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Faith in Authority and the (Political) Constitution

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1. Introduction

J.A.G. Griffith's 'The Political Constitution'¹ has spawned a vast literature, with 'political constitutionalism' being transformed, in the 40 years since the lecture was delivered, from its original status as a normative phenomenon predicated upon a distinctive (broadly positivist) methodology into both a merely descriptive and a distinct and much more thickly normative creature. In the former conceptualisation, it is a description of the constitutional arrangements of the United Kingdom at the relevant point in time. In the latter, that description is elevated to the heights of a model to which constitutions generally should aspire but from which the United Kingdom itself may already have departed.² But the method of Griffith's piece, and the motive for which it was originally adopted, have not lost their relevance. Both continue to matter, perhaps even more so than the question of what exactly 'the political constitution' is, or what it requires in terms of the institutional arrangement of a given constitutional order; on what side of some constitutional controversy it requires us to come down. Indeed, if the methodology of political constitutionalism has been obscured in contemporary constitutional discourse by such anterior concerns, it is because that methodology is implicitly (if inconsistently) adopted by many of those who engage in these debates, whether 'legal constitutionalists' or 'political constitutionalists' or somewhere in between. Moreover, that method is always and everywhere available in order to critique even the claims of those who do not employ it. This article considers the primary factor identified by Griffith as prompting the adoption of the method of the political constitution – faith in authority and, more precisely, its loss – and explores certain aspects of its relevance for the development of public law in the United Kingdom over time.

The matter is considered under three headings. The first is that already identified, and which emerges most directly out of a re-reading of the Chorley Lecture 40 years on: faith in authority as

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¹ JAG Griffith 'The Political Constitution' (1979) 42 *MLR* 1.

² See Paul Scott '(Political) constitutions and (Political) constitutionalism' (2013) 14 *German Law Journal* 2157.

the underpinning of the old liberal democratic order, and the loss of that faith as the basis for a new method – one which looks past the conceptual apparatus in which the constitution is presented (and perhaps even presents itself) in order to ascertain the underlying reality of power within the constitution. Those concepts – amongst them most prominent the rule of law, and the separation of powers – which serve to disguise that reality are, in this endeavour, deprecated though not (as I discuss below) necessarily dispensed with altogether.

The second aspect of the issue as seen through the lens of faith in authority is a consideration of the evolution of the political constitutionalist literature in the period since the Chorley Lecture was delivered. Though arguments are not always or even usually advanced in those terms, the method which the Chorley Lecture exemplifies allows, even tempts, us to see all arguments in terms of their effect upon the distribution of power within the constitutional order, and so to read them as reflecting the underlying faith that constitutional commentators do or do not have in particular actors or sets of actors. The loss of faith in authority which Griffith treats as prompting the methodological turn that he describes (and exemplifies) in this way marks a second turning point: for those who internalise it, it becomes difficult – perhaps impossible – to return to a way of seeing the constitution which accepts the reified conceptual apparatus through which it presents itself, and with which others seek to describe, but also to shape, it. And so these two points are linked: the first loss of faith authority – the methodological turning point – opens up a question which was previously neither asked nor askable, and which now lurks in the background of all constitutional discourse.

The third section seeks to move the question of faith in authority past where the literature can be seen thus far to have taken it thus far. Griffith treats the issue of faith in authority primarily as what we might call a ‘vertical’ phenomenon, pertaining to the faith possessed by those who do not directly participate in the processes of governance in those who do but, rather, are external to it. This paper posits that ‘vertical’ aspect as existing in a dialectical relationship with a related matter which, imperfectly, we could describe as ‘horizontal’: the faith that those who do or might participate in authority, and so are internal to the system, have in each other.³ The British system, I suggest, operated against the background of a well-developed social hierarchy, with those who participated in it having been socialised (largely via a shared educational experience) into a common mode of seeing the world. This permitted the British system to mostly manage without

³ In talking of internal and external perspectives, I of course use – and perhaps more realistically abuse – the Hartian terminology: HLA Hart, *The Concept of Law*, 2nd ed, Clarendon Press (1994), 89-91.

the Enlightenment model of constitutionalism – a model of the separation of and limitation upon powers designed to guard against the negative consequences of human imperfection – and rely instead upon a series of unwritten rules and (legally) unenforceable conventions. Just as those external to the system might lose faith in its operation, so too might those internal lose faith in each other. For this reason, it is not enough to consider how and why external observers of the constitutional order (of the sort that a ruler/ruled distinction implies) felt and feel about those who internal to it: we must also consider how those who are internal to it felt and feel about each other. Though the co-extension of ruler and ruled is perhaps as much a rhetorical as a practical feature of the contemporary constitution, to the extent that co-extension has been achieved, it leads us to consider the interaction of these horizontal and vertical dimensions: the question of the extent to which the people had, and has, faith in itself as the ultimate wielders of democratic power. We start, though, with a consideration both of Griffith's method and, more importantly, the source of that method: the loss in the faith of authority which permitted the functioning – in the nineteenth century and beyond – of what Griffith calls 'liberal democracy'.

2. Faith in authority and the methodology of the political constitution

Griffith's narrative on the loss of faith in authority in the United Kingdom invokes a (rather particular) conception of nineteenth century liberal democracy, which for him designated 'a form of government which was Parliamentary in structure and which sought to secure a particular set of political and economic ends.'⁴ But such a form of government was itself closely tied (perhaps inextricably – Griffith says 'very strongly inherent')⁵ to a particular relationship between governed and government. It required, that is, something along the lines of the consent of the ruled to their rulers – this is the 'faith' to whose loss Griffith avers. He quotes a description of the state of politics in the 1880s: politician 'were dealing seriously and adequately with the main problem confronting them, namely that of presenting themselves and the world of parliamentary activity generally in a sufficiently attractive, necessary and interesting way to maintain a general consent to their hegemony...'⁶ We are therefore dealing with a particular ontology of democracy, one which may not be recognised today, in which democracy does not imply self-government, with rulers and ruled co-extensive, but rather the separation of rulers from ruled, those to whom

⁴ Griffith (n 1) 3.

⁵ Griffith (n 1) 1.

⁶ AB Cooke and JR Vincent, *The Governing Passion: Cabinet Government and Party Politics in Britain, 1885-86*, Harvester Press (1974), quoted in Griffith (n 1) 3.

consent is given, and those who give it: the latter may choose the former (or, perhaps better, choose amongst them) but they nevertheless remain separate from them.

It serves to remember here that in the period under discussion, the process of democratisation had a long way to go (which is not of course to say that it is now complete): the 1832 Reform Act – passed after a decade of relative calm which followed on from the Napoleonic Wars and then, in the United Kingdom, a turbulent period of regency associated with significant social inequality⁷ – had begun the process of enfranchising the masses, but in the short term had done little to expand the electorate.⁸ Though Europe had convulsed in the mid-nineteenth century,⁹ the United Kingdom had managed to head off revolutionary projects, assisted first by the authoritarian turn in Regency England,¹⁰ and then later by political and economic reform (including the Great Reform Act itself and the repeal of the Corn Laws).¹¹ It therefore remained largely untouched by the revolutionary fervour of 1848. The discontent which elsewhere resulted in violent uprising was in the United Kingdom reflected instead mostly in the petitions and mass demonstrations – though in the period leading up to the Reform Act radicals had not only agitated within the political process but plotted and schemed outside of it.¹² The House of Lords remained prominent within the legislative process, ready and willing to force the Prime Minister of the day to go to the polls (on the theory of ‘the mandate’)¹³ where the democratic credentials of some proposed change were in doubt. The Reform Act itself had been passed only on the

⁷ The 1820s was a largely peaceful decade for the United Kingdom, with some of the repressive measures enacted in the 1810s being repealed and a number of liberalising measures introduced, including the Sacramental Test Act 1828 and the Roman Catholic Relief Act 1829, which brought to a conclusion the process of emancipation of Catholics in the United Kingdom.

⁸ For a history of the enactment of the 1832 legislation, see Michael Brock, *Great Reform Act*, HarperCollins (1973).

⁹ The ‘Spring of Nations’ in fact began in January 1848, in Sicily, with the revolutionary wave – liberal, democratic, and anti-monarchical – eventually encompassing the majority of European states, but not the United Kingdom.

¹⁰ A political radicalism had arisen in the context of unemployment and starvation caused by the Napoleonic wars. As part of it, the Manchester Patriotic Union organised a demonstration on St Peter’s Field, Manchester, which was broken up by a cavalry charge in which 15 died. The Home Secretary, Viscount Sidmouth, responded by introducing the ‘six acts’, repressive measures aimed at radicals and the publications through which they communicated. See also the Scottish ‘Radical War’ of 1820, in which similar causes were pursued under the banner of anti-Union uprising: Peter Berresford Ellis and Seumas Maca’Ghobhainn, *The Scottish Insurrection of 1820*, Littlehampton Book Services (1970).

¹¹ By the Importation Act 1846, following a long campaign by the Anti-Corn Law League.

¹² See John Stevenson, *Popular Disturbances in England, 1700-1832*, 2nd edn, Longman (1992). Notable amongst the plotters were those who sought unsuccessfully – in the ‘Cato Street Conspiracy’ – to murder the entirety of Lord Liverpool’s Cabinet in 1820.

¹³ GH Le May, *The Victorian Constitution: Conventions, Usages, and Contingencies*, Palgrave MacMillan (1979), 134ff.

back of threats to flood the Lords with new peers,¹⁴ and the House of Lords continued to play a prominent role throughout the century, most notably in persistently obstructing moves towards Home Rule for Ireland.¹⁵ When it eventually overreached, blocking Lloyd George's 'People's Budget' of 1909 and provoking perhaps the last true constitutional crisis of the United Kingdom's history, the threat to flood the upper chamber was again deployed in the service of the enactment of a statute which gave legislative – and so formal – effect to its already well-established constitutional inferiority.¹⁶ In the meantime, the cause of democratic governance had been further advanced by the Second Reform Act of 1867,¹⁷ which had enfranchised much of the urban working classes, but only those who were male: no women would have the vote until 1918,¹⁸ after the events which Griffith identifies as the proximate cause of the loss of faith in authority.

There is something to be suspicious of in the suggestion of some prelapsarian past, not least because it seems unlikely that the faith in authority described was ever quite so broad or penetrated so deeply as Griffith's (brief, but telling) account suggests. Not least because at the time in question the franchise was still based upon property and women were still excluded from it all altogether: for those and many other reasons, the category of persons whose opinions the political classes were required in practice to consider will not have been even nearly co-extensive with that of those over whom they exercised power. The objective legitimacy of their power – whether, that is, it constituted something capable of exercising a true authority – might therefore be doubted, even if they were successful in attracting, from a sufficient portion of the social whole, the sort of subjective consent that Griffith's account suggests that the system was aimed at retaining. Further, to talk even of consent is likely to overstate the matter. Tacit acquiescence may be a better way to characterise the attitude of the masses, but even that lesser response should not be taken for granted. The defining characteristic of liberal democracy is that it succeeds in hiding the state's underlying monopoly on the use of force, and that task is of course both easier and more likely to succeed where the political process only rarely erupts into tangible, palpable violence. Even if the best that can be said of the United Kingdom's constitutional order

¹⁴ Le May (n 13) 32.

¹⁵ The best account remains George Dangerfield, *The Strange Death of Liberal England: 1910-1914*, Stanford University Press (1997). See also Roy Jenkins, *Mr. Balfour's Poodle: Peers Versus People*, Collins (1968).

¹⁶ Le May (n 13) 212-9; Dangerfield (n 15) 37-66. The legal effect of the 1911 Act and its 1949 counterpart was considered in *R (Jackson) v Attorney General* [2005] UKHL 56.

¹⁷ The best modern study of the 1867 Act puts it in the context of events including the 1848 revolutions in Europe: Robert Saunders, *Democracy and the Vote in British Politics, 1848–1867: The Making of the Second Reform Act*, Routledge (2011).

¹⁸ By the Representation of the People Act 1918, though suffrage was enjoyed by women on equal terms with men only following the enactment of the Representation of the People (Equal Franchise) Act 1928.

in the mid- to late- nineteenth century is that enough was done to avoid revolution, it is not unreasonable to identify that as representing – at least from the point of view of that order itself – a remarkable success. The law had undoubtedly had a role to play in that success, both in terms of certain specific statutory concessions, prominent amongst them those noted above, but also the more general ideology of the rule of law whose successes (as practice and as ideology) have been identified by EP Thompson in relation to the previous century.¹⁹

Despite these caveats, however, the system of government (on this account) rested on a bed of something that we can call, with at least tolerable accuracy, faith in authority, and could not survive its loss. That loss came, Griffith suggests, with the Great War, and the massive and pointless loss of life it entailed:

Orders were being given which resulted in the death of tens of thousands to no purpose. Sometimes the orders came from on high. Sometimes immediately.²⁰

He quotes eyewitness accounts of the effect of some of those orders and concludes, in bare terms:

Faith in authority which, I suggest, is essential to the working of that form of government known as liberal democracy, was never recovered.²¹

This loss rendered suspicious those exposed to the discourse of liberal democracies – ‘seen at worst as elaborate facades deliberately constructed to fool most of the people most of the time’ or, at best, ‘out of date pieces of stage paraphernalia which someone had forgotten to clear away with the other impedimenta of Professor Dicey’s England’ – who at the same time were ‘discarding’ a sense of the state which ‘had enabled the holders of political and economic power to appear as trustees rather than as manipulators’.²² This intellectual liberation, together with the

¹⁹ See the appendix to EP Thompson, *Whigs and Hunters: The Origin of the Black Act*, Pantheon Books (1976), discussing the rule of law, which Thompson famously described as an ‘unqualified human good’, noting that the law cannot perform a legitimating function if it works transparently in favour of the economic and political elite: ‘The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.’

²⁰ Griffith (n 1) 4.

²¹ Griffith (n 1) 5.

²² Griffith (n 1) 5.

reception into intellectual fashion of the positivism of Comte and those who followed him,²³ paved the way for Griffith's account of 'the political constitution', an intellectual phenomenon which, despite what it has since become in the literature, was originally very closely tied to a particular method of public law scholarship,²⁴ in which Griffith and his peers sought 'to free ourselves from the tentacles of the natural lawyers, the metaphysicians and the illusionists who gave the impression that the working of constitutions was something all done by mirrors, by sleight of hand, and by the use of nineteenth-century language based on eighteenth-century concepts'.²⁵

The key features of this method is a concern for the reality of political power which lies behind the conceptual framework through which the exercise of that power is explained (often in terms which suggest the conceptual framework is immanent in the order, rather than imposed on it by those who wield power), and a concomitant distaste for the language of natural law, which – in its many forms – serves to disguise rather than to illustrate the reality of political power. From that, in Griffith's telling, all else follows: the futility of substituting law for politics (which, we now see, simply results in a transfer of political power from politicians to non-politicians) and a desire to enlarge the possibilities of political participation. In the context in which Griffith spoke, the consequence of taking this methodological approach was transposed principally into his well-known opposition to bills of rights,²⁶ which speak the language of a priori values, transfer political power from politicians to judges (from actors who can be removed to actors who cannot) while denying that they do so, and limit opportunities for political participation by placing certain substantive topics beyond the reach of the (confessedly) political branches of the constitution. In another time and place, the same method might lead one to focus, for instance, on the status of local government,²⁷ to critique the assumption by the judiciary of new powers which effectively allowed constituted new and more restrictive limitations on how political

²³ Griffith (n 1) 6. Griffith identifies in particular Durkheim, and – 'for me' – Léon Duguit, who presented 'the nearest thing to a solid, positivist, unmetaphysical, non-natural foundation for analytical jurisprudence.' In the introduction to the Laskis' translation of his *Law in the Modern State*, Duguit gives an account of the evolution of public law which in many ways resembles that offered by Griffith in the Chorley lecture: 'the idea of public service replaces the idea of sovereignty. The state is no longer a sovereign power issuing its commands. It is a group of individuals who must use the force they possess to supply the public need.' Léon Duguit, 'Author's Introduction' in *Law in the Modern State* (Frida and Harold Laski trans) Howard Fertig (1970), xliv.

²⁴ See Martin Loughlin in the current volume, though below I query some of his claims.

²⁵ Griffith (n 1) 6.

²⁶ See Ronald Dworkin, *Taking Rights Seriously*, Gerald Duckworth & Co (1977), Lord Scarman, *English Law – The New Dimension*, Stevens (1975) and Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, HarperCollins (1978).

²⁷ JAG Griffith, *Central Departments and Local Authorities*, Allen & Unwin (1966).

bodies might lawfully exercise the powers recognised to them,²⁸ or to promote freedom of information laws.²⁹ All of this from a method whose initial prompting is the loss of faith in authority; the fact that (at least some of) the subjects of political power were no longer willing to accept the orthodox constitutional account of the relationship which had previously subsisted between them and their political leaders.

And though my task here is not to trace the pre or post-history of this methodology within the discipline of public law, I venture to suggest – as a first approximation – that it is in many ways the default methodology of public law, and to the extent that it is not, it has nevertheless become a feature of all standard accounts of public law. This is, of course, not to say that we are all political constitutionalists in the sense in which that designation is (sometimes pejoratively) used, nor that we abjure the conceptual apparatus through which the constitutional order presents itself to the world, and in which it hides the underlying reality which we – the intellectual superiors to the high priests of the Liberal order(!) – seek to expose. Instead, I suggest, when we use these concepts, we (often) do so with at least some sense of their implications for the distribution of power within the constitutional order, and in fact the invocation of certain concepts (say, the rule of law) is often attractive (or unattractive) precisely because we know that it means in terms of the balance between political and legal institutions. Elsewhere in the current volume, Martin Loughlin identifies the Chorley lecture as the last gasp of public law functionalism – the method exemplified by the work of LSE scholars such as Harold Laski, Ivor Jennings, and William Robson – which he contrasts with the normativism of those, both liberal and conservative, who seek not merely to understand the functioning of the constitutional order but to promote certain values.³⁰ I do not seek to contest that claim, but rather to complicate it: while we not all carry out functional analysis, we are all capable of it; all aware (often all too aware) that this mode of seeing exists.

We will return to the question of the changing politics of political constitutionalism below. For now, it suffices to make two points. The first is that the descriptivism of Griffith's account – a descriptivism which, in many accounts, has been overtaken by the mutation of his work into a

²⁸ JAG Griffith, *Public Rights and Private Interests*, Academy of Legal Publications (1981), lecture III.

²⁹ Griffith (n 28), lecture IV.

³⁰ The distinction is of course one which Professor Loughlin himself identified in his *Public Law and Political Theory*, Oxford University Press (1992). At 11, Loughlin gives a brief account of the thought of John Millar which includes the claim – reminiscent of the work of Duguit quoted above at n 23 – that the rights of government historically 'rested on authority' but 'with the progress of civilization it comes to rest on utility'.

fully normative project³¹ – must not be overstated: as already noted, he is very clear as to certain of his normative preferences, and they do not map neatly onto the categories of liberal and conservative normativism identified by Loughlin. Instead, we might present them as a sort of democratic normativism, whereby the space for democratic contestation is to be expanded to the greatest possible extent, and the obstacles which litter it are to be progressively dismantled.³² What is true, however, is that this normativism is layered upon, and explicable only in light of, an underlying functionalism which is much older: we see clearly, for example, that Griffiths opposes Bills of Rights precisely because his functionalist method convinces him that their effect is to shrink the space of democratic contestation, handing what is in effect political power to persons who are not politicians and so not removable by those whose needs they are intended to serve. The substantive constitutional commitments reflect, though are not determined by, the methodology which precedes them. The same methodology whose adoption was a function of a loss of faith in authority which made it necessary to reject – impossible not to reject – the constitutional order’s default (self-)presentation.

The second point: to identify a methodological turning point prompted by a loss of faith in authority and whose ramifications are still felt today is not in any way to suggest (I note again) that we moderns are somehow the evident superiors of the mystified ancients. Indeed, the opposite may be the case. The ‘impedimenta of Professor Dicey’s England’, being the conceptual apparatus through which the constitution is understood, remain the core not only of the contemporary public lawyer’s vocabulary, but also constitute the intellectual framework through which that understanding is transmitted to students: though we apprehend, intuitively but also often explicitly, the implications of these various concepts – the rule of law, the separation of powers, even the sovereignty of Parliament – for the practical balance of power within the constitutional order, we have not yet transcended them, and probably never will. And, in the meantime, any attempt to displace them is liable only simply to result in a situation in which the underlying reality of power is disguised in slightly different ways, attractive only for its novelty. Nevertheless, as I suggest in the next section, the turning point is real: whether it took place at the point in time, or for the reasons, which Griffiths claims to have been the case is less

³¹ See Graham Gee and Grégoire Webber, ‘What is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273.

³² Gee and Webber (n 31) identify the normativity of the modern political constitutionalist project as existing at the meta level, with political constitutionalism requiring that the boundaries of the constitutional order themselves be contestable within a political process. It seems clear, however, that the normativity can be dualistic, incorporating this meta-level contestation but without being agnostic as to what those boundaries should be.

important than the fact in which it provides a distinct and distinctive way of seeing the constitution. It is a lesson which cannot be wholly unlearned, no matter how much we might want it to be, or how hard we might try.

3. Political constitutionalism: faith in which authority?

The question of faith in authority comes back into the political constitutionalist endeavour at a second point. As well, that is, as prompting the emergence of the methodology which underpins the normative position Griffith articulates, later contributions to the literature make it a more direct explanation for sharing (a version of) Griffith's normative claim. To make the point another way, Griffith's claim – though it reflects a particular political context, without which the arguments would seem less urgent if not less true – is essentially, a principled one. Political power should be exercised by political actors, actors who are removable, and – the logic of the Chorley lecture demands – that commitment should remain in place regardless of the way in which legal and political actors are likely to or in fact do exercise the power they possess. It is a necessary, rather than a merely contingent, constitutional commitment. The political constitutionalist argument made by Griffith here therefore stands alone from claims about the relative political alignment of the political branches of the state and that of the judicial branch at any given point in time: strictly speaking, that is, *The Political Constitution* does not need *The Politics of the Judiciary*.³³ In later incarnations of what we now call political constitutionalism, however, a pragmatic (or, perhaps, consequentialist) vision of political constitutionalism has evolved, whereby the relationship between these two sets of claims is no longer contingent – a happenstance which may feed into the frequency or the urgency with which the political constitutionalism argument is made but which does is logically separate from it – but rather causal. In this form, we must support the empowerment (or protect the existing power) of the political branches precisely because they are likely to use the power in a manner which is superior to the way in which it will be made use of by the judicial branch. Let us note first that where such arguments are made – whether positively or not – there is an implicit functionalism at play: this argument makes no sense if we understand the constitution solely through the conceptual categories which prevail; where we are able only to argue, for example, about what the rule of law requires of a constitution, and whether or not some change is compatible with it.

³³ JAG Griffith, *The Politics of the Judiciary*, 5th ed, Fontana Press (2015). Nor indeed, *Judicial Politics Since 1920: A Chronicle*, Wiley Blackwell (1993), in many ways the superior work.

And of course, the use of this cheap and empty adjective ‘superior’ reflects the fact that though this argument has often been deployed, in keeping with Griffith’s life and work, from the left, it need not be. It is equally plausible to argue that the political branches make better decisions when those decisions are assessed from the point of view of some other value or set of values which we take to be of sufficient importance that they might legitimately be invoked in order to determine the structure of our constitutional order. And, again, once the form of the argument is settled, there is no reason – none whatsoever – why it should be deployed only by political constitutionalists. As has indeed been the case, the same basic logical form might well be deployed in favour of the empowerment of the judiciary (or, what is not quite the same thing, the placing of new obstacles on the freedom of action of the political branches) on the basis that they are better at protecting our chosen values, or that the political branches are more likely to act contrary to them. On this account – to put the point in a necessarily crude fashion – faith in authority is not merely about whether or not we accept at face value the conceptual apparatus by which the those internal to the constitution explain it, or whether we seek to understand the reality which that conceptual façade hides: it also contributes to an answer to the question of who should – now that the scales have fallen from our eyes – exercise the power. Knowing where power is genuinely located, we are in a position to consider where it should be located, and we do so often via a consideration of which of the various constitutional authorities enjoy our ‘faith’; who it is that we trust to exercise power as it should be exercised. The loss of faith in authority in the general sense requires us to consider in which of the authorities – now plural – we can have faith.

This is a cynical approach to the question, one which risks assimilating the concept of faith in authority from which we began with bare political preference. Before moving on from that cynical assimilation, I wish to defend it briefly. It seems undisputable that the original political orientation of political constitutionalism project (if that term does not mislead by suggesting a unity which does not and never has existed, and distinguishing again between the functionalist method and the associated normative stance) was a left-wing one: Griffith was speaking in a context in which judges (legal actors, who unlike political actors could not be removed) might use their power to obstruct the initiatives of a left-wing government, the same way they had many times done in the past in, say, the field of labour law about which he had written so much. And of course, Griffith’s Chorley Lecture was not given in a constitutional vacuum. Leaving

Dworkin to one side for the moment,³⁴ a key target of Griffith's critique is Lord Hailsham, who in his *The Dilemma of Democracy* had argued for a number of constitutional reforms, amongst them the incorporation of the ECHR into domestic law.³⁵ Strangely (or perhaps not, on my current account) Hailsham's concern for the possible excesses of a majority government faded from view as – shortly after the Chorley lecture was delivered and then published – the Labour governments of the mid-1970s gave way to a Conservative majority under Margaret Thatcher.³⁶ Political constitutionalism was a politicised response to a (what we would now call) legal constitutionalism that was itself certainly not unrelated to the domestic political context within which it was articulated, and many of whose adherents seemed to lose interest after the dawn broke on a new political era. Though the method was not new in 1979, what followed from it was likely to vary (in urgency if not in substance) as the political backdrop evolved.

This same basic dynamic might equally be identified in the context of the modern reinvigoration (revival? rebirth?) of the political constitutionalism in its normative form, which now is at least as likely to criticise courts from a broadly centre-right perspective as it is from a centre-left one,³⁷ a trend most obvious within the basic suspicion of the Conservative Party of the Human Rights Act, as well as in concerns about the judicialization of warfare,³⁸ or even the general perception

³⁴ Dworkin (n 26). Dworkin was, of course, an academic rather than a judge or a politician (or, as was the case with Lord Hailsham's after 1979, both – this being the heyday of the Lord Chancellor as the institution which fused the three branches of state). Though nothing turns on it, it may be that it is easier for the liberalism of the academic to remain constant over time than it is for that of the politician. Alternatively, it may be – though I would not bet on it – that the academic's commitments are less likely to reflect, even subconsciously, temporary political convenience.

³⁵ Hailsham (n 26) 170-4: 'I wish to put an end to the elective dictatorship... in this armoury of weapons against elective dictatorship, a Bill of Rights, embodying and entrenching the European Convention might well have a valuable, even if subordinate, part to play.' At 174, Hailsham clearly endorses an entrenched and higher-order constitution, if a means can be found to achieve one.

³⁶ Compare, for instance, Hailsham's *On the Constitution*, Harper Collins (1992), in which little is said, and what is said is much more hesitant. Hailsham notes first that 'no British government has taken what I would regard as the obvious course of passing legislation providing that, in the absence of any express provision to the contrary, the law of the United Kingdom in its several parts must be read in individual cases to whatever defined extent as subject to the code.' (80), a course of action less radical than his previous recommendation. He then claims that 'one incidental advantage of our continuing adherence [to the Convention] is that, so long as we are members, there is an overwhelming argument against anyone concocting a new and home-brewed 'Bill of Rights' on the American model to be inserted into our domestic law' (80).

³⁷ See, most prominently, the Judicial Power Project, which has produced a range of works on specific judicial decisions and wider trends. Though the political and constitutional commitments of contributors are many and varied, the Project is run by the centre-right think tank Policy Exchange. For discussion, see PP Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 *University of Queensland Law Journal* 355 and, responding, Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 *University of Queensland Law Journal* 375.

³⁸ Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*, Policy Exchange (2015),

that on a number of occasions the courts have made decisions which have the effect of empowering the judiciary at the expense of the political branches in contexts unrelated to human rights doctrine.³⁹ To the extent that this is a fair characterisation of the change which has taken place, it would seem to be a function of the fact that certain assumptions which might once have been made about the relative centres of ideological gravity of members of the judicial branch and (during the years of Labour government, at least) the political branches no longer hold. Without wishing to enter into a sociology of the judiciary, it seems clear that the judiciary is in many ways transformed as compared to even the relatively recent past. This is not, of course, to say that where once we had a generally conservative (small-c) judiciary, we now have a generally progressive one; rather, it is to suggest that, to some degree, and at least at the higher levels, the judiciary now appears to possess a liberal instinct that occasionally (and at times quite strikingly) distinguishes it from its predecessors and renders it equally likely (and in some of the most politically sensitive areas of policy, perhaps more so) to find itself in dispute with right-wing governments as with those of the traditional left.⁴⁰

This change (which is necessarily overstated for the purpose of argument)⁴¹ might be explained in a number of ways. One of those, a favourite for those who would seek to defend the role of the courts as currently understood by those courts themselves, is to point to the mandate which Parliament has given it: if the courts are more liberal, it is because they act upon a Parliamentary instruction to be so. Perhaps. Such explanation struggles, however, to account for a rebirth in the common law constitutionalism which is evident at times the Human Rights Act might appear to be under threat,⁴² for the occasionally expansive decision-making which takes place in the name of the rule of law,⁴³ or for decisions which have the effect of limiting the use to which the prerogative powers of the executive might lawfully be put.⁴⁴ Regardless of the causal basis of the shift under discussion, however, it appears true to say that in a certain sense the content and

³⁹ The cases argued by one author or another to represent this trend include *R v Secretary of State for the Home Department, ex parte A* [2004] UKHL 56, *R (Evans) v Attorney General* [2015] UKSC 21, *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁴⁰ A point made also by Loughlin in the present volume.

⁴¹ It may be, for example, that the alleged liberalism of the contemporary judiciary is no more than a myth – and those judgments which seem to prove it are either exceptional or futile – while claims about the historic conservatism of the judiciary are also potentially vulnerable to empirical falsification.

⁴² See, eg, the discussion in Roger Masterman and Se-shauna Wheatle ‘A Common Law Resurgence in Rights Protection?’ (2015) *European Human Rights Law Review* 57.

⁴³ See *R (Evans) v Attorney General* [2015] UKSC 21 and *R (UNISON) v Lord Chancellor* [2017] UKSC 51. Though it was not the basis of the decision, the apotheosis of rule of law rhetoric was that found some of the judgments of the Law Lords in *R (Jackson) v Attorney General* [2005] UKHL 56.

⁴⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

source of political constitutionalist arguments would appear to reflect – quite directly, at times – the question of who it is we trust to make decisions which accord with (some of) our political preferences or more fundamental, and so intuitive, values. As the facts change, so too do minds. In this context, the fact that modern centre-right antipathy towards rights is in keeping with a hostility which was evident in the later New Labour years might be seen by some not as contradicting this basic narrative by rather as demonstrating that there is rather more political continuity between the Labour government of 1997-2010 and the contemporary Conservative party than either may wish to admit, in which case the useful comparison is in fact between the latter and the Labour Party under Jeremy Corbyn.⁴⁵ And, finally, it is worth noting – again, in defence of the sceptical note struck above – that where there has been, within the academic literature, a relative consistency in the view taken as to the appropriate role of courts (or, to the extent that it is not the same thing, the place of human rights instruments within the constitution) the relevant people would seem either to have shifted in their own personal politics,⁴⁶ or to write from a political position which cuts across the liberal-authoritarian divide which seems very often to separate the judicial from the political branches and which therefore may be reflected in attitudes as to how much power (and what type) power should lie with each.⁴⁷

To link this back to our previous discussion. It was noted above that Griffith's functionalist method clears the ground for a series of unambiguous normative claims. I called the overall approach a democratic normativism, though the label does not matter much. The point is simply that the two phenomena at issue are not mutually exclusive. Rather, they are causally related: the specific normativism is only possible due to the underlying functionalist method, which allows for the appreciation of the reality of power within the constitutional order. The same may go, however, for at least some of those who Loughlin identifies as endorsing, in many contemporary incarnations of political constitutionalism, a new (or renewed) conservative normativism. The shift he notes – whereby the judges having become adherents to a liberal normativism, conservative normativists who once might have argued for the empowerment of the judges now argue for their restraint – might well in some cases reflect an appreciation of the true loci of political power and a related sense of how particular acts of constitutional tinkering do or would

⁴⁵ Though in reality the turning point is probably the election of Ed Miliband as Labour Leader.

⁴⁶ See, eg, the work of Adam Tomkins. Compare, in particular, *Our Republican Constitution*, Hart Publishing (2003) with 'What's Left of the Political Constitution?' (2013) 14 *German Law Journal* 2275. In this picture, the fact that Tomkins' more recent work might seem to represent a move back towards political constitutionalism strengthens, rather than falsifies, the claim: 'The Guardianship of the public interest: a British tale of contestable administrative law' (2017) 24 *George Mason Law Review* 417.

⁴⁷ Most notable here is the work of Keith Ewing.

work to redistribute that power. That is, while it would be a stretch to say that the all normativists are also functionalists, it seems true to suggest that many modern discussions about legal and political constitutionalism can be explained most plausibly through a functionalist lens. And, crucially, even where those normative claims do not share Griffith's functionalist method, that method will always be available to those who wish to contest them – to show, for example, that though a normative claim is advanced in wholly normative terms, the conceptual apparatus of which is sound, and the logic of which is compelling, that its effect will be to transfer power from one place in the constitutional order to another.

If nothing else, therefore, we must be careful not to set up a 'debate' between normativism and functionalism, to reify a misleading opposition between them in the way that has too often happened with political and legal constitutionalism.⁴⁸ Rather, and as was foreshadowed above, we should realise that the functionalist method – once it is available to observers of the constitution – conditions all that comes after it, so that any normative claim is capable of being viewed through that methodological lens, even (and perhaps especially) where that is not the basis upon which it is advanced. This is the legacy of the method Griffith identifies and exemplifies, even if he did not invent it: we are no longer capable of understanding constitutional debates purely in terms of the normative terms in which they are advanced, but fated always to understand – or at least to be capable of understanding – them in terms of their impact upon the underlying distribution of power. Griffith notes the tendency of those who start by describing constitutions to lapse back into the language of natural law ('if we only and merely begin to make deductions from our analysis, values begin to re-enter and unless we are very careful the waters of natural law close over our head')⁴⁹ but the opposite is also true: faith in authority having been lost, we can never, it seems, return to a world in which the normative concepts are understood as things in themselves, apart from their effect on the distribution of political power.

4. The faith of the governors in themselves

So far, our discussion has mostly accepted something roughly analogous to the ontology of democracy from which Griffith begins. That is, we have considered the question of faith in authority almost entirely from the point of view of those outside of the constitutional order: only Lord Hailsham, who wrote *The Dilemma of Democracy* in between two stints as Lord Chancellor

⁴⁸ A point made by, eg, Scott (n 2).

⁴⁹ Griffith (n 1) 7.

and as a member of the House of Lords, spoke of the system from within.⁵⁰ But of course the question of faith in authority need not be asked only in that fashion: it is equally worthwhile to consider how those who are internal to the system – those who seek consent, rather than those who give it – approach the matter. We might therefore look to move beyond not only Griffith's account⁵¹ but also beyond the more recent debates about the appropriate location of power within the constitution discussed in the previous section. We might, that is, ask this question of faith in authority not just in terms of the who 'we' or the public beyond us trust more (or, perhaps more cynically, whose decisions we approve of more frequently) but also as a prism through which to consider the faith that the different elements of the governed have in each other: what it means to have such faith and to what extent such faith exists, as well as how that issue has interacted with the evolution of the constitution. This section focuses on the first of these questions, considering the status of the constitutional order in the period leading up to the zenith of the liberal order Griffith described and through to the current day. It addresses the way(s) in which we might seek to its evolution by reference to the extent to which those who could or did participate in the political process could and did trust in the faith of each other. In making this move, I hope to advance, however tentatively, a more general argument about the development of the United Kingdom's constitutional order over time.

The constitution at the end of the nineteenth century, even more so than at the beginning of the twentieth-first, was obviously distinct from those constitutions built upon the Enlightenment model.⁵² Rather than attempting to design out the fallibilities of political actors specifically and humans generally, to balance powers against each other and divide actors so as to perform discrete functions, the United Kingdom's constitutional system embraced a well-known fusion of powers,⁵³ a heavily circumscribed range of legal checks on the exercise of executive power⁵⁴

⁵⁰ Hailsham disclaimed his hereditary peerage in order to seek election as leader of the Conservative Party after the resignation of Harold Macmillan, and sat in the House of Commons for much of the 1960s (having also sat in it before inheriting his peerage). He was then granted a life peerage in 1970, and so returned to the Lords in a different guise.

⁵¹ Which, we have said, effectively constitutes contributors to the debate as outside of the system through which power is exercised, and the distribution of power within which is the key point of dispute between political and legal constitutionalists.

⁵² I take this term, as well as the general concept, from Jeremy Waldron, 'Isaiah Berlin's Neglect of Enlightenment Constitutionalism' in Laurence Brockliss and Ritchie Robertson (eds), *Isaiah Berlin and the Enlightenment*, Oxford University Press (2016).

⁵³ Most significantly in terms of the formation of the executive out of the legislature – recall Bagehot's claim that the 'efficient secret of the English Constitution' is 'the nearly complete fusion, of the executive and legislative powers' in which the 'connecting link is the cabinet.' Walter Bagehot, *The English Constitution*, Cambridge University Press (2009), 8-9.

and, most distinctively, the absence of any absolute legal limits upon the legislative power.⁵⁵ The Enlightenment model which took hold elsewhere in the later eighteenth century – and which achieved more or less total dominance in the course of the twentieth century – presupposed the need to manage the irrationalities, the self-interest and the vicissitudes of those who operate within it.⁵⁶ It is for precisely this reason that said model seeks explicitly to resurrect the ancient notion of the rule of law and not of men. But the distinction can be seen as one of means and not of ends: the basic end which was to be achieved by the British constitution was broadly equivalent to that pursued by those Constitutions being introduced on the continent throughout the nineteenth century and up to the present day. Both could ultimately be explained in terms of a desire to prevent the arbitrary exercise of power.⁵⁷ That term, of course, hides at least as much as it illuminates, and in the period Griffith observed as the height of liberal democracy Dicey was famously arguing that the existence of a system of administrative law contributed to, rather than mitigating (as we would now assume was the case) against the possibility of power being so exercised.⁵⁸ Again, the dispute is one of means and not of ends: Dicey shows every sign of accepting the fundamental opposition between the rule of law and arbitrary power, not only in his preference for ‘ordinary law’ applied by ‘ordinary tribunals’,⁵⁹ but also in his suspicion of the grand declarations of fundamental rights found in codified Constitutions which were not accompanied by tangible remedies.⁶⁰

That the British system could be understood as operating to prevent or minimise the possibility of power’s arbitrary exercise even in the absence of the classic features of Enlightenment constitutionalism reflected a series of assumptions that would seem not to have been shared by Dicey’s compatriots abroad. One was the absence of administrative law and, what for Dicey was related to it, the equality of persons before the law (even if Dicey downplayed the extent to which those bits of the state which were emanations of the Crown were capable of evading what

⁵⁴ Though this of course ebbed and flowed over time, becoming more significant with the growing range of tasks carried out by the state and the habit it developed, in order to achieve these new ends, of legislating in broad terms and leaving it to officials to apply these rules to individual cases.

⁵⁵ A point made most famously in AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (Indianapolis, Liberty Fund, 1982) first published in the middle of the decade described by those whose views on liberal democracy Griffith quotes.

⁵⁶ Waldron (n 52).

⁵⁷ See Martin Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’ in Gianluigi Palombella and Neil Walker (eds) in *Re-Locating the Rule of Law*, Hart (2008), contrasting ‘anatomical’ accounts of the rule of law which focus upon the manner of its achievement with ‘teleological’ accounts, which focus instead on what the rule of law is intended to achieve.

⁵⁸ Dicey (n 55) chapter XII.

⁵⁹ Dicey (n 55) 114-5.

⁶⁰ Dicey (n 55) 115-6.

would otherwise be the legal consequences of their actions).⁶¹ Another was the common law, a repository of wisdom built up over time, which worked to limit the extent to which any individual actor could depart too lightly from the constitution's core values. Perhaps most striking, however, is that the British constitution – unlike its continental counterparts – appears in the post-Glorious Revolution period to have reflected a pervasive, perhaps all-encompassing, assumption of good faith or mutual trust on the part of those who did or might exercise power within it. That is, Parliament could be sovereign because though it might one day be populated by those with whom one disagreed, these would be moderate men, possessed of the good sense and shared habits which were the sure effect of education at the public schools and leading universities. The judiciary could be trusted with the power to, in effect, create new rules regarding the relationship not only between the individual and the state but also between the different elements of the state, including the judiciary themselves, because they too shared in the dominant habitus, a fact whose persistence Griffith highlighted much later.⁶² The monarch could as a matter of formal law possess many of the powers which would one would expect to find in the hands of an absolutist monarch – to dissolve the Parliament on a whim, to appoint new members (and indeed their heirs in perpetuity) to the legislature, to exercise an absolute and insurmountable veto on any and all legislative endeavours – precisely because assumptions, only occasionally challenged, and evolving over time, about how the monarch would in fact use those powers held good in practice.

And though we are used to analysing many of these assumptions in terms of the concept of the constitutional convention, there are several reasons for which analysis in terms of the faith that those participating in the task of government (broadly understood) have in each other might be preferable. First, this underlying assumption of good faith touches even those legal powers whose use is not and has never claimed to be governed by convention. More importantly, however, it addresses the fact that though individual conventions can operate even in the absence of the necessary faith that those to whom they apply will abide by them (after all, the nature of a convention is not that there are no consequences for failure to adhere, but rather the consequences are political rather than legal) a constitutional regime in which conventions play a significant part requires a more general faith. It requires, that is, faith that people will act as they have in the past and as they are supposed to, and faith that if they do not there will be a price to pay in terms of how they are treated by other members of the political class. Indeed, one truly

⁶¹ Dicey (n 55) 114 and I Jennings, *The Law and the Constitution*, 5th edn, University of London Press (1967), 221-8.

⁶² Griffith (n 33).

remarkable feature of the British constitution is how quickly its processes come to seem ineffectual when confronted with individuals or groups who are not as susceptible to shaming as the order assumes them to be. To make the link back to the points discussed in the previous section (the loss of faith in authority as the prompting of a methodological turn; faith in specific authorities as a lens through which to understand more modern debates on the balance of political and legal power) we can – I submit – understand an internal rather than external faith in authority as a precondition for the existence of a constitution of the sort that the constitution of the United Kingdom possessed in the nineteenth century and to a considerable extent still does.

If we articulate a causal relationship between the basic constitutional identity and the faith which parts of the ruling classes had in each other (not that the former was caused by the latter, but perhaps that the latter permitted the former to persist longer than it would otherwise have done so), it becomes necessary to explain how the faith in question itself arose and survived. Part of the answer, of course, is that the relevant section of the population was so small: a hereditary aristocracy and an electorate of only a few percent of the adult population (rising above 7% after 1832 and above 16% after 1867),⁶³ and excluding – well into the twentieth century – one gender entirely. But beyond that, a part of the explanation for the internal mutual trust upon which the constitutional order was predicated would appear to lie in institutions – and elements of the social order – which we do not routinely include within our understanding of the constitution, even allowing for the broader and more flexible understanding of that term which can prevail in the absence of a codified document. That the centrality of these institutions to the exercise of public power was once accepted can be seen from the fact that, writing in the first part of the nineteenth century, Lord John Russell argued that the public schools constituted (along with dinner parties) an integral part of the constitution. He warned of the dangers of denying one's sons the benefits of the 'right' schooling:

[P]arents ought to beware how they withhold from their sons, if sufficiently strong and healthy, the advantages of a public school. The democratic character of the nobility of England, the democracy of the aristocracy... is very much to be attributed to the gregarious education they receive. In this manner, her public schools form a part of the constitution of the country. If they produce some vice, and a good deal of rudeness, they

⁶³ Figures taken from Robert Blackburn, *The Electoral System in Britain*, St Martin's Press (1995), 74-5. See also Neil Johnston, *The History of the Parliamentary Franchise*, House of Commons Research Paper 13/14 (1 March 2013).

subdue pride, selfishness, and conceit; they create emulation, friendship, a love of truth, and a manly strength of mind.⁶⁴

Not only. They also served to smooth out any tensions which might exist between the aristocracy and the emerging business classes. Le May, in his history of the Victorian constitution, notes that '[i]t was by way of Harrow and Eton, respectively, that Peel and Gladstone took their places, as of right, amid the governing class':

The doors of preferment might be hard to open, for new men not endowed with uncommon talents, but they were never locked; they opened into a small and exclusive theatre, where the actors (and actresses) knew intuitively their own roles and those of the other protagonists.⁶⁵

Likewise with the loose systems which had emerged and were emerging in order to regulate, though by convention only, the relationship between Commons and Lords, between Parliament and executive; between Monarch and executive. All of this could happen on an unwritten, unenforceable, often unspoken, basis, because despite the significant points of disagreement between different elements of the ruling classes,⁶⁶ and even more so than their common enmities,⁶⁷ they were drawn from a pool of individuals who could be trusted to operate within shared boundaries of good sense:

The smallness of the governing class meant that it was relatively easy to agree, in outline at least, upon a national interest; hence the exercise of power was seldom permitted to degenerate merely into the distribution of advantages...⁶⁸

To say that the ordering of the constitution traditionally reflected a pervasive internal faith in authority is not, of course, to say that the constitution did not have to adapt, nor that the assumptions on which its functioning depended did not come under threat. But the faith that the

⁶⁴ Lord John Russell, *An Essay on the History of the English Government and Constitution, from the Reign of Henry VII to the Present Time*, 2nd edn, Longman (1823), 255.

⁶⁵ Le May (n 13) 10.

⁶⁶ '[T]he governing class exhibited diversity as well as unity; the great political quarrels – parliamentary reform, free trade, Ireland, the Church of England, the expansion of the Empire and, at the end of the period, tariff protection – cut across social lines' Le May (n 13) 13.

⁶⁷ 'Mill owners and mill operatives had conflicting economic interests, but they could find points of agreement in hostility to parsons, squires and the Corn Laws which were believed to sustain them' Le May (n 13) 13.

⁶⁸ Le May (n 13) 14.

ruling classes enjoyed in each other, over and above the faith in their authority of the masses whom they sought to command, seems to have been what permitted the system to function as it did: often fumbling but never collapsing; its rules stable without being written in stone; flexible but not ephemeral. And so, if we consider the period identified as the height of liberal democracy – before the general loss in faith of authority caused by the Great War – we might distinguish between the positions as regards the two groups. Those external to the order (or who discussed it from an external point of view even if they participated, say, as electors) did not – in this picture – concern themselves with the issue of who did or should exercise power. Rather, they accepted still the framework in which the constitution (with the help, or perhaps at the prompting, of those internal to it) presented itself to the world. On the other hand, those who were internal to the order did not need to worry about the point: they could and did assume the good faith of their peers and the system operated in a fashion which reflected that mutual trust, with their disputes playing out both within and against the background of that same conceptual framework.

We have now considered both the internal and external dimensions of the question of faith in authority, both of them considered against the background of the loss of faith in authority which Griffith identifies in his Chorley Lecture as prompting the emergence of the methodology he exemplifies. The connection drawn between the events of the Great War and that loss of faith in authority would tend to render the narrative as one of a wholly exceptional event – a fundamental change in perspective prompted by an unthinkable and unrepeatable cataclysm – and so of limited generalizable value. A single sentence in Griffith’s lecture, however, hints at the challenges which authority was already facing in the years prior to the World War; at ways in which the legitimacy of governance was being progressively undermined and by virtue of which the relevant faith may have been lost even had war not erupted in Europe in 1914. Griffith states that ‘the break-up of the nineteenth century world in Britain was manifest in the years before 1914 and indeed it is arguable that the war prevented outbreaks and uprisings led by the Irish, the industrial working class and the suffragettes which might have changed the course of history in these islands’.⁶⁹ For this point, he cites ‘The Strange Death of Liberal England’, Dangerfield’s magisterial history of the United Kingdom in the immediate pre-war years.⁷⁰ Each of the three emerging crises – which Dangerfield terms the ‘Tory rebellion’ (against moves towards Irish Home Rule),⁷¹ the ‘Women’s Rebellion’⁷² and the ‘Worker’s Rebellion’⁷³ – represented challenges

⁶⁹ Griffith (n 1) 4.

⁷⁰ Dangerfield (n 15).

⁷¹ Dangerfield (n 15), 72-120.

to the liberal democratic order itself: they were, in that sense, indications that the breakdown in faith in authority whose eventual happening Griffith attributes instead to the Great War was already underway; that the ‘consent’ upon which the functioning of pre-war liberal democracy was contingent was in danger of being withdrawn.

The ‘resolution’ of these rebellions – in the form of the partition of Ireland,⁷⁴ the extension of the franchise to women, and the successful entry into power in the post-War years of a party representing organised labour⁷⁵ – cannot be neatly analysed in the terms of the attitude of the outside government to those within it (of the ruled towards their rulers): the effect of the changes precipitated by the various crises of the pre-war years was instead to implement a great leap forward in terms of the identity of both groups, accelerating the movement towards a situation in which the rulers and the ruled are at least rhetorically, and sometimes also practically, synonymous. A form of government which is truly democratic, in that we do not merely choose our rulers but are our own rulers: from elite to popular democracy, perhaps, or from pseudo to actual democracy. Regardless of when we take the process to have started, and whether or not it is considered to have ever been completed (to cut a long story short: much remains to be done) we are now very close to a situation in which there exists no formal differentiation between the two; where the rulers and the ruled are coextensive, at least at the point at which the electorate periodically exercises its right to vote. The slow dialectical interplay of politics and law considered above, which took place throughout the nineteenth century and which acted as a valve through which pressure might be relieved, jumped suddenly to life in the early twentieth century, entering the final phase, in which the remaining formal elements of the ruler-ruled distinction would be erased. And with the expansion of the category of rulers, the mutual trust of those who exercised power could no longer be assumed: new ways of seeing the world would enter the formal political process, the shared understandings of those internal to the system would inevitably weaken, it would become necessary in time to formalise hitherto unwritten rules and perhaps even seek to limit the use to which political power was put.

⁷² Dangerfield (n 15), 121-177

⁷³ Dangerfield (n 15), 178-266.

⁷⁴ By the Government of Ireland Act 1920 and, at the conclusion of the Irish War of Independence, the Anglo-Irish Treaty of 1921 (given effect in the United Kingdom by the Irish Free State Constitution Act 1922).

⁷⁵ The Labour Party under Ramsay MacDonald, which formed a minority government in January 1924 after a general election the previous month had resulted in a hung Parliament, with Labour the second party behind the Conservatives. Labour’s first electoral victory (though still without a Parliamentary majority), resulted from the general election of 1929, the first in which women voted on equal terms with men.

The external loss of faith in authority prompted, it was said above, an approach to public law which allowed for an understanding of the distributive effects of constitutional reforms. Though it was not the case for Griffith, this might – we said – be augmented by a second, normative, question of faith in authority, whereby certain reforms are endorsed or opposed specifically because of those distributive effects; because, for example, they empower those whose values we share at the expense of those whose values we don't. But our third invocation of the notion of (the loss of) faith in authority would appear to possess an explanatory as well as a normative force, helping us to understand when and why constitutional reform takes place. We know, for instance, that the primacy of Commons over Lords was put on a statutory footing precisely because the peers had shown, when they obstructed the 'people's budget' of 1909, that it could no longer be taken for granted that they would restrict themselves to playing the constitutional role that time had identified for them. Dangerfield offers a telling image to suggest that the House of Lords could simply not help themselves:

By constitutional tradition, they could veto everything but a Budget: yet here was a Budget crying to be vetoed. It was like a kid, which sportsmen tie up to a tree in order to persuade a tiger to its death; and at its loud, rude bleating the House of Lords began to growl.⁷⁶

It may be, too, that much later constitutional reform, actual and proposed, can be best understood through a similar lens, representing changing beliefs about who could and who could not be relied upon to act in accordance with unwritten but shared standards which had permitted the United Kingdom's constitution to function without the trappings of enlightenment constitutionalism. This would seem to be true of the 1970s arguments for the incorporation of a Bill of Rights, at least some of which appear to represent attempts to narrow the range of action open to a majority government in a period when, post oil-shock, the post war consensus was breaking down and the economic policies of the main parties were beginning to diverge radically for the first time in decades. This could be true also of the late 1990s, when the political divergence between the House of Commons under Labour control and the (still largely unreformed) House of Lords was such that the hereditary peers had to be removed from the equation in order to render manageable the political gap which existed. And it may be true now of the desire to undo some of the consequences of the enactment of the Human Rights Act 1998, as those in political power find themselves apart from those who exercise judicial power,

⁷⁶ Dangerfield (n 15) 30.

no longer operating against the background of the shared worldview which still existed when the Conservatives last formed the Government. If and when, then, the United Kingdom's patchwork constitutional order is replaced with a Constitution of the sort which prevail elsewhere, we may wish to question the extent to which it represents a vindication of those values which are distinctive to, or otherwise emblematic of, that state. On this telling, it may in fact be a sign that there are no longer any values to which a sufficient portion of the demos – and, in particular, those who exercise power within it – subscribe that action in accordance with them can be taken for granted; that so little faith do the ruled have in the rulers, and the rulers in each other, that to give constitutional status to whatever little upon which a bare majority can agree seems the only way forward.

5. Conclusion

We have then two parallel losses of 'faith': one which is external, for which World War I acts as a tipping point (but which would, it seems, have happened anyway) and which both prompts a constitutional scepticism which results in the adoption and pursuit of a positivist and functionalist methodology, and which in some cases would seem to determine – at a later point in the same discussion – whether we prefer political power to be exercised by legal or political actors. Alongside this external loss of faith, there stands a parallel loss of faith which is internal to the system, relating to how different categories of constitutional actor view, and whether they trust, each other. This second loss of faith was, I suggest, if not prompted, then at least accelerated by the first: the ruling classes cease to trust each other and come to do so even less as the 'ruled', no longer willing to acquiesce in the hegemony of the twentieth century elites, progressively merges into a new, expanded variant, of that group. Political power comes to be possessed (if not shared on equal terms) by those who did not attend Eton and cannot be assumed to share – indeed, will in many cases reject – the values of the ruling classes. It is to the reforms necessitated by this second loss of faith which Griffith's sceptical, positivist methodology is applied. The practice of the constitution and the manner in which it comes to be viewed by (at least some) observers are fundamentally altered by these two losses of faith, only one of which Griffith describes, but the second of which seems to be similarly immanent to the development of the constitutional order. I do not intend, by invoking the same concept in relation to each process, to equate these two phenomena, the external and the internal losses of faith in authority. One is part of the journey to political maturity of people who were for a long time excluded from the political process, and who even upon their admittance to it, have often lacked the political capital to either play a meaningful role within it, or to be aware of themselves

as doing so. The other is almost directly the converse: the realisation of the ruling classes that their ability to exclude others from the political process is weakening; the successive attempts to co-opt those who they had been forced to admit, to reproduce the habits and hierarchy of the previous division between political haves and have-nots in other ways; and successive realisation that even this was not enough.