laws, 'Law and Democracy' (n 48). For Allan and other interpretivists, *moral values* rather than any positivist source determine legal and constitutional content: see Allan, *The Sovereignty of Law* (n 1) 133. Both versions, and every other, I contend, are subject to the explanatory burden I set out below.

[62] Goldsworthy, *History and Philosophy* (n 1) 240.

explanation, he concludes, is GO(1): the powers of Parliament and judges depend on a 'widespread consensus among senior officials in all branches of government'.[63]

Goldsworthy derives the premise of his historical argument from his 'philosophical' conclusion that GO(1) is correct. Given the philosophical truth of GO(1), he says, 'a history of the development of parliamentary sovereignty must be a history of [the consensus among the most senior officials of all branches of government] ...'.[64] Applying that premise, he conducts a detailed historical survey of judgments and academic commentaries, encompassing the work of Locke, Blackstone, Coke, Dicey, and many others.[65] His conclusion is that there is overwhelming evidence that for centuries, lawyers and officials have accepted the correctness (of GO(2) and GO(3)).[66] Therefore GO(2) and GO(3) are correct.

Notwithstanding the monumental research behind Goldsworthy's philosophical and historical arguments, I am afraid that they share a defect with all other descriptive methods. To begin with the philosophical argument, Goldsworthy is right to say that common law cannot be the source of Parliament's powers (and vice versa), but we need to account carefully for why this is so. The reason is this: judgments by courts and statutory texts enacted by Parliament, are among the facts and features of British constitutional practice that GOists and CLCists are *seeking to explain*. They are part of the *object* of explanation (explanandum) of which GO and CLC are rival constitutive models (explanans). It follows that neither common law nor statute can confer authority on the other. This would be to assume, question-beggingly, the law-making authority of the power-conferring source or institution.[67] It would be to treat part of the explanandum as the explanans. The problem with GO(1) as an explanation for GO(2) and (3) is that it begs precisely the same question. It rests on the circular claim

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[63] ibid.

[64] ibid 6.

[65] ibid passim.

[66] ibid 7.

[67] I rely here on the arguments in Greenberg, 'How Facts Make Law' (n 38). See further, N Stavropoulos, 'Why Principles?' (unpublished) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023758 (accessed 30 July 2021).

that one part of the explanandum (the beliefs of most officials) can determine the relevance of other parts of the explanandum (the authority of statute or common law).[68] But the fact that most officials hold certain beliefs about the powers of Parliament and courts GO(1) has no *automatic* relevance or irrelevance to the content of the law or the Constitution. Nor do any other Hartian dispositions – what people have said, thought, written, and so on. These are among the very facts whose *putative* or presumptive legal relevance GOists and CLCists are attempting to explain (or explain away).

Precisely the same problem stings Goldsworthy's historical argument. Indeed, the two arguments are barely distinguishable. This argument again seeks to use one putatively relevant part of British constitutional practice – the *historical* beliefs of officials – to explain the legal relevance of other putatively relevant parts of the practice – the powers of Parliament and the intentions of Parliament GO(2) and (3). But this again fails to recognise that history, the beliefs of officials, the doctrine of parliamentary sovereignty, and the intentions of Parliament are facts or features of the practice to which GOists, CLCists and others assign different meanings and significance (or insignificance).

Let me amplify this point. It is at least plausible that historical facts about British constitutional practice are relevant to the content of the Constitution today. In their common law reasoning and statutory interpretation, judges plausibly apply standards laid down in *previous* cases or practices.[69] One might even argue that Parliament has some sort of duty to legislate in a way that coheres with past legislation.[70] History is a phenomenon, we may say, which anyone seeking to give an account of the British Constitution must reasonably explain or explain away. But leading commentators and judges disagree about whether and how history is relevant. They give different

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[68] As Greenberg puts it, the mistake is to suppose that the facts that make up a constitutional practice can determine their *own* relevance to the law. Greenberg, 'How Facts Make Law' (n 38) IV and VI.

[69] For contrasting models of history in legal reasoning, see S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed) *Exploring Law's Empire* (Oxford, Oxford University Press, 2006) ch 5.

[70] See Dworkin, *Law's Empire* (n 24) 217 on 'legislative integrity'. For criticism, see Kyritsis, *Shared Authority* (n 21) ch 4.

models of history.[71] Among the commentators who arguably denies the relevance of history to the content of the Constitution is John Griffith. For him, the content of the Constitution does not depend on any previously established 'fact or principle'.[72] It depends on the here and now of 'what happens'.[73] Judicial decisions, he contends, are forward-looking, pragmatic judgments of politics or policy, shaped by the particular social class, education and ideology of the judges.[74] In a different vein, Herbert Hart, on whose work Goldsworthy relies, arguably makes the content of the rule of recognition depend on the *present* rather than historical beliefs of officials.[75] For him, the fact that a particular rule of recognition may have endured for centuries does not bear upon what the rule is today. CLCists agree with Goldsworthy that history is relevant, but they disagree about *how* it is relevant. These differences reflect the contrasting models of moral and empirical facts in GO and CLC. For Dworkin, history is relevant, not in terms of what most officials have accepted, and not 'over all historical stages of a community's law' (as Goldsworthy's own model seems to suggest),[76] but in terms of the 'range of standards the community now enforces'. Those standards are specifically, he argues, the scheme of moral principle underlying past political decisions.[77] It follows that, for CLCists, the relative powers of Parliament and courts,[78] or even the distinction between Parliament

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[71] Compare in this volume, for instance, M Gordon, ch 9 at section IIIBii, Arvind and Stirton, ch 4 at section IIB, N Barber, ch 1, n 59 59.

[72] Griffith, 'The Political Constitution' (n 15) 19.

[73] ibid.

[74] J Griffith, *The Politics of the judiciary* 5th edn (London, Fontana, 1997) chs 8–10.

[75] For an excellent discussion, see A Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty', (2011) 31 *Oxford Journal of Legal Studies*, 61, 68–70.

[76] Dworkin, *Law's Empire* (n 24) 225.

[77] ibid 227.

[78] Support for such a view can arguably be found in Lord Steyn's statement in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56 that the courts might establish a new 'hypothesis of constitutionalism' in the event of attempts by Parliament to abolish judicial review. See further J Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' [2006] *Public Law* 562; Arvind and Stirton, ch 4 in this volume at section IID. Naturally, GOists dismiss such dicta as 'demonstrably [ie historically] false'. See Goldsworthy, ch 2 in this volume at n 141.

and courts,[79] may not be today what they were in the past. Evidence that most officials and commentators have consistently *said* or *believed* that GO(2) and (3) are correct is therefore no 'embarrassment' to CLCists, as Goldsworthy claims;[80] for this is not the relevant *aspect* of history within their model.[81]

As ever, supporters of each of these different models of whether and how history is relevant can point to aspects of British constitutional practice that support their view.[82] Each view arguably *fits* the practice. The challenge for each participant is to provide a methodological argument as to why their model is correct and others incorrect. In so doing, we must emphasise, they cannot use one putatively relevant part of the practice to explain some other putatively relevant part. This injunction applies as much to CLCists and rights sceptics as it does to GOists. For example, CLCists cannot move from the fact that a particular scheme of moral principles underlies British constitutional practice, or the fact that judges and commentators *say* they are reasoning morally, to the conclusion that moral principles limit the legislative powers of Parliament.[83] Sceptics cannot move from the facts that judges and lawyers disagree and reason morally about the law, to the conclusion that there are

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[79] N Duxbury, *Elements of Legislation* (Cambridge, Cambridge University Press, 2012).

[80] J Goldsworthy, 'The Real Standard Picture, and How Facts Make it Law; a Response to Mark Greenberg' (2019) 64 *The American Journal of Jurisprudence* 163, 7.

[81] There is an obvious analogue here with disagreement between so-called originalist and evolutive interpretation. For an illuminating discussion, see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford 2007) ch 3.

[82] For a Dworkinian account of British constitutional history rivalling Goldsworthy's, see P Craig, 'Public Law, Political Theory and Legal Theory' [2000] *Public Law* 211; P Craig, 'Theory and Values in Public Law: A Response' in P Craig and Richard Rawlings (eds), *Law and Administration in Europe Essays in Honour of Carol Harlow* (Oxford, Oxford University Press, 2003).

[83] I explore whether Allan adopts this structure of argument (concluding that he does not) in S Lakin, 'Defending and Contesting the Sovereignty of Law: The Public Lawyer as Interpretivist' (2015) 78 *Modern Law Review* 549 (a review of Allan, *The Sovereignty of Law* (n 1)).

no genuine legal rights and duties, and that public law (or all law) is politics.[84] In each case, we need an argument about the meaning and significance of the (putatively relevant) explanatory facts.

Having called into question Goldsworthy's philosophical and historical arguments in favour of GO(2) and (3), we can now take a step towards a sounder methodological argument. In order to avoid the explanatory bootstrapping difficulty identified above, the explanation for the correct model of British constitutional practice must be *independent of* the facts and features of British constitutional practice of which GO and CLC are rival models.[85] As Greenberg puts it, the method must provide a 'rational relation' between different models and different doctrinal claims: an explanation as to why *this* model rather than any one of the countless alternative models makes a particular doctrinal proposition true or false.[86] This conclusion gives concrete form to some of the parameters that I laid down above: that a successful methodological argument must include some objective metric by which to assess rival models, and that it must not give a priori weight to any one model in advance of that assessment. Before I propose such an argument, I first want to consider briefly one further attempt to argue descriptively for the correctness of GO.

In a recent article, Goldsworthy makes a long and intricate argument against Greenberg's 'moral impact' theory of law – which, for our purposes, approximates to CLC.[87] His aim is to prove that 'Legislative Supremacy' – GO(2) – and 'Legislative Intentions' – GO(3) – are 'actual fundamental doctrines of constitutional law in Anglo–American systems'.[88] His strategy is to respond to criticisms by CLCists that GO(2) and (3) cannot adequately explain (ie do not fit) three characteristic features of Anglo-American legal practice: the fact that judges and lawyers disagree about the meaning of statutes, the fact that judges characteristically rely on moral standards, and the

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[84] See J Waldron, 'Did Dworkin Answer the Crits' in Hershovitz (ed) (n 38) ch 7.

[85] Greenberg, 'How Facts Make Law' (n 38) 245–251.

[86] ibid 223 and 249.

[87] Goldsworthy, 'The Real Standard Picture' (n 80).

[88] ibid 1.

fact that laws are binding.[89] In response to this criticism, Goldsworthy offers detailed explanations for each of these features, consistently with GO(2) and (3). To give just one snapshot of this exchange, applying CLC(3), Greenberg contends that only *moral values* can adequately explain why judges apply a principle of narrow construction to criminal law statutes, but not civil statutes.[90] Goldsworthy replies from the perspective of GO(3) that this principle of narrow construction was historically invented by judges acting pragmatically 'to blunt the brutalism of 18th Century Criminal Law', but today the principle is an instance of 'supplementing interpretation, due to statutory interpretations being ambiguous or vague. In this situation, [judges] are free to rely on [extra–legal] normative considerations...'.[91]

Let us grant that GO(2) and (3), as elaborated by Goldsworthy, have the resources to explain the features of legal practice highlighted by Greenberg. Where does that take us in terms of assessing GO against CLC? Consider the following passage from early in Goldsworthy's article:

> [CLCists] cannot argue that [GO(2) and (3)] are merely a contestable theory of what constitutes legal content in Anglo–American law, which should be replaced by [CLC]. [They] must show that these doctrines...are not fundamental elements of that legal content, whose constitutive determination requires theoretical explanation.[92]

Goldsworthy here seems to lay down a *presumption* in favour of GO(2) and (3). Provided that GO(2) and (3) *can* explain the features highlighted by Greenberg, he implies, then GO(2) and (3) are indeed 'fundamental elements of legal content'. CLCists will not have rebutted the presumption; and they will not have made the case for 'replacing' these fundamental doctrines. There is simply no basis for such a presumption.[93] The back-and-forth between Goldsworthy and Greenberg instead illustrate in admirable detail a point that I have made repeatedly thorough this chapter: that *both* GO and CLC

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[89] ibid passim.

[90] ibid 25.

[91] ibid (footnotes omitted).

[92] ibid 12.

[93] See Lakin, 'Debunking the Idea of Parliamentary Sovereignty' (n 43); Lakin, 'How to Make Sense of the HRA 1998: The Ises and Oughts of the British Constitution' (2010) 399 (a review of A Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2009).

fit British legal and constitutional practice. In other words, GO and CLC are precisely what Goldsworthy says they are not: 'contestable (and contested) theor[ies] [or models] of what determines the legal content of statutes'. It is therefore premature to speak of CLC *replacing* GO(2) and (3). We have yet to establish, by some objective, independent, metric which model is currently the correct one. To hold otherwise is to violate the parameter laid down above that a method must not give a priori weight to any model.

IV. GO and CLC as Rival Interpretations of British Constitutional Practice

Moral values are our metric; and interpretivism, or what Kyritsis describes as 'moralised constitutional theory', is our method.[94] Or so I shall now briefly argue. Space precludes any lengthy explanation or defence of this position.[95] Rather, I want to make fourshort points in light of the earlier arguments of this chapter.

First, I have said above that an argument in support of GO or CLC must be independent of the very facts and features of British constitutional practice of which GO and CLC are rival models. It must supply some objective standard that can explain why a doctrinal proposition depends for its correctness or incorrectness either on GO or CLC (or some other model). The interpretative method meets this challenge. Moral values can tell us, non-question-beggingly, why empirical facts, moral facts, or some combination of the two determines the content of the law.[96] No further (non-moral) argument is needed to establish this relationship.[97] On this view, GOist values such as certainty and stability *make it the case* that the powers of institutions should depend on a consensus among officials

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[94] I borrow this phrase from Kyritsis, *Where Our Protection Lies* (n 21) 7.

[95] The leading account is Dworkin, *Law's Empire* (n 24).

[96] Greenberg, 'How Facts Make Law' (n 38) 254–264.

[97] ibid. See further, R Dworkin, 'Objectivity and Truth: You'd Better Believe It' [1996] *Philosophy and Public Affairs* 87.

GO(1).[98] Likewise, (a political constitutionalist understanding of) values such as democracy and separation of powers,[99] authority,[100] and the ability to evaluate the law,[101] *make it the case* that parliamentary intent makes a proposition of (statute) law true GO(3). For CLCists, values such as equal liberty,[102] integrity[103] or shared authority[104] *make it the case* that the powers of institutions, and the correctness of propositions of law depend on the scheme of principle underlying the practice CLC(1) and (3).

Moral values may not be the only candidate to remedy the bootstrapping problems of descriptive methods, but I think that they are the best candidate.[105] This brings me to my second point. We have seen that GOists and CLCists share highly targeted and distinctive aims. Their specific object of explanation is the *British* Constitution – or at least Anglo-American constitutions – rather than constitutions or legal systems at all times and in all places. And the types of explanations they

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[98] See Goldsworthy, ch 2 in this volume, section VI; Goldsworthy, 'The Real Standard Picture' (n 80) 47 (perhaps conceding, in line with the interpretative method, that GO must have an *evaluative* basis).

[99] See Bellamy, *Political Constitutionalism* (n 40).

[100] For a moralised view of Joseph Raz's theory of law, see, for instance, Dworkin, *Justice in Robes* (n 23) 198–212 and 227–331; Kyritsis, *Where Our Protection Lies* (n 21) 18–20.

[101] J Waldron, 'Normative (or Ethical) Positivism' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford, Oxford University Press, 2001), 430. For discussion, see M Gordon, ch 9 in this volume at section IIB.

[102] Allan, *The Sovereignty of Law* (n 1) ch. 3.

[103] Dworkin, *Law's Empire* (n 24) chs 6 and 7.

[104] Kyritsis, *Shared Authority* (n 21) passim.

[105] The chief rival involves 'indirectly evaluative' analysis of which model or features are 'central to our self-understandings in terms of law'. See J Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) 10 *Legal Theory* 117–156, 124; Raz, *Ethics in the Public Domain* (n 32) 301; A Zanghellini, 'A Conceptual Analysis of Conceptual Analysis' (YEAR?) 30(2) *Canadian Journal of Law and Jurisprudence* 467. This explanation arguably runs into the bootstrapping problem identified in section II: it takes empirical facts about the psychological views of participants to make other facts constitutive. See Greenberg, 'How Facts Make Law' (n 38) 255. For further criticism, see Barber, *The Constitutional State* (n 22) 8–11.

offer are constitutive and doctrinal: they each want to explain what makes propositions of law and the constitution true; and they each want to detail the true extant propositions. Among their shared parameters for success, we have seen, is whether a model *fits* the practice. More specifically, both Goldsworthy and Allan agree that the correct model must be the one *to which a political community is committed*. The interpretative method, I suggest, explains the importance of these common questions and concerns about a constitutional practice.[106] They speak, say interpretivists, to two fundamental questions of political legitimacy. First, why do the decisions and practices of these institutions and officials impose *binding* legal obligations (in so far as they do)? Why, for instance, does a text created by a body of people sitting in a particular place change the normative position of individuals? Second, why, in circumstances of disagreement about justice, rights, and so on, do the members of a community owe their allegiance to such decisions (in so far as they do)?[107] In other words, on what basis do the values and principles of the practice take priority over the personal moral convictions of individuals? It is my argument that we must assess a model of the British Constitution – or indeed *any* constitution – by how successfully it responds to these questions.[108] The justification for each model will constrain the ability of that model to explain a constitutional practice.[109] If so, then GOists and CLCists each face an arduous interpretative challenge. They must first show that

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[106] There are a bewildering number of theories to which people refer as interpretative (or in an alternate spelling, interpretive). The version I endorse is that elaborated by Dworkin, *Law's Empire* (n 24), and Stavropoulos, 'Legal Interpretivism' (n 24). For a comparison between other variants, see M Moore 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41(4) *Stanford Law Review* 871. Within this volume, M Gordon (ch 9) contrasts the versions of interpretivism espoused by Dworkin and Martin Loughlin at section X; and A Young (ch 3) discussed the version of interpretivism advanced by N Barber, (ch 1, n 22) at section X.

[107] See Stavropoulos, 'Legal Interpretivism' (n 24); See the chapters in this volume by Kyritsis (ch 8) and Dyzenhaus (ch 7). In posing these questions I am not assuming any general accounts of bindingness or political obligation. My point is that we should understand both GO and CLC as representing, or entailing, such an account.

[108] Goldsworthy contends that (non-moral) standards of rationality could perform the same role, specifically the tacit or implied assumptions about a practice: Goldsworthy, n 87, 38-41. Admittedly, rationality can help to rule out what Greenberg describes as 'bent' (i.e. bizarre) configurations of a practice (Greenberg, (n 38) 248-251); but such standards are not equipped, in my view, settle deep disagreements of the sort between GOists and CLCists.

[109] See, Dworkin, *Law's Empire* (n 24) 234. For this 'holistic' (as opposed to 'threshold') account of fit and justification, see Kyritsis, *Shared Authority* (n 21) ch 3.

their answers are defensible as a matter of political morality. They must then show, crucially, that their convictions in political morality are *reflected in British constitutional practice*. It is by joining these two dimensions of constitutional argument – justification and fit – that both GOists and CLCists address the practice *as it is* rather than as it *ought to be*.

This brings me to my third point, and a belated attempt to pick a winner between GO and CLC. Goldsworthy has argued that even if GO cannot be *descriptively* correct, it is interpretively so. As he puts it, the '...interpretive methodology is construed ... as an attempt to clarify and harmonise the principles *actually accepted* by British legal officials'.[110] To 'disconnect the behaviour from the reasons that actually motivate those who engage in it, and provide it with a justification that they would disown' he says 'is to propose a new practice rather than interpret theirs'.[111] This is, I am afraid, an attempt to smuggle the descriptive positivist method critiqued above back into the arena. It again *assumes* that a practice can only be that which people think or believe it to be. But CLCists give a rival account of what it means for a practice to belong to a political community, one that has as much purchase within British constitutional practice as the GO account. For them, it is people's *normative* reasons rather than their motivational reasons that make the practice their own.[112] For interpretivists there can be no predetermined, factual, view on which of these accounts is correct – whether in favour of GO or CLC.[113] Correctness depends on which of the complex stories in political morality supporting each account makes best (moral) sense of British constitutional practice.

So which model of the practice is correct, CLC or GO? Let us return to some of the facts in dispute between Greenberg and Goldsworthy above: that judges characteristically disagree about the meaning of statutes; and that in their reasoning they characteristically draw upon moral principles. In order to vindicate their model of the practice, GOists must show that *despite* these features, judges nonetheless generally apply common standards of legislative intent, such that the content of the law

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[110] Goldsworthy, *History and Philosophy*, (n 1) 254.

[111] ibid 253.

[112] For discussion of the distinction between motivating and normative reasons, see Goldsworthy, 'The Real Standard Picture' (n 80) 37–39; Letsas, 'The DNA of Conventions' (n 21).

[113] See Lakin, 'Defending and Contesting the Sovereignty of Law' (n 83); Stavropoulos, 'Why Principles?' (n 67).

is certain, stable and non-dependent on the moral preferences of judges. In effect, GOists must *explain away* such features. This endeavour leads Goldsworthy and other GOists to the most ingenious broadening of the notion of intent. For instance, Goldsworthy tells us that legislative intent is under-determinate,[114] that judges sometimes exercise unacknowledged interpretive creativity,[115] that judges sometimes deliberately depart from the law for consequentialist reasons,[116] and that the suggestions by judges that moral principles limit the powers of Parliament are all necessarily obiter dicta and wrong. To every suggestion by CLCists that moral principles partly determine the content of the law, GOists respond with some creative rendition of legislative intent.[117]

No doubt legal reasoning within some constitutional systems does, has, or could honour GOist values, but it is far from clear that the British Constitution does so today.[118] GOist's 'bed of Procrustes' treatment of legislative intent, and their accommodation of frequent extra-legal judicial excursions off-piste, are arguably ill-suited to securing the certainty, stability and judicial restraint that they prize. The further that the practice of legislation and adjudication moves from clear and ascertainable legislative intention, consistently applied by judges, the weaker that a model based on these types of values looks.[119] Indeed, I think this gap gives us reason to look away from GO to CLC. For CLCists, moral disagreement about the role and powers of institutions and the meaning of statutes, is not an illusion, masking the truth of GO; it is a defining feature of contemporary legal and constitutional practice. This is not to 'celebrate' moral disagreement for disagreement's sake,[120] but to recognise that an interpretative justification for the practice must embrace this constitutional

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[114] Goldsworthy, 'The Real Standard Picture' (n 80), 15–20.

[115] ibid 21–24.

[116] ibid 20.

[117] For an exhaustive study on legislative intent, see R Ekins, *The Nature of Legislative Intent* (Oxford, Oxford University Press, 2012).

[118] On the relevance of Dicey's theory in different periods in British constitutional history, see Craig, 'Theory and Values in Public Law' (n 82).

[119] Dworkin, *Law's Empire* (n 24) 139–150.

[120] See Goldsworthy, ch 2 in this volume text to n 134.

phenomenon rather than apologise for it.[121] In its 'protestant' model of legal and constitutional reasoning, CLC does just that.[122] Rather than dismiss as constitutionally unwarranted and legally irrelevant the moral disagreements of judges in cases such as *Privacy International*, CLCists view such disagreements as a clear manifestation of the values underlying constitutional practice. They are, says, Allan, part of an ongoing attempt to 'integrat[e] shared basic values in a larger scheme, able to reconcile divergent conceptions of legality, equality, and justice'.[123] It is these values that plausibly explain both the bindingness of law and the (presumptive) allegiance owed by members of the British constitutional community to the law. GOists cannot shoot down this conclusion on the basis that it does not accord with their model, or that it is not the practice that most people or officials accept. The practice is what the best interpretation makes it. The only response available to GOists is to give a better account of disagreement and other key features of the Constitution, one that is consistent with the values underlying their models. This brings me to my fourth and final point.

I have focused in this chapter on two illustrative, broad-brush accounts of the Constitution, GO and CLC. While this focus has been sufficient, I hope, to make the case against descriptive constitutional methods and in favour of interpretivism, it leaves much room for debate about the correct interpretative model of the Constitution. Positivist and interpretivist theorists disagree as much among themselves as they do with each other about which combination of values and facts generate which legal and constitutional doctrines. More generally, constitutional commentators disagree about the relative importance of legal and constitutional rights, duties, powers etc as against 'the experience, impulses, the practical, detailed ongoing of politics'.[124] I leave open the possibility that the correct interpretation of the Constitution may emerge from either the positivist or interpretivist camp, or

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[121] For an interesting political constitutionalist explanation for disagreement, see Gee and Webber, 'What is a Political Constitution?' (n 38) 277.

[122] For the protestant approach to legal argument, see Dworkin, *Justice in Robes* (n 23) ch, 6; Allan, *The Sovereignty of Law* (n 1) 342–346; Gerald J Postema, '"Protestant" Interpretation and Social Practices' (1987) 6 *Law & Philosophy* 283–319.

[123] Allan, *The Sovereignty of Law* (n 1) 345.

[124] See G Gee and G N C Webber, 'Rationalism in Public Law', (2013) 76 *Modern Law Review* 708, 722.

indeed from some other camp. I also freely acknowledge that a model of constitutional practice must deal with the 'messiness' and complexity of practical politics as much as more orderly questions of normative constitutional content.[125] What I have attempted to argue in this chapter is that there is no *descriptive* method available to settle these types of disagreements. It is only by understanding which values underpin the constitution that we can do so.

There is a broader closing point to make here about the virtue of the interpretative method both as a way of understanding a constitutional practice, and as a way of conducting scholarly disagreements. Properly applied, this method honours the choices made by a political community, through its institutions practices and decisions, about how to organise its constitution and legal system.[126] Hence, it is entirely conceivable for interpretivists that *any* morally defensible model of a practice could provide the correct understanding of the Constitution today, whether GO, CLC, some combination of the two,[127] or something else. In this respect, the method satisfies the first parameter I identified above: it enables an objective and unprejudiced comparative appraisal of different models. This has important implications, I think, for how constitutional scholars engage with each *other* as much how they engage with different constitutional practices. It does no injury to a scholar's work to assess the political values to which *they* are committed, and to examine whether a constitutional

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[125] Many authors in this volume have emphasised this point. The emphasis on law and courts in this chapter on law for illustrative purposes only.

[126] There is no cause, then, for Goldsworthy to be 'baffled' by the interpretivist's approach to the Mongolian legal system (see Goldsworthy, ch 2 in this volume, section VI). The interpretivist, as much as the positivist, seeks to make sense of the practice as it is, rather than as he would wish it to be. See P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press, Oxford, 1990) 3. For a fascinating exchange of views on precisely how values relate to a particular constitutional practice, see the chapters by P Cane and P Craig in *Law and Administration in Europe Essays in Honour of Carol Harlow* (Oxford, Oxford University Press 2003). For criticism of both views, see Allan, *The Sovereignty of Law* (n 1) 333–340.

[127] For argument to this effect, see Lakin, 'Defending and Contesting the Sovereignty of Law' (n 83). For a model that combines insights from interpretivism and legal positivism, see D Kyritsis, 'What is Good about Legal Conventionalism' (2008) 14 *Legal Theory* 135.

practice instantiates those values. To the contrary, this constructive process makes every constitutional scholar a collaborator with every other.

V. Conclusion

My overarching aim in this chapter has been to clear the way of a constitutional theory roadblock: the mistaken view that one or other account of a constitution can be *descriptively* correct. This widespread view is responsible, I think, for the polarised and uncompromising feel of much contemporary constitutional writing. It explains the popular view, criticised above, that accounts of the British Constitution such as GO and CLC are so different as to be incommensurable. Having removed that roadblock, I have attempted to show that we can understand GO and CLC as rival models of the salient facts and features (both empirical and moral) of British constitutional practice. The question of how to establish which model is the *correct* one (our motivating question), I have argued, is an interpretative rather than a descriptive one. We must ask which model provides the most attractive justification for the practice. With a briefness that, I fear, will disappoint many of the readers drawn to this chapter by its title, I have tentatively concluded that CLC gives the superior interpretation.[128] Perhaps more frustratingly still for such readers, I have enthused about the methodological possibility of some model of the Constitution other than CLC being interpretatively correct, whether now or in the future.

[128] For a comprehensive philosophical and doctrinal defence, see Allan, *The Sovereignty of Law* (n 1).