

The Institutional Implications of Political Constitutionalism:

Applying Political Constitutionalism to Questions of Legislative Design

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# *Abstract*

This thesis analyses how legislative institutions should be designed according to political constitutionalism. Proponents of political constitutionalism argue, that in a polity such as the UK, the national legislature provides the most legitimate and effective institution for securing constitutional goods. Yet, for the most part, political constitutionalists have not articulated a rounded understanding of the nature, roles, workings and designs of legislative institutions. In essence, political constitutionalism is insufficiently institutional in its content. In response, this thesis explores the potential for and limits on using political constitutionalism as a way of understanding and evaluating the political dimensions of modern constitutional orders, in particular the constitutional importance of legislative institutions and legislative design.

In doing so, this thesis makes three main original contributions. First, it delineates between three distinct strands of political constitutionalist thought—*democratic socialist*, *republican* and *liberal—*and explains how each strandarticulates a subtly different understanding of democracy and legislative design. Second, it adopts a cross-disciplinary approach that interweaves constitutional theory, legislative studies and institutionalism—and, in doing so offers a richer and more nuanced understanding of the nature, purposes, workings and designs of legislative institutions than has traditionally been the case in UK constitutional law and theory. Third, it draws on insights from these literatures to explain how the three strands of political constitutionalist thought differently address questions of institutional design, such as what should be the role of the legislature within the ordinary political process; how should the legislature organise political life through the distribution of legislative resources; how should inter-cameral relations be managed and how should political accountability be institutionalised through legislative design. By addressing these questions, this thesis seeks to show how political constitutionalism can take legislative design seriously and therefore become more institutional in its content.

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# I

# *Legislatures and the Institutional Content of Political Constitutionalism*

Over the last twenty years, public law has borne witness to the debate between political and legal constitutionalism.[[1]](#footnote-1) In this debate, political constitutionalism has traditionally been valued as a “bulwark” against the perceived increase in judicial power.[[2]](#footnote-2) However, what if political constitutionalism was capable of serving another more valuable purpose within contemporary public law scholarship, and if this so, how could it be enhanced? This thesis argues that instead of seeing political constitutionalism solely as a weapon for challenging legal constitutionalism and for critiquing rising judicial power, we should recognise that political constitutionalism has the potential to help public lawyers make better sense of the often complex and fraught political aspects of a constitutional order. In particular, because of its focus on legislative institutions, political constitutionalism might appear attractive to those interested in exploring, explaining and analysing the constitutional significance of legislative institutions. After all, political constitutionalism has consistently sought to defend legislative institutions, as part of its case *for* legislative supremacy and *against* constitutional entrenchmentandstrong-formjudicial review.[[3]](#footnote-3) Yet, despite the significant amount of emphasis political constitutionalism has placed upon legislative institutions, there has been relatively little consideration given to political constitutionalism’s approach to questions of legislative design. That is so say; there is a paradox within our existing knowledge of political constitutionalism: we know that defending the legislature (and more particularly: legislative supremacy) against the perceived risks posed by ascendant judicial power has not been accompanied by a sophisticated understanding of the design, purposes, functions and working practices of legislatures themselves. Accordingly, this thesis addresses the following central research question: *how should legislative institutions be designed or reformed according to political constitutionalism?*

This central research question in turn prompts five secondary questions, which will be addressed throughout the thesis. First, *what is the value of political constitutionalism?* In other words, it is important to identify the value of political constitutionalism, by which I mean its capacity as a constitutional theory or model to help public lawyers make sense of and analyse the complex political aspects of our constitutional orders. Second, *what is the content of political constitutionalism?* This thesis will focus on the legislative content of political constitutionalism and in particular its understanding of how legislative institutions organise politics. Third, *is there any unity of thought among political constitutionalists about legislative institutions?* This thesis seeks to enrich our understandings of political constitutionalism through demonstrating how and why political constitutionalists articulate different understandings about the legislature and, more broadly, ordinary politics. Fourth, *why does the design of legislative institutions matter?* In adopting a cross-disciplinary approach to understanding legislative institutions (by drawing on insight from political science and political theory), this thesis seeks to demonstrate how legislative design affects the ways in which the legislature organises and manages politics. Fifth and finally, *how should political constitutionalism respond to the choices that arise in the process of legislative design?* As this thesis will show, designing requires making choices between competing and often incommensurable options that will alter how the legislature organises political life within the constitutional order.

This thesis argues the value of political constitutionalism has been undermined because the existing literature is insufficiently ‘institutional’ in its understandings of legislative institutions and legislative design. That is to say, political constitutionalism has not taken sufficiently seriously the need to explore and problematise, among other things, the functions, structures and workings of the various legislative institutions that shape our political systems. Although political constitutionalism has tried to present legislatures in a more positive and accurate light, there remains a troubling oversight within political constitutionalism’s existing understanding of legislative institutions. The existing literature fails to recognise that legislatures are constitutionally important because they impose material constraints upon the exercise of political power. Legislative institutions are not black boxes that magically convert political inputs into authoritative legislative outputs.[[4]](#footnote-4) A legislative institution is a “relatively enduring collection of rules and organized practices, embedded in structures of meanings and resources that are relatively invariant in the face of turnover of individuals and relatively resistant to idiosyncratic preferences and expectations of individual and changing circumstances.”[[5]](#footnote-5) Legislative institutions are of constitutional importance because they organise political life, and the organisation of political life makes a difference.[[6]](#footnote-6) Through their design, legislative institutions channel and shape political action, providing opportunities and constraints for those political actors and ordinary citizens who engage in the ordinary political process.[[7]](#footnote-7) Consequently, as long as political constitutionalism’s institutional content remains underexplored, its ability to explore, explain and analyse legislative institutions is weakened, in turn undermining the value of political constitutionalism within contemporary public law scholarship. Therefore, this thesis seeks to provide an original contribution to our knowledge of political constitutionalism (and more broadly public law scholarship) through remedying this oversight, by presenting a more refined and realistic understanding of political constitutionalism in relation to legislative institutions.

This thesis attempts to remedy this problem by applying political constitutionalism to questions of institutional design. Legislative institutions are not identical in the ways in which they organise political life. Nor are they organic constructs, rather they are artificial. As John Stuart Mill aptly remarked:

Political institutions are the work of men – owe their origins and their whole existence to human will. Men did not wake up on summer morning and find them sprung up. Neither do they resemble trees, which, once planted are ‘are aye growing’ while men ‘are sleeping.’ In every stage of their existence they are made what they are by voluntary human agency. Like all things, therefore, which are made by men they may be either well or ill made.[[8]](#footnote-8)

Over time, political actors have, intentionally or unintentionally, made decisions that have determined how their legislative institution shapes and channels political action moving forward. The design of legislative institutions affects how the legislature manages political disagreements and promotes general constitutional goods.[[9]](#footnote-9) Simply put, legislative design matters because the success of “political democracy depends not only on economic and social conditions but also on the design of political institutions.”[[10]](#footnote-10) Legislative design involves confronting unavoidable choices that will determine how the legislature shapes and channels political action. Often these choices require those political actors involved in the process of constitutional design and reform to make choices between incommensurable options. One can think of these unavoidable design choices and the resulting compromises or trade-offs, as the kind of ‘procedural nettles’ that Richard Bellamy acknowledges one must confront when establishing a political constitution.[[11]](#footnote-11) Therefore this thesis surveys and analyses these design choices and the trade-offs they involve.[[12]](#footnote-12) In doing so, it demonstrates how constitutional designers and reformers can respond to these design trades in ways that are compatible with political constitutionalism. Significantly, this thesis contends there are different ways of responding to these design choices, which are compatible with different interpretations of – or: as I will call them, strands of – political constitutionalism.[[13]](#footnote-13) The benefits of this approach are threefold. First, mapping out these design dilemmas improves political constitutionalism’s ability to acknowledge, explore, explain and analyse how different aspects of legislative design can affect the ways in which our legislative institutions organise and manage politics. Second, in doing so, it can help political constitutionalists, public lawyers and even political actors to better reflect upon normative values and logics that underpin our legislative institutions. Third, it also enables us to analyse how political actors can respond to these design dilemmas in ways which enhance the values of political constitutionalism.

In short, this thesis seeks to provide an original and important contribution to knowledge by interrogating political constitutionalism’s understanding of and approach to legislative design. This thesis maintains that refining and improving political constitutionalism’s value necessitates making political constitutionalism more institutional in its understandings about legislatures and their design.

## *The Value of Political Constitutionalism*

To appreciate the contribution this thesis makes it is important to reflect on political constitutionalism as a constitutional model and its relevance to contemporary British (and wider) constitutional scholarship. This requires us to reflect on some of the methodological challenges involved in the study of public law. In doing so, we can appreciate how constitutional theories or models, including political constitutionalism, can provide us with valuable tools for overcoming these challenges. As will become clear, the value of political constitutionalism comes from its distinctive and illuminating focus on the political aspects of modern constitutional orders. Accordingly, political constitutionalism is a useful tool for constitutional scholars to make sense of and analyse complex constitutional phenomena.

According to Martin Loughlin, public law is about the study of governing.[[14]](#footnote-14) It is concerned with how governing is conditioned by and maintained through a broad range of sources including “rules, principles, canons, maxims, customs, usages and manners.”[[15]](#footnote-15) This is further complicated by the fact the phenomena that is being studied within public law is constantly changing and often these changes are very subtle. Accordingly, scholars must develop methods of overcoming the challenges associated with studying such a broad, unwieldy and ever-changing phenomena. These challenges are certainly present when studying any constitution, but they are particularly prominent when studying the United Kingdom’s constitution.

The UK constitution is famously unwritten, unassembled and composed of an imprecise collage of discrete parts.[[16]](#footnote-16) In response to these challenges, some constitutional scholars have developed and deployed different conceptual theories or models as methodological tools to overcome the hurdles that are associated with studying the often “complex and contingent” nature of constitutional phenomena.[[17]](#footnote-17) As Graham Gee and Grégoire Webber explain, conceptual theories and models are “highly abstract and idealised replicas of phenomena.”[[18]](#footnote-18) Once constructed, a conceptual theory or model provides an explanatory framework, which enables scholars to not only better understand complex constitutional phenomena, but also to critique them.[[19]](#footnote-19) As the term “idealised replica” implies, there is an intentional gap between theory and reality. In this sense, conceptual theories and models are similar to maps, in that a map is an intentional attempt to represent only certain selected features of the real world.[[20]](#footnote-20)

Like the usefulness of a map, the worth of a conceptual theory or model is dependent on whether it achieves its defined purpose and whether that stated purpose is of value to begin with. For example, if a map explicitly proclaims that its purpose is to represent all the pubs in the Sheffield area, and we discover the map does not do that, then the map fails based on its defined purpose of representing those specific features of the real world. The core problem here is that the map does not *fit* with the reality. However, suppose our map misses out on just one pub; is this map worthless? As the legal philosopher Brian Bix argues, conceptual theories and models are assessed differently from theories found in the natural sciences. In the natural sciences, theories stand or fall on the falsifiability of their empirical or predictive claims. In contrast, Bix posits that conceptual theories and models can only be evaluated based on the extent to which they achieve their stated purpose.[[21]](#footnote-21) Thus under the map metaphor, whether a map *fits* with the reality it claims to represent, is always a matter of degree. If the map of Sheffield pubs was to miss just one pub, out of the hundred in the Sheffield area, a reasonable person would probably believe the map still has significant value for planning a pub-crawl, because it mostly delivers on its purpose. After all, one might reasonably say it is better to have a partially inaccurate map then no map at all.[[22]](#footnote-22) As long as the map is not a gross misrepresentation of reality, it may still achieve its purpose to some degree. Of course, if you have no interest in touring the Sheffield pub scene, you will see little *value* in this map, regardless of the extent to which the map fits with reality.This is a critique of the *value* of the map; it is an assessment of whether the stated purpose of the map (or for the purposes of this thesis: the theory or model) is of value to begin with.[[23]](#footnote-23)

The purpose of a conceptual theory or model can vary, and often a theory or model will seek to serve multiple purposes simultaneously. Bix identifies four common purposes behind conceptual theories and models. Charles Taylor also highlights a fifth potential purpose. The first purpose is to stipulate the boundaries necessary to categorise a given phenomenon.[[24]](#footnote-24) For example, “swans are white” provides us with a classification of what is and is not a swan, thus a black swan-like creature is not considered a swan under this definition. For this purpose, conceptual theories and models are not about challenging or discovering new facts, but rather they seek to provide clarity about the facts we already know and have experienced.[[25]](#footnote-25) The second potential purpose of a conceptual theory or model is to attempt to track and explain linguistic usage.[[26]](#footnote-26) Thus, a conceptual theory captures and replicates the linguistic style and terminology of a group, culture or tradition. The third potential purpose is to capture, illuminate and elucidate interesting or significant features or meanings about a given practice.[[27]](#footnote-27) At one level, this might be something previously ignored or underappreciated. On another level, a theory might seek to present something well known but in a new and interesting light. The fourth potential purpose behind a conceptual theory is to provide some form of moral or qualitative criteria for evaluating whether reality is deserving of a certain label. This purpose is actually an attempt to challenge reality to *fit* with the theory or model. It is at this point the theory or model seeks to impose normative and moral criteria on the real-world phenomena. For example, a conceptual theory of democracy can be used to determine whether real world states should be described as democratic. Here democracy, however defined, is being recognised as a normatively desirable quality for states to have. Taylor highlights a fifth potential purpose, observing that theories can challenge or re-enforce our understandings of the real world and its social practices.[[28]](#footnote-28) For example, Taylor suggests Marxism has had a disruptive effect on reality by undermining the social practices and social confidence that together sustain a capitalist society.[[29]](#footnote-29)

Political constitutionalism should be understood as a model, capable of performing all the purposes discussed above. First, one purpose of political constitutionalism has been to define and stipulate the characteristics of real-world constitutional phenomena. It provides constitutional scholars with a classification tool for designating a constitution as ‘a political constitution.’[[30]](#footnote-30) Of course, this will always be a matter of degree as all constitutions contain political and legal elements.[[31]](#footnote-31) As Gee and Webber stress, as a model political constitutionalism will never be able to completely resonate with all aspects of a constitution.[[32]](#footnote-32) However, it remains possible to think of political constitutionalism as a useful but partial map for understanding the complex and contingent nature of a constitutional order. The political model has been a particularly useful tool in defining the character of the British constitution. The British constitution sufficiently aligns with the political model due to its heavy reliance on legislative supremacy, political discretion and conventions. Second, the model purposively helps identify a school of constitutional thinkers known as political constitutionalists, and the terminology they use to convey their beliefs and ideas.[[33]](#footnote-33) Third, one long standing implicit purpose (and in this authors opinion, the most useful and attractive purpose) of political constitutionalism has been to cast light on elements and practices of a constitutional order which have previously been overlooked or disregarded, such as the constitutional importance of the inner workings of the national legislature.[[34]](#footnote-34) In addition, political constitutionalism has provided us with an interesting and useful re-appreciation of established and often underappreciated features of constitutional practice. For example, political constitutionalism has re-evaluated majority rule in a welcome and interesting way. It has argued that traditional concerns about the “tyranny of the majority”[[35]](#footnote-35) are misplaced by highlighting how democratic majorities are really coalitions of different minority groups who have decided to work together to shape their society.[[36]](#footnote-36) Furthermore, political constitutionalists have argued that even if we remain concerned about the tyranny of the majority; we should recognise that constitutional courts often rely on majority voting to reach their decisions.[[37]](#footnote-37) Fourth, it has provided constitutional scholars with a normative framework for critically analysing real world constitutions and their ongoing developments.[[38]](#footnote-38) Fifth and closely related, as a model, political constitutionalism can be invoked for the purposes of challenging or defending constitutional practices. Therefore, political constitutionalism serves as both a descriptive and a normative theory about a constitutional order.[[39]](#footnote-39)

For many years, the fourth and fifth purpose of the political model served as an animating force in constitutional discourse within the UK. During this period, scholars tended to understand the value of the political model primarily as a tool for critiquing or undermining certain constitutional reforms and judicial practices within the UK’s changing constitution.[[40]](#footnote-40) However, by focusing narrowly on this evaluative purpose, there is the risk of overlooking the model’s other valuable purposes, in particular, the political model’s valuable and distinctive focus on illuminating and re-appraising ignored or criticised political practices and political institutions.

To reflect on this, we must consider what is distinctive about political constitutionalism within the broader genus of constitutionalism. All forms of constitutionalism are concerned with legitimising the state through the prescription of positive and negative norms.[[41]](#footnote-41) In its positive sense, constitutionalism is concerned with directing and enabling the institutions of state to govern and secure important values such as a wellbeing of the citizenry.[[42]](#footnote-42) In its negative sense, constitutionalism is concerned with constraining the state.[[43]](#footnote-43) However, constitutional scholars have often narrowed their definition of constitutionalism by putting a greater degree of emphasis on the latter.[[44]](#footnote-44) As Jeremy Waldron reflects, constitutionalism is usually associated with the belief that “the concentration of power in the state leads to its abuse” and consequently the constitutional order ought to prevent a concentration through power-dispersing and power-limiting structures.[[45]](#footnote-45) For example, both Giovanni Sartori and M.J.C. Vile reflected that constitutionalism was widely associated with the idea of limited government.

All over the western area people requested and or cherished “the constitution” because this term meant to them a fundamental law or a fundamental set of principles and a correlative institutional arrangement, which would restrict arbitrary power and ensure a limited government.[[46]](#footnote-46)

The great theme of the advocates of constitutionalism, in contrast either to theorists of utopianism, or of absolutism, of the right or of the left, has been the frank acknowledgment of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.[[47]](#footnote-47)

Even if we were to accept this narrow definition, we would also accept the basic proposition that the design of institutions within the state ought to be a central concern for those promoting negative constitutionalism. Accordingly, we would expect constitutionalism to recognise that institutions, including legislatures, contain rules and structures that channel (limit or enable) the political freedom of political actors and citizens. Thus, legislative institutions would remain central to promoting constitutionalism.

Yet as Anthony Bradley, Katja Ziegler and Denis Baranger have pointed out, advocates of constitutionalism tend to ignore, or even worse, look down upon legislative institutions.[[48]](#footnote-48) They suggest there are two reasons for this. First, in practice, parliamentary legislatures (and I would add presidential legislatures to some degree)[[49]](#footnote-49) are predominantly engaged in *enabling* the executive to govern, rather than limiting it.[[50]](#footnote-50) This is performed through the legislative majorities directly (or indirectly in the presidential context) allowing the executive to stay in office and by enacting whatever policy they see fit to allow the executive to govern. Although Walter Bagehot’s *efficient secret* implied the legislature could control the direction of the executive and provide a limit on abuse of its powers,[[51]](#footnote-51) most constitutional scholars tend to believe this is not the case, as the executive controls the legislature.[[52]](#footnote-52) Second, Bradley, Ziegler and Baranger suggest there is a common belief that as majoritarian institutions, legislatures are incompatible with negative constitutionalism’s belief that it is necessary to restrain state power to protect minorities.[[53]](#footnote-53) Therefore, this interpretation of constitutionalism ends up lapsing into what Roberto Mangabeira Unger calls “the dirty little secrets of contemporary jurisprudence… its discomfort with democracy: the worship of historical triumph and the fear of popular action.”[[54]](#footnote-54) However, constitutionalism’s attitude towards legislative institutions is simply too crude and fails to recognise the legislature’s role in promoting rights.[[55]](#footnote-55)

Additionally, contemporary constitutionalism has been influenced by the popular *Legislative* *Decline Thesis*.[[56]](#footnote-56) The decline thesis is a product of James Bryce’s influential “the decline of legislatures” which wrongly tarnished the reputation of legislatures within political science.[[57]](#footnote-57) Published in 1921, Bryce was of the view that there was a broad consensus that the golden era of legislatures was firmly over. Bryce observed that there had been “in nearly every country some decline from that admiration of and confidence in the system of representative government which in England possessed the generation who took their constitutional history from Hallam and Macaulay, and their political philosophy from John Stuart Mill and Walter Bagehot.”[[58]](#footnote-58) Therefore, Bryce contended that legislatures were failing to live up to their normative and historical expectations. For Bryce, the causes were numerous: universal suffrage, the rise of political parties and party whips, politicians from different classes, the rise of complex administrative policies, the rise of press and obstructionism.[[59]](#footnote-59) Yet these arguments are deeply flawed. First, they show a deep level of contempt towards the idea of democratic equality. These views were common among the political elite during the period, as they were learning to accommodate universal suffrage into the established constitutional order. Bryce spoke of an “old country gentlemen” class of legislators[[60]](#footnote-60) versus what Bryce believed to be a less intelligent set of legislators, drawn from different classes and backgrounds, seeking to represent different groups who had previously been ignored.[[61]](#footnote-61) Second, it is debatable whether Bryce’s “golden age of parliament” ever existed to begin with. Hugh Berrington criticised those who denounced the decline of strong and independent legislators for failing to recognise that “the romantic picture of crusading knights [legislators] fighting for the rights of the legislature against executive tyranny is a crude if unwitting distortion.”[[62]](#footnote-62) The problem with this false narrative, as Mathew Flinders and Alexandra Kelso contend, is that it fosters unrealistic and false expectations about legislative politics. When these unrealistic expectations are applied to our modern legislatures, they appear automatically destined to disappoint.[[63]](#footnote-63)

When one reflects on political constitutionalism against this backdrop of anti-legislative sentiments within traditional constitutional study and political science, it becomes clear that the political model is a valuable tool for constitutional scholarship because of its unique and positive focus on legislative institutions. It is distinct within the broader genus of constitutionalism, in that it places the legislature as the central institution of its model. In doing so, the political model seeks to challenge the negative and often inaccurate views of the legislature found within contemporary constitutional discourse. Although political constitutionalism’s attempts to re-habilitate constitutional scholarship’s understandings about legislatures is commendable, the full potential of the political model has yet to be realised. A reductive understanding of legislative institutions not only holds the model back but also creates the risk that political constitutionalism ends up replacing one negative and crude account of legislatures with a positive but ultimately equally crude account. For this reason, we need to re-evaluate political constitutionalism’s institutional content.

## *The Intellectual Development of Political Constitutionalism*

Political constitutionalism is not the only model one can deploy to make sense of constitutional phenomena. Since real world constitutions are so complex and contingent, it is unsurprising that different and often competing conceptual theories or models have developed around them. Just as it is possible to have two or more maps claiming to represent a given area, those studying constitutions are likely to be confronted with multiple models seeking to capture the same constitutional phenomena. Political constitutionalism’s perceived rival is legal constitutionalism (also known as common-law constitutionalism, liberal normativism, liberal legalism or neo-constitutionalism).[[64]](#footnote-64) There is a wide array of contrasts between the political and legal models, resulting in both models offering divergent interpretations of a constitutional order. Despite these differences, the purposes underpinning both models are sufficiently similar to those discussed above. Regrettably, constitutional theory tends to treat political and legal constitutionalism as a competition for “the soul of the British constitution.”[[65]](#footnote-65) As Gee and Webber observe, “it is commonplace… for textbooks and articles to juxtapose the idea of a political constitution with that of a legal constitution.”[[66]](#footnote-66) It should be admitted this tendency has, in part, been fuelled by the intellectual development of political constitutionalism. Throughout its development, many political constitutionalists have intentionally positioned the theory as a counter force to a perceived shift, both in terms of thinking and actual constitutional practice, towards legal constitutionalism.[[67]](#footnote-67) According to Christopher McCorkindale and Marco Goldoni, the intellectual development of political constitutionalism can be charted through three stages or waves.[[68]](#footnote-68)

The first ‘descriptive’ wave – associated with J.A.G. Griffith’s seminal 1978 Chorley Lecture *The Political Constitution* – is considered to mark the modern origins of the theory.[[69]](#footnote-69) In this lecture, Griffith articulated a functionalist reading of the British Constitution in the late 1970s. Griffith was a prominent practitioner of the functionalist style of public law, which was influenced by an eclectic and sometimes conflicting range of intellectual movements including Sociological Positivism, Fabianism, New Liberalism, Idealism and Pragmatism.[[70]](#footnote-70) The functionalist style adopted a practical approach to the study of public law, one that rejected abstract and metaphysical concepts.[[71]](#footnote-71) For functionalists, society was understood as a social organism, and the state was merely the apparatus necessary for performing functions necessary for the preservation and promotion of social solidarity.[[72]](#footnote-72) Functionalists viewed law as an instrument for fostering social solidarity and enabling the conditions necessary for self-realisation.[[73]](#footnote-73) Accordingly, the style displayed a collectivist social ontology and was closely associated with democratic socialism.[[74]](#footnote-74) Furthermore, the functionalist style emphasised “the importance of legislation as the primary method of law-making and therefore of the institution of Parliament in the business of governing.”[[75]](#footnote-75)

The functionalist style positioned itself as a modernising approach, which was in opposition to the dominant conservative normativist understanding of public law.[[76]](#footnote-76) This was significant, as the functionalist style performed both a stipulating and illuminating purpose within the study of public law. Functionalism challenged the dominant Diceyan model of the constitution. Functionalists claimed Albert Venn Dicey’s model represented an outdated and inaccurate understanding of the British constitution. Functionalism presented a positivist reading that captured the realities of the contemporary constitution. Functionalism also carried out an illuminating purpose, as its proponents sought to re-evaluate many aspects of the constitution that had previously been underappreciated or inaccurately presented by Dicey’s conservative normativism.[[77]](#footnote-77)

The differences between the Diceyan and Functionalist styles of public law are represented in their conflicting perspectives regarding what public lawyers should study within the constitution. Dicey recognised that the constitution was comprised of two sources; *laws* which were *“*enacted by statute or derived from… the common law” and capable of being enforced via the courts; and *conventions* which were “understandings, habits or practices which…regulate the conduct” of political institutions and were not enforced by the courts.[[78]](#footnote-78) Dicey argued public lawyers should not concern themselves with *conventions* because they were “not one of law, but of politics... and need trouble no-lawyer… [For] his proper function is to show what are the legal rules (i.e. the rules recognised by the courts).”[[79]](#footnote-79) For Dicey, public lawyers should study the legal aspects of the constitution, and the political aspects should be left to historians and political theorists to study.[[80]](#footnote-80) Given their focus on law, Dicey opted to describe his idealised public lawyers as “legal constitutionalists.”[[81]](#footnote-81) In contrast, Ivor Jennings rejected Dicey’s narrow understanding of public law. First, Jennings argued Dicey’s constitution said “very little about the constitution. It is not a system at all but a mass of disconnected rules.”[[82]](#footnote-82) For example, the public lawyer who only focused on law would only know of the Prime Minister and the Cabinet if, and only if, they were mentioned in a statute.[[83]](#footnote-83) For Jennings, the public lawyer’s proper task was far broader than Dicey envisaged. The public lawyer was to study “the constitution including all the machinery and all rules under it which it functions.”[[84]](#footnote-84) The laws and courts were merely part of a wider phenomenon, which included administration, the institutions of the state and their conventions and rules.[[85]](#footnote-85) Second, in doing so, Jennings rejected Dicey’s dichotomy between *laws* and *conventions* by arguing “all law and government were politics” and the public lawyer who ignored the rules that regulated political institutions and political actors risked presenting “bits and snippets of the constitution suspended in thin air.”[[86]](#footnote-86) In essence, while the Diceyan approach presented a constitutional model that captured only the constitution’s legal dimension, the functionalist style in contrast presented a model capturing the constitution’s political and legal dimensions.

As a student of Jennings, the functionalist style of public law underpins the themes of Griffith’s *Political Constitution.* Griffith’s positivist reading of the constitution begins by contesting the idea of the constitution as preserving some form of equilibrium between the political and economic forces within Britain. Through highlighting a vast range of deep disagreements within Britain during the 1970s, Griffith maintained the reality was that “conflict is at the heart of modern society.”[[87]](#footnote-87) This is because of what Griffith calls the “wearisome condition of humanity.” [[88]](#footnote-88) Humans are both individual and social animals, and this duality “sets up conflicts from which we can never be free.”[[89]](#footnote-89) For Griffith, disagreement was the unavoidable and undeniable reality of social interdependency.[[90]](#footnote-90) In response to disagreements, Griffith stressed, “politics is what happens in the continuance or resolution of these conflicts. And law is one means, one process, by which those conflicts are continued or may be temporarily resolved.”[[91]](#footnote-91) Echoing Emile Durkheim and Leon Dunguit, Griffith emphasised the state’s duty to manage these conflicts and to preserve and foster social solidarity through statutory law. As Griffith contends, the reality of the constitution was that:

Governments of the United Kingdom may take any action necessary for the proper government of the United Kingdom as they see it, subject to two limitations. The first limitation is that they may not infringe the legal rights of others unless expressly authorised to do so under statute or the prerogative. The second limitation is that if they wish to change the law, whether by adding to their existing legal powers or otherwise, they must obtain the assent of Parliament.[[92]](#footnote-92)

Having presented this positivist understanding of a conflictual society and the role of politics and law, Griffith proceeded to challenge Ronald Dworkin, Lord Hailsham and Lord Scarman’s proposals for constitutional reform.[[93]](#footnote-93) Griffith contended that these reforms were attempting to resurrect a natural law reading of the constitution.[[94]](#footnote-94) In particular, Griffith focused on the proposals for a Bill of Rights and the rule of law as a constitutional constraint upon the power of the state. Griffith maintained these would “change the constitution at its very heart.”[[95]](#footnote-95)

In response, he set out a political and philosophical objection to these reforms. The political objection was that although rights were being presented as the means of resolving conflicts, they were actually statements of conflicts.[[96]](#footnote-96) Griffith noted that at one level, proponents disagreed about what rights should be protected.[[97]](#footnote-97) At another level, even if they were to overcome this disagreement by simply adopting a Bill of Rights, which mirrored the European Convention of Human Rights, this would not end the disagreement. Instead, a Bill of Rights would only pass the political decision over how the disagreement is managed into the hands of unelected judges.[[98]](#footnote-98) This is because the rights found within, for example, the European Convention of Human Rights where intentionally vague and would need to be interpreted in relation to the nature of the disagreement. Here Griffith emphasised the importance of political accountability; “I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable… the responsibility and accountability of our rulers should be real and not fictitious.”[[99]](#footnote-99) In practice, Griffith was of the view that Members of Parliament should take these decisions.

Griffith’s philosophical objection contended that there were no such things as fundamental or over-ridding human rights.[[100]](#footnote-100) This critique is endued with the functionalist rejection of the metaphysical. Griffith argued that those who claimed they had fundamental or inherent rights, were actually making subjective claims upon the state.[[101]](#footnote-101) If these subjective claims were convincing enough or garnered enough public support they may be recognised by the state and given legal form, but they do not hold any moral authority.[[102]](#footnote-102) Despite these objections, the lecture concluded with the curious claim that it would not be ‘unconstitutional’ for these reforms to be adopted; for Griffith suggested:

the constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also*.*[[103]](#footnote-103)

By this, Griffith may have been acknowledging that his objections were themselves nothing more than political claims about how the constitution should operate.[[104]](#footnote-104) Consequently, the government of the day was under no moral obligation to accept and act upon his claims.[[105]](#footnote-105) It is unlikely Griffith intended *The Political Constitution* to serve as a theory or model. Due to his positivist outlook, he was wary of theorising about the constitution, and warned scholars of the dangerous gap between what is and what ought to be.[[106]](#footnote-106) Nevertheless, *The Political Constitution* had a significant impact on constitutional discourse within the UK. Regardless of whether the lecture’s claims were fresh or long established,[[107]](#footnote-107) Griffith’s provocative lecture appealed to subsequent generations of public lawyers. Even today, Griffith’s claims still cast a long shadow over contemporary political constitutionalist thinking.

The second ‘normative’ wave marks the conversion of *the political constitution* into *political constitutionalism*.[[108]](#footnote-108) It is most clearly associated with the contributions made by Jeremy Waldron, Richard Bellamy and Adam Tomkins.[[109]](#footnote-109) These are discussed in more detail in the next chapter; for now it is important to recognise these contributions recast Griffith’s political constitution into a normative model, with the aid of liberal and republican political theory.[[110]](#footnote-110) Each of these authors was motivated by what they perceived to be a crisis of faith among politicians, public lawyers and political theorists in the ability of political institutions, such as legislature, to promote and defend constitutional goods. By end of the 1990s, politicians, public lawyers and political theorists had begun to look to courts to defend human rights and were consequently advocating constitutional reforms that could enhance judicial power. As a result, political constitutionalism sought to reaffirm the constitutional importance of the political institutions and critique rising judicial power. Jeremy Waldron’s liberal interpretation of political constitutionalism sought to restore the dignity of legislation within legal theory, by re-apprising the legislature. Elsewhere, Bellamy and Tomkins deployed republican political theory to articulate their accounts of political constitutionalism. Whereas Waldron and Bellamy presented a particularly abstract account of political constitutionalism, Tomkins account provided a normative republican reading of the British Constitution. A significant feature of the second wave was that constitutions were often presented as either exclusively *political* or *legal*.[[111]](#footnote-111)

The latest wave of political constitutionalist literature is the ‘reflective’ wave.[[112]](#footnote-112) McCorkindale and Goldoni consider it a ‘nebula’ of works, in the sense that despite the “uncertain and blurred boundaries”, there is a shared common trait within the literature.[[113]](#footnote-113) This is an intentional and critical attempt to reflect on the second normative wave of political constitutionalism. Therefore, the reflective wave engages in an examination of the model’s internal tensions, implications and weaknesses, as well as developing new ideas.[[114]](#footnote-114) It is a celebration and exploration of its constitutional possibilities.[[115]](#footnote-115) Works within this third wave have explored the grammar of public law necessary to articulate political practices and ideas,[[116]](#footnote-116) constitution making,[[117]](#footnote-117) the application of political constitutionalism to international legal order[[118]](#footnote-118) and the possible place of referendums with the model,[[119]](#footnote-119) to list just a few contributions. This thesis broadly falls in line with the third wave, but it seeks to create greater critical distance from the normative claims by political constitutionalists.

A prominent trend within the third wave has been a growing discomfort among political constitutionalists, and other constitutional scholars more broadly, with the polarising debate between political and legal constitutionalism. With the benefit of hindsight, one can see that the rise of the second normative wave of political constitutionalism coincided with a distinct period of UK constitutional history. This period was marked by an expansion of judicial power - in part a result of the Blair Government’s agenda for constitutional reform and the steady growth of judicial review – as well as the political response to the war on terror.[[120]](#footnote-120) The resulting constitutional anxiety provided fertile ground for an agonistic debate between political and legal constitutionalism to flourish. In this debate, a premium was placed upon using both models as means of evaluating constitutional reforms and institutional performance.

Yet in more recent years many have acknowledged that this ‘war of the gods’[[121]](#footnote-121) struggle has not only yielded diminishing returns, but also proved to be a misguided endeavour.[[122]](#footnote-122) For example, by 2013, Tomkins had considerably softened his position. In the decade prior, Tomkins had categorised the UK as having a distinctly political constitution, and contended a shift towards legal constitutionalism was not only undesirable but also unconstitutional.[[123]](#footnote-123) Yet Tomkins now insists the UK has a mixed constitution, “neither exclusively political nor exclusively legal.”[[124]](#footnote-124) Accordingly, Tomkins posited that the challenge of constitutional scholars was to find the appropriate balance between the two.[[125]](#footnote-125) Nevertheless, as Loughlin has argued, Tomkins is to blame for this agonistic debate, as Tomkins started the polarising discourse by superimposing his own views onto Griffith’s work.[[126]](#footnote-126) In similar fashion, Goldoni and McCorkindale relay a collective view, from the contributors to a special issue of the German Law Journal, about the desire to move beyond political vs legal constitutionalism debate.[[127]](#footnote-127) In response, this thesis posits that in order to move beyond this debate, we should view the political model as a means of casting new light and interrogating the political aspects of modern constitutional orders which have previously been overlooked or underappreciated.

## *A New Research Agenda for Political Constitutionalism*

With a consensus now firmly against maintaining the binary discourse between the political and legal model, the challenge we face is to find a means of moving forward. In response, various scholars have put multiple research agendas forward. This section will situate the thesis within this literature by demonstrating how the thesis builds on one of Goldoni and McCorkindale’s proposed trajectories of research, Waldron’s recent *political political theory,* and Gerry Stoker’s ‘*design arm*’ approach to political science.

Goldoni and McCorkindale advocate moving away from a focus on both the political and legal models to instead analysing a single model. In essence, they argue we should reflect more on the political model itself. Accordingly, they have briefly sketched out four possible research agendas, which do not require the political model to be pitted against the legal. First, scholars could reflect more on the meanings and assumptions they have about ‘the political’ – the radical potential of disagreement and conflict.[[128]](#footnote-128) Second, research could explore the relationship between “political and economic institutions, cultures and constitutions.”[[129]](#footnote-129) A third agenda could be to explore the application of political constitutionalism norms in relation to the relationship between national and supranational actors.[[130]](#footnote-130) Their fourth possible research agenda suggests a move away from understanding political constitutionalism solely through the lens of the British Constitution. Goldoni and McCorkindale suggest that through a comparative approach, our understanding of political constitutionalism can be enhanced by gaining comparative insights into how different constitutional arrangements capture and preserve political constitutionalist norms.[[131]](#footnote-131) As will be explained below, this thesis to some extent seeks to align with this comparative research agenda.

Jeremy Waldron has recently presented a stimulating case for returning to a more classical understanding of political philosophy and constitutional study, by advocating what he labels ‘*political, political theory’* or an institutional approach to political theory.[[132]](#footnote-132) Waldron reasons that political theory is concerned with three questions: identifying the principles of good governance, the design of political institutions, and identifying the ends and ideals of a good society.[[133]](#footnote-133) Yet Waldron posits that political theory post-Rawls has become too focused on identifying the ends and ideals of a good society.[[134]](#footnote-134) *Political political theory* attempts to remedy this by encouraging political theorists to focus more on the design of political institutions. As Waldron argues, this is not a new research agenda *per se*, but rather a return to a classical style of political philosophy, seen in the works of J.S Mill, James Madison and Montesquieu: “the study of political institutions, are issues that dominate the canonical writing of the philosophers we study in the history of ideas.”[[135]](#footnote-135)

According to Waldron, *political political theory* is concerned with examining “the ways our political institutions house and frame our disagreements about social ideals and orchestrate what is done about whatever aims we can settle on.”[[136]](#footnote-136) We might think of *political political theory* as a philosophical counterpart to political science’s institutionalist approach. As leading institutionalists James March and Johan Olsen explain, institutionalism is “simply an argument that the organization of political life makes a difference to political life.”[[137]](#footnote-137) Those within political science who adopt the institutionalist approach to studying political phenomena seek to analyse “to what extent, in what respects, through what processes, under what conditions, and why institutions make a difference.”[[138]](#footnote-138) Although there are variants of institutionalism within political science - *Old Institutionalism*[[139]](#footnote-139) and *New Institutionalism*[[140]](#footnote-140) - they share the belief that institutions should be the central focus of political analysis. *Political political theory* seeks to translate this perspective to political theory. As Waldron contends:

We need institutions to frame the hard choices and decision-making that our disagreements give rise to. And we need to find ways of respecting one another in our politics in the environment that those institutions provide. Institutions matter… Institutions make a difference, not just to the political game but, through the  
inclusiveness of the order they establish, to the security, prosperity, and openness of the societies in which they are established.[[141]](#footnote-141)

As Waldron rightly points out, when studying political institutions, political theorists will have to make normatively informed choices about the design of the institution and the processes within it.[[142]](#footnote-142) It may be argued that political theorists should leave these questions for political science to answer through empirical testing. However, as Waldron highlights, the benefit of analysing institutions from a normative perspective is that political theory can bring to bear different analytical understandings than those commonly associated with political science. According to Waldron, political scientists are likely to be uncomfortable with analysing institutions in a non-consequential way. Political theory in contrast is well suited to pass judgment on institutional arrangements based on dignitarian and sacramental values.[[143]](#footnote-143)

Interestingly, at the same time some political scientists, such as Gerry Stoker and Mathew Flinders, have begun to advocate a problem-solving approach to political science.[[144]](#footnote-144) Their concern is that the traditional insistence within political science that empirical and normative theorising ought to be kept separate has had an undermining effect on political science as a discipline. As Stoker suggests, the relevance of political science should not be in any doubt, as “a great deal of political science has a lot to say about the problems of our political systems.”[[145]](#footnote-145) The problem is that political scientists are often reluctant to communicate their findings in a problem-solving way. In response, Stoker recommends that political science develop a *design-arm,* which seeks to apply empirical findings towards normative goals.[[146]](#footnote-146) Therefore, at the same time as we see Waldron advancing the idea that political theorists should analyse how political institutions can be designed to achieve normative goals, we also see a move within political science to find a way to make use of their empirical findings as a guide to normative design.

In response, this thesis builds upon these proposals. First, it builds on Waldron’s political political theory approach; it adopts an institutional approach to political constitutionalism, by concentrating on how institutions can be designed to foster and preserve principles of political constitutionalism. Second, building on Stoker’s design arm approach, the thesis draws upon political science literature - particularly those found within the sub-genre of legislative studies - to highlight and inform our normative assessments. Ironically, despite seeking to draw out the important political dimensions of constitutional practice, political constitutionalism has largely neglected the political science literature on political institutions. Political science literature is used to highlight the design choices and help determine how political constitutionalism can respond to these choices, as this literature often identifies the strengths and weaknesses associated with competing design options. Third, this thesis draws heavily upon comparative studies of legislative arrangements. Therefore, this thesis responds to Goldoni and McCorkindale’s suggested comparative approach to enriching our understanding political constitutionalism.

Finally, in adopting an institutional approach, this thesis pays homage to not only Griffith’s *The Political Constitution* but also his other seminal contributions to constitutional study. Throughout his long career, Griffith produced many ground-breaking contributions to both public law and legislative studies, much of which remains relevant today. His extensive and detailed work on Parliament,[[147]](#footnote-147) the parliamentary scrutiny of bills,[[148]](#footnote-148) delegated legislation[[149]](#footnote-149) and local government[[150]](#footnote-150) should all serve to remind us that Griffith’s conviction to democratic institutions was ultimately underpinned by both his ideological commitment to democratic socialism, and perhaps more importantly, by his careful, detailed and accurate understanding of political institutions. Indeed, Griffith once remarked “it has always seemed to me to be a weakness in the study of politics and in the study of law that so often an intimate relationship is treated as no more than the chance meeting of two disparate disciplines” and asserted “the study of law and the study of politics gain much mutual benefit when considered as one.”[[151]](#footnote-151) Through analysing political constitutionalism and legislative design, this thesis hopes to prove Griffith’s assertion to be correct. Political constitutionalism has much to gain by following in Griffith’s footsteps to explain and analyse the constitutional importance of legislative institutions.

In brief, by combining the research trajectories on political constitutionalism proposed by Goldoni and McCorkindale, Waldron’s institutional turn in his account of political political theory, and Stoker’s ‘design arms’ approach to political science, this thesis strives to make an important and original contribution to political constitutionalism and, indeed, public law scholarship more generally.

## *Research Method*

The method used throughout this thesis is intended to provide answers about how a legislative institution should be designed according to political constitutionalism. Consequently, eight important decisions were taken during this research. First, this thesis presents an account of political constitutionalism, extracted from an extensive review of the existing literature on political constitutionalism. The process of identifying this literature was relatively straightforward. The existing literature originates from three different groups. The first and largest group explicitly identify themselves and their claims as part of the political constitutionalist movement. The second group consists of scholars who do not explicitly describe themselves as part of the movement, but who have made claims that are sympathetic to, or are sufficiently similar or identical to, those claims made by the first group. These scholars and their claims can be and are frequently identified as part of the political constitutionalist movement.[[152]](#footnote-152) The third group has made claims about political constitutionalism, but it is explicitly opposed to the political constitutionalist movement. This group has indirectly contributed to the development of political constitutionalism by challenging claims made by political constitutionalists.[[153]](#footnote-153) Since this group more often rebuts political constitutionalists claims about judicial institutions, rather than legislative institutions, this literature was not considered directly relevant for this inquiry.

Second, after 20 years of contributions by multiple authors, the existing literature had become somewhat unwieldy. Consequently, it was necessarily to construct a central account of political constitutionalism, which give explanatory priority to those claims and traits manifested to a high degree within the literature.[[154]](#footnote-154) Furthermore, this thesis also recognises and distinguishes between three peripheral accounts or ‘strands of political constitutionalism’ within the existing literature. It distinguishes between different strands of political constitutionalism based upon the political theories that the various authors have used to articulate political constitutionalism. These are the *liberal*, *republican* and *democratic socialist* strands of political constitutionalism. This was necessary to gain a more sophisticated grasp of how political constitutionalism understands legislative institutions and whether there was unity of thought among political constitutionalists about how a legislature should be designed.

Third, this thesis recognises legislatures as political institutions that organise political life for the explicit purpose of making law.[[155]](#footnote-155) Other political institutions that implicitly make law, such as the courts and executive, are not considered. This is logical given that the central research question is specifically concerned with political constitutionalism’s understanding of legislatures, rather law-making institutions in a broader sense.

Fourth, legislative institutions will be analysed in a universalistic and non-contextualised manner. This is appropriate because political constitutionalism seeks to present an abstract and idealised constitutional model.[[156]](#footnote-156) An additional benefit of this approach is that the thesis’s analysis does not need to address specific cultural, historical and social considerations. Nevertheless, it acknowledges that these are issues that should be addressed when analysing a specific real-world legislature.

Fifth, this thesis draws upon cross-disciplinary literature to identify how different aspects of legislative design affect the ways in which legislative institutions organise political life. In particular, this thesis focused on political science literature regarding political institutionalism, legislative studies and comparative studies because these areas focused on researching legislatures. This was also necessary to move beyond the limitations of the existing public law literature on legislatures. Interestingly, despite their attempts to explain and analyse the realities of ordinary politics, political constitutionalists have not engaged with these bodies of literature. Consequently, this thesis also delivers an important contribution to knowledge by adopting a cross-disciplinary law and politics approach.

Sixth, this thesis is primarily concerned with national legislatures, rather than sub-national legislatures. This is because political constitutionalism has traditionally focused on defending the legislative supremacy of the national legislature. At the time of writing, there have been few or no attempts to tackle the issue relating to the compatibility of sub-national legislatures with political constitutionalism. This is not uncommon, as both political theory and political science have also traditionally focused more on national legislatures, treating sub-national legislatures as a secondary concern. However, political science has in more recent times started to pay closer attention to sub-national legislatures within federal states.[[157]](#footnote-157)

Seventh, this thesis analyses only four aspects of legislative design. This was necessary because legislative institutions are large and complex organisations. It was not possible within the scope of this thesis to demonstrate and analyse every variable of legislative design. Instead, the four aspects were chosen because of their relevance to political constitutionalism. According to political constitutionalism, constitutions should be designed to respect and manage political disagreement. Therefore, this thesis analyses how differences in the legislature’s role, the organisation and distribution of resources, and bicameralism can affect the ways in which the legislature respects and manages disagreement. For example, the legislature role within the constitutional order affects it capacity to mould political inputs into compromises. The organisation and distribution of resources determines how competing groups debate and influence the policy preferences of the political community. Bicameralism introduces the need for inter-cameral relations to manage disagreements. Political constitutionalism has also emphasised why it is desirable for political actors to be accountable. One of the ways that legislative institutions organise political life is through providing opportunities and constraints upon those seeking to hold political actors to account. Therefore, the design of legislative institutions is essential to securing political accountability. Accordingly, it was appropriate to analyse how the design of legislative institutions can promote political accountability.

Finally, each of these aspects of legislative design requires choices to be made between competing options. Therefore, this thesis used logical deduction to determine how the different strands of political constitutionalism respond to these choices. In particular, this thesis adopts a rational choice approach towards legislative design. Giovanni Sartori argued that constitutions and institutions should be seen as incentive-based structures.[[158]](#footnote-158) A rational choice approach assumes a strategic internal calculus drives political actors. That is to say, political actors are assumed to have their preferences and goals, and will behave in ways that they believe will maximise the attainment of these preference.[[159]](#footnote-159) Importantly, the design of legislative institutions organises political life through “providing actors with greater or lesser degrees of certainty about the present and future behaviour of other actors.”[[160]](#footnote-160) Institutions provide political actors with resources that incentivise certain behavioural logics and constraints that discourage deviant behaviour. Sartori posited constitutional design required the identification of the appropriate structural incentives necessary to achieve a set of normative goals.[[161]](#footnote-161) Therefore, this thesis uses insights from political science to logically deduce which design choices will incentivise the legislature to organise political life as desired by the different strands of political constitutionalism.

## *Structure*

The structure of this thesis is as follows: Chapter Two presents a critical review of the existing political constitutionalism literature to identify and analyse how legislative institutions are understood by political constitutionalism. This review presents a central case for political constitutionalism and three peripheral accounts or ‘strands’ of political constitutionalism; *liberal, republican and democratic socialist.* Here it will be argued that although political constitutionalism contends the constitution should be organised around the legislature, in order to ensure it respects and manages political disagreement, both the central case and strands are insufficiently institutional in their understandings about legislatures. It will explain why this is problematic and therefore establishes the problem that the rest of chapters seek to resolve.

Chapter Three is concerned with how legislative design determines the legislature’s role within the ordinary political process. This chapter argues that although most legislative institutions perform similar functions within their political communities – *law making, linkage, executive-legislative relations, legitimation* and *political training* – the ways in which these functions are performed varies from legislature to legislature. In practice, legislative institutions perform differently within ordinary political process because of differences in their design.[[162]](#footnote-162) Consequently, it will be argued, legislatures can perform either a “transformative” or an “arena” role within the ordinary political process.[[163]](#footnote-163) This in turn raises the question of what the legislature’s role should be according to political constitutionalism. Through reconstructing political constitutionalism’s conception of ordinary political process, it will be argued that the liberal strand understands the legislatures as performing a primarily transformative role. In contrast, the republican and democratic socialist strands believe the legislature should primarily perform an arena role. These findings will be used in subsequent chapters to help determine how a legislature should be designed according to political constitutionalism.

Chapter Four is focuses on how the design of legislative institutions provides opportunities and constraints upon political action, through the distribution of resources. In the context of legislative institutions, plenary time is a precious resource.[[164]](#footnote-164) The management of disagreement requires legislative institutions, through their design, to distribute plenary time between different legislative groups and actors. However, there are different ways of distributing plenary time, which involve balancing majority and minority rights and the division of labour between the main chamber and committee system. Therefore, this chapter will analyse how to organise the legislature to perform the roles identified in Chapter Three.In response, this chapter argues, the liberal strand requires legislative design to distribute plenary time, by dispersing agenda-setting rights to the committee system and making the committee deliberation the focal point of the legislative process. In contrast, the republican and democratic socialist strands require legislative design to concentrate agenda-setting rights within the governing majority, provide minority groups with opportunities to present themselves and their policies to the electorate as an alternative to governing majority, and ensure the main chamber is the focal point of the legislative process.

Chapter Five addresses how legislative design in the context of bicameralism. It will be argued that bicameral design has complex implications for how inter-chamber relations shape and channel political action. Differences in design can result in the legislature institutionalising symmetrical or asymmetrical inter-cameral relations.[[165]](#footnote-165) In the former, the first chamber is unable to easily ignore the second chamber, but in the latter, it can. This chapter will demonstrate how bicameral design requires reflection on questions about the second chamber’s power, composition and legitimacy, and how they interact with each other to determine the relationship between the two chambers. Accordingly, this raises the question of how bicameralism could be institutionalised in a way that was compatible with political constitutionalism. It will be argued that the liberal stands favour a second chamber capable of challenging the first. This requires designing a second chamber with the power and legitimacy necessary to challenge the first chamber. In contrast, because both the republican and democratic socialist strands are sceptical about bicameralism, they would argue for an asymmetrical form of bicameralism. This presents two options, which can only be determined by whether one believes the second chamber should be elected.

Chapter Six analyses how legislative design can promote political accountability. Political constitutionalists have traditionally viewed the electoral system as the primary means of holding political actors to account. However, in the periods between elections, the political community is dependent upon the legislature to hold political actors to account. This chapter will argue that legislative design can help ensure political actors are held to account between elections, on behalf of the political community. The design of legislative institutions can organise political life in ways that influence the behaviour of political actors, such as the executive, committees and individual legislators.[[166]](#footnote-166) It will be argued that if a legislature is appropriately designed, it can provide a normatively attractive multifaceted form of political accountability. This chapter will demonstrate how legislative institutions can be designed to include a range of “police patrol” and “fire alarm” accountability mechanisms.[[167]](#footnote-167) Policy patrol mechanisms are rules and practices that allowed enabled the legislature or via specific groups and actors to patrol for trouble. In contrast, fire alarm mechanisms are mechanisms that are used by citizens to alert the legislature to wrong-doing by political actors.

Chapter Seven is the final of the chapter of thesis. It will begin by providing a summary of the central findings of this thesis and therefore an answer to the central research question. This chapter will also reflect upon these findings. It will be argued that legislative design and reform is an inevitable and undeniable aspect of ordinary political life. It is a political activity, which political actors perform over time. However, because it is a political activity carried by political actors and has consequences for how the legislature shapes and channels political action, political constitutionalism can help these political actors and public lawyers reflect and debate the values and logics that underpin our real-world legislatures. This chapter also reflects upon some of the future research questions regarding political constitutionalism and the design of legislative institutions.

# II

# *Political Constitutionalism*

Political constitutionalism is a model; a tool to help public lawyers better comprehend and evaluate the often complex and fraught political aspects of our constitutions. Given its distinctive attempt to defend and reappraise legislative institutions, the political model might appear attractive to those interested in exploring, explaining and analysing the constitutional significance of legislative institutions and their design. Despite the political model’s focus on legislative institutions, public lawyers have paid little attention to how legislative institutions are understood by the model, and how these understandings might inform questions of legislative design. In response, this thesis interrogates how legislative institutions should be designed according to political constitutionalism. Chapter One posited that the value of political constitutionalism comes, in part, from its ability to explore, illuminate and analyse often ignored or criticised political practices and political institutions, including legislatures. This claim in turn provokes the following question: *what is the institutional content of political constitutionalism?* That is to say; why does political constitutionalism focus on legislatures and is there any unity of thought among its proponents about legislative institutions?

This chapter provides a critical review of the existing political constitutionalist literature. In doing so, it makes four claims. First, political constitutionalism argues that constitutional design should be concerned with identifying and establishing a procedural, equalitarian and contestable framework for managing disagreement. From this perspective, the normative value of the ordinary democratic process – including legislative politics - is revealed, while simultaneously, undesirable aspects of constitutional entrenchment and strong-form judicial review are exposed. Second, legislative institutions are pivotal to the political model, because they are the only constitutional bodies practically capable of providing a procedural, equalitarian and contestable form of decision-making. Third, there are three main interpretations or *strands of political constitutionalism*. They exist because the political model was never grounded in a single political theory, instead it was grounded in socialist, liberal and republican theories of democracy. This results in subtle variations in how legislatures and democratic politics are understood within the existing literature. Finally, this chapter examines the paradox of political constitutionalism’s institutional content. Despite legislatures being pivotal to political constitutionalism, the existing literature is insufficiently institutional in its understandings about legislative institutions. The literature has failed to seriously engage with questions of institutional design by intentionally or unintentionally avoiding them within their analysis.

The structure of this chapter is as follows. Section One presents a central case for political constitutionalism, as a means of identifying the main tenets of the political model and its institutional content. Section two presents the three main strands of political constitutionalism, identifying their main proponents, their reasoning and how they understand legislative institutions. Finally, section three critically reflects on why these strands have struggled to reflect upon legislative design.

## *The Central Case of Political Constitutionalism*

As discussed in Chapter One, the existing literature on political constitutionalism is relatively well defined. However, this literature can convey an unwieldly and at times contradictory impression of the political model. In response, this thesis uses the central case method to make sense of the literature. The central case method is a “philosophical device which enables an increasingly differentiated description of” a phenomenon “to be offered still as a general theory of” a phenomenon.[[168]](#footnote-168) In adopting this method, one must distinguish between the existence of typical and marginal examples of a phenomenon. In a typical instance, there are norms and traits that “are manifested to a very high degree.”[[169]](#footnote-169) In marginal instances, these norms and traits will only be present but to “a lesser degree or in which one or two are absent altogether.”[[170]](#footnote-170) The central case gives explanatory priority to the typical instances of the phenomenon. In advancing a central case, one does not deny the existence of marginal cases, but instead merely acknowledges that they may exist and share some similarities and differences with the central case. In constructing a central case, one does not aim to capture all the variations of the phenomena that might exist; instead, one must abstract the important and statistically occurring traits, themes and norms. In doing so, one can avoid the risks associated with producing an overwhelming, contradictory and even dull account of the phenomenon.[[171]](#footnote-171) The central case for political constitutionalism does not intend to represent of any single author’s claims. Rather, it is an abstraction of the reasoning that is used within the existing literature as a whole. The central case for political constitutionalism allows us to identify the central tenets of the model and reveal why legislatures are pivotal to political constitutionalism.

### *Law and Politics in the Circumstances of Politics*

Underpinning the political model is the belief that constitutions should recognise and respect reasonable disagreement. Political constitutionalism understands there is an inherent tension in the human condition; humans are both individuals and social animals.[[172]](#footnote-172) Individuals have their own desires and goals but share the world with others. Yet as Bernard Crick maintained, “the more one is involved in relationships with others, the more conflicts of interests and circumstances will arise.”[[173]](#footnote-173) This dualism means politics is a fundamental aspect of the human condition that cannot be escaped.[[174]](#footnote-174) For politics is about the recognition of “the simultaneous existence of different groups, hence different interests and different traditions.”[[175]](#footnote-175) For Crick, politics was similar to sexuality. In one sense, politics and sexuality are both “activities which must be carried on if the community is to perpetuate itself.”[[176]](#footnote-176) Just as sexual intercourse can create new life, politics creates potential new understandings about oneself and the community. In another sense, politics and sexuality are both activities that cannot be opted out of, instead, over time one becomes more aware of them as parts of the human condition.[[177]](#footnote-177)

Importantly however, the human condition creates the potential for disagreement and even violent conflict. For the Nazi constitutional scholar Carl Schmitt, politics arose out of the inevitable distinction between friend and enemy.[[178]](#footnote-178) The relationship between these two was distinguished by the extent to which they judged themselves to be in union or in separation from one another.[[179]](#footnote-179) Schmitt describes the enemy as existing only when one fighting collective of people confronts a similar collective.[[180]](#footnote-180) A political enemy is not necessarily morally evil; rather the enemy is simply a stranger whose opposition makes them a rival to be defeated.[[181]](#footnote-181) The friend vs enemy nature of politics always creates the potential for conflict as “the enemy concept belongs the ever present possibility of combat [sic].”[[182]](#footnote-182) Although one could never rule out the possibility of civil war, Schmitt is generally understood to believe that the state acted as a pacifying force on domestic politics.[[183]](#footnote-183) By this, Schmitt believed the state’s monopoly on coercive force enabled it to manage political disagreement by reducing the levels of antagonism to avoid violence.[[184]](#footnote-184) Accordingly, the state’s duty was to reduce the possibility of violence within its political community by managing disagreement.

Politics as an undeniable, unavoidable, and continuous aspect of the human condition underpins political constitutionalism’s understanding about the relationship between law and politics.[[185]](#footnote-185) Central to political constitutionalism is the belief that law and politics operate within “the circumstances of politics.” This refers to any circumstance where there is “the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.”[[186]](#footnote-186) The circumstances of politics are prone to occur whenever an outcome can only be achieved through collective action.[[187]](#footnote-187) Importantly, political constitutionalism perceives the circumstances of politics as a non-exhaustive phenomenon. The circumstances of politics apply not only to questions of policy, but also rights, practices, procedures, rules, norms and even the architecture of the constitutional order itself. The circumstances of politics are all-encompassing because “within pluralist societies, the range of core values held by individuals is so wide that almost any proposed reason is likely to conflict with that of someone else.”[[188]](#footnote-188) A further complexity of the circumstances of politics is its temporal implications. Reasonable disagreement pervades through time. For this reason, a community should be understood as being in a constant state of flux. The community is made of an ever-changing cast of actors, who enter and leave the stage without warning, and the behaviour of these actors intensifies or mitigates the points of disagreement within the community. In these ever-changing circumstances, what was once an acceptable solution to the specific area of disagreement may itself become a source of disagreement at a later point in time.[[189]](#footnote-189) For political constitutionalism, the circumstances of politics mean the relationship between law and politics must be that politics precedes law. In this essence, law is a product of political discourse.[[190]](#footnote-190) It is politics which decides how disagreements should be managed, by producing laws that legitimate the exercise of state power towards particular ends in particular circumstances. Therefore, politics deploys law as a means of temporarily managing disagreements.

The circumstances of politics have two further implications for the relationship between law and politics. First, the circumstances of politics apply to not only questions of policy but also questions of fundamental norms, values and rights. In the circumstances of politics, one should expect citizens to hold different views about how their society should be organised.[[191]](#footnote-191) Therefore, in the circumstances of politics it is unlikely that one can construct a shared understanding about what constitutes fundamental values.[[192]](#footnote-192) Traditionally, labelling something as a fundamental value is intended to signal that it is beyond politics, i.e. placing it beyond the realm of politics. Yet, the circumstances of politics casts doubt upon the existence of a non-political realm, as its boundaries will be subject to disagreement.[[193]](#footnote-193) There is “no sphere outside of politics, the attempts to depoliticise certain areas of social life proves impossible.”[[194]](#footnote-194)

Second, the circumstances of politics casts doubt upon the possibility of an apolitical decision-making framework. Some constitutional scholars believe that judicial courts, constitutional assemblies and deliberative citizens’ juries can provide apolitical forums. In contrast, political constitutionalism maintains that these forums cannot cleanse the political from their decision-making processes. Instead, they simply carry politics on in a different form. For example, if one were to organise their constitution around an entrenched text protected by a constitutional court, it would still be political in the sense that disagreements about the constitutional text would be managed through the narrow forms of legal interpretation.[[195]](#footnote-195) Consequently, political constitutionalism contends that law cannot predominate over politics. Instead, the relationship between law and politics must be reconceptualised to recognise that politics precedes law within the management of disagreement, in the sense that politics is the continuous attempt to manage disagreement, and law is just a tool or mechanism used by politics.[[196]](#footnote-196)

### *Managing Reasonable Disagreement*

In the circumstances of politics, the management of reasonable disagreement requires a decision-making process with the authority and legitimacy necessary to make decisions about how to proceed. Political constitutionalists maintain “the test of a political process is not so much that it generates outcomes we agree with as that it produces outcomes that all can agree to, on the grounds they are legitimate.”[[197]](#footnote-197) In response, political constitutionalism prescribes a theory of legitimacy premised around procedural egalitarian norms of political equality, majority rule and what we might call the principle of contestability. Nevertheless, it should be noted that since even a proceduralist approach could be subject to disagreement within the circumstances of politics, political constitutionalism attempts to circumvent this challenge by instead prescribing as little as possible. It has traditionally sought to prescribe only the bare minimum requirements for establishing a decision-making process for managing disagreement.[[198]](#footnote-198) These minimalist, procedural and egalitarian norms of political equality, majority rule and contestability are prescribed simply as means of identifying a decision-making framework that can manage disagreements in ways that respect and work within the circumstances of politics.

First, political constitutionalism’s theory of legitimacy requires a morally agnostic attitude towards the substantive ends of politics.[[199]](#footnote-199) In the circumstances of politics, the ends of politics are subject to disagreement. Therefore, one cannot construct a theory of authority or legitimacy that is determined by the extent to which a decision-making body produces certain outputs that align with pre-determined ends. This has important implications for determining which decision-making process should be responsible for managing disagreement.[[200]](#footnote-200) The circumstances of politics require that the authority and legitimacy of a decision-making process and their decisions be based upon procedural qualities. Procedural grounds are those reasons that are independent of considerations about the substantive outcomes of politics.[[201]](#footnote-201) Furthermore, the decision-making process will need to be egalitarian. The decision-making process cannot institutionalise a bias towards certain citizens or certain political claims. Instead, it must treat all citizens and their corresponding claims as equals. It must seek to accommodate the diversity of opinion that exists within the polity on a given issue.[[202]](#footnote-202) Therefore, political constitutionalism maintains that a decision-making process needs to secure the norm of political equality. This is a procedural conception of political equality, defined as the need for each and every citizen to have an equal opportunity to participate in and influence a decision that affects their community.[[203]](#footnote-203) Political equality is akin to the right to vote, a means through which other rights and duties can be determined.[[204]](#footnote-204) This requires some practical means for ensuring each and every citizen’s opinion is weighed equally in the decision-making process.[[205]](#footnote-205) Since modern political communities are often composed out of millions of individuals, each individual’s weight within the process will admittedly be very small.[[206]](#footnote-206)

Second, the decision-making process should aim to be as neutral as possible towards outcomes. Political constitutionalism contends that ordinary majority decision-making can provides this. Majority rule is statistical in nature and this ensures that the decision-making process is fair. The statistical nature ensures the process is neutral towards outcomes.[[207]](#footnote-207) Under a majority decision-making process, the winner is determined by the number of votes they received, rather than whether their views conformed to a pre-determined standard. Winning under majority rule simply requires canvassing enough support for your side’s claims. The winners cannot claim their victory was a product of their opinions being superior to their rival’s.[[208]](#footnote-208) Majority rule also pays respect to the circumstances of politics by not requiring “anyone’s sincerely held views to be played down or hushed up because of the fancied importance of consensus.”[[209]](#footnote-209) Everyone is able to express their views on any matter and those views will be acknowledged by the process. Majority decision-making is practical when one needs to grant the same decision-making weight to millions of individuals.[[210]](#footnote-210) It should be noted that political constitutionalism is critical of *super-majority decision-making*. In a super-majority decision-making process, winning requires also meeting a pre-determined quota; e.g. for a vote to be implemented the winning option must be supported by 60% of all the votes cast. This is considered problematic; the quota is seen by political constitutionalism as biased towards the status quo, as the higher the quota, the more difficult it will be to change the status quo.[[211]](#footnote-211)

Third, the principle of contestability is associated with the need to accommodate the temporal aspects of the circumstances of politics within the decision-making process. Every decision taken may become a source of disagreement in the future.[[212]](#footnote-212) The principle of contestability is the argument against entrenchment and for accountability. It is against entrenchment of any decision – whether that be a policy, the appointment of a political actor, or a constitutional reform - because entrenching the outputs of a decision-making process risks failing to respect future disagreements.[[213]](#footnote-213) The entrenchment of certain decisions is problematic if over time the majority begins to oppose the initial decision.[[214]](#footnote-214) The principle of contestability acknowledges the fact that majorities are not monolithic, but rather change over time. Within the circumstances of politics, majorities like society are in a state of flux and in a process of constantly re-configuring themselves; accordingly, decisions may need to be retaken. This is important because it provides the losers of any outcome with the comfort of knowing that while they may have lost this time, they will have another opportunity in the future to try again.[[215]](#footnote-215) The principle of contestability also demands something of political actors involved in a decision-making process. It requires that they too should be contestable; they must face the possibility of being removed from their position for the decisions they have taken. Thus, the principle of contestability also demands an accountable form of decision-making.

### *The Supremacy of the Legislature*

Political constitutionalism advances that in order to provide a decision-making framework capable of managing disagreement in a way that respects the circumstances of politics, the constitution must be organised around the supremacy of the national legislature. This conclusion is based upon political constitutionalist critical analysis of how compatible traditional constitutional institutions are with the procedural and egalitarian norms discussed above. Political constitutionalism posits that the ordinary democratic process – of which the legislature is a central part – provides the closest practical means for actualising its ideal decision-making framework. It also maintains that this ideal constitutional order must be organised around the supremacy of the legislature. In effect, political constitutionalism advances the case for why the legislature should be recognised as the *supreme* decision-making body within a constitutional order.

#### The Core Case for Legislative Decision-Making

Political constitutionalism engages in a comparative institutional analysis of the decision-making processes used by legislative and judicial institutions to determine which is most capable of respecting the circumstances of politics. Legislative institutions engage in decision-making through plenary debates and voting on bills that propose changes to the status quo. In contrast, judicial institutions engage in decision-making through judicial review, statutory interpretation and the development of legal principles. It should be noted that political constitutionalism chooses to engage in comparative analysis only between legislative and judicial institutions; the executive is conspicuously absent from this analysis within the existing literature. Yet this may be because most proponents of political constitutionalism appear to believe that the constitutional order should institutionalise a parliamentary system of governance. In this regard, there is a tendency within the literature to understand the legislature and executive as fused together. Political constitutionalists maintain that this comparative institutional analysis demonstrates why legislative institutions are better equipped for respecting the circumstances of politics than their judicial counterparts. To do this, they highlight the substantive and procedural defects that prevent judicial institutions and judicial decision-making from respecting the circumstances of politics.

Political constitutionalism suggests that on substantive grounds, judicial decision-making cannot produce superior reasoning, rather it is at best on par with legislative reasoning. First, political constitutionalism draws attention to how judicial institutions institutionalise a form of decision-making, which in effects strips away the personal characteristics of those individuals involved in the dispute.[[216]](#footnote-216) These include personal issues, values and the circumstances at stake. Once a dispute reaches the superior courts, judicial decision-making ignores the personal circumstances of the parties, in favour of focusing on technical legal interpretations, precedents and reasoning.[[217]](#footnote-217) Legislative reasoning is less likely to be distorted by these questions of textual interpretation.[[218]](#footnote-218) As the prominent political constitutionalist Jeremy Waldron has remarked, “it is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional calligraphy.”[[219]](#footnote-219) Second, although both legislatures and courts must justify their decisions, legislative justification is more likely to be accessible and transparent in nature because legislatures express their reasoning through public debate.[[220]](#footnote-220) While judicial judgments are publicly published, traditionally one must be well versed in legal studies to understand these judgments. This comparative analysis also suggests that procedural weaknesses prevent judicial decision-making from respecting the norms of political equality and the principle of contestability.[[221]](#footnote-221) Political constitutionalism contends that judicial decision-making risks “privileging majority voting among a small number of unelected and unaccountable judges” over of the rest of the community.[[222]](#footnote-222) This is because judicial actors and their decisions are noticeably less contestable, as judicial actors are commonly neither directly elected nor capable of being easily contested by the political community.[[223]](#footnote-223) Consequently, political constitutionalism concludes that judicial institutions are by design insufficiently capable of respecting the circumstances of politics.

In contrast, this comparative analysis suggests legislative institutions are better suited to respecting the circumstances of politics. It is important to recognise that this claim is premised on how political constitutionalism views legislative institutions as a critical component of the ordinary democratic process. As Stephen Tierney observes, political constitutionalism’s focus on institutions suggests a propensity to understand the ordinary democratic process as being synonymous with representative democracy.[[224]](#footnote-224) This is because political constitutionalism acknowledges that in the context of a large political community, identifying a decision-making process capable of promoting the norms of political equality, majority rule and contestability presents significant practical challenges. Therefore, the political model accepts that representative democracy - understood as the combination of a single majority plurality or proportional electoral system and a legislature – can provide a large political community with a decision-making process capable of respecting and managing political disagreements.[[225]](#footnote-225)

Therefore, political constitutionalism illuminates how representative democratic decision-making secures and promotes political equality, majority rule and contestability. This can be understood as a two-stage decision-making process: electoral decision-making and intra-institutional decision-making. The first stage involves recognising how electoral decision-making via the electoral system respects the circumstances of politics. Elections empower citizens, at set intervals, with equal influence in the decision-making process on the question of who within their community shall represent them and make decisions on their behalf within the legislature.[[226]](#footnote-226) On this understanding, the right to vote is an essential ingredient for securing political equality.[[227]](#footnote-227) Nevertheless, it should of course be noted that political constitutionalism’s understanding of voting is premised on a somewhat naïve assumption that everyone within the political community is granted the right to vote.[[228]](#footnote-228) The second stage also respects the circumstances of politics as within the legislature, each and every elected representative has equal influence in decisions about changing the status quo via legislation. Therefore, this secures political equality among the elected representatives. Moreover, both the electoral and legislative stages rely on majority decision-making.[[229]](#footnote-229) Similarly, both stages can secure the principle of contestability. The electoral system empowers citizens, at set intervals, to remove and replace their legislative representatives.[[230]](#footnote-230) In this regard, citizens have the right to hold their legislators to account for their behaviour and actions within the legislature. During the periods between elections, legislators are empowered with the power to replace, repeal or amend previous bills. Furthermore, legislators also empowered to hold political actors to account on behalf of the political community in between elections.[[231]](#footnote-231)

Political constitutionalism also emphasises how the self-policing properties of ordinary electoral and legislative politics reduce the likelihood of majorities behaving tyrannically.[[232]](#footnote-232) The ordinary political process polices itself through different stages of competition, deliberation and voting. Political constitutionalism theorises that because of the circumstances of politics, majorities will not be static in nature; rather they will be in a state of flux, changing from issue to issue. They also maintain that electoral and legislative politics will inevitably involve competing groups aiming to build a majority winning coalition. This has two important features which reduce the likelihood of tyrannical behaviour occurring. First, electoral and legislative debates incentivise different groups to challenge, respond to, deliberate, and compromise with one another to help construct or maintain a majority on a certain issue. On this understanding, the ordinary democratic process produces legislation that “is not the product of a homogenous majority but a series of compromises brooked by winning coalitions.”[[233]](#footnote-233) Indeed, against this background of disagreement and majority coalition building, political constitutionalism presents the act of successfully legislating on a given matter as a considerable achievable within the circumstances of politics.[[234]](#footnote-234) Second, electoral competition incentivises these different groups to behave in a respectful and responsible manner towards one another and towards the beliefs of others during both the electoral and legislative decision-making processes. It assumes that because legislative actors are consciously aware that they are accountable to the electorate, they have incentives to behave responsibly. Furthermore, it also assumes that political rivals have sufficient incentives to monitor each other’s behaviour and alert the wider political community to wrong-doing as a means of improving their own standing among the electorate.

Political constitutionalism’s analysis of electoral and legislative decision-making presents a positive case about the normative value of ordinary democratic politics as a decision-making framework. On this basis, political constitutionalism makes a further striking claim by advancing that the ordinary democratic process should be the central organising principle of the constitution.[[235]](#footnote-235)

#### Organising the Constitution around the Legislature

Having established that the ordinary political process provides the most desirable method for managing disagreement, the question of how a constitutional order can be designed around the ordinary democratic process remains. The goal here is to ensure that the rest of the constitution is responsive to and respectful of the democratic decision-making process.[[236]](#footnote-236) Political constitutionalism proposes a distinct vision of a constitutional order organised around the supremacy of the democratic legislature. To make this case, political constitutionalism begins by revealing how traditional counter-majoritarian constitutional features – such as the entrenchment of certain constitutional provisions and judicial review – fail to respect the circumstances of politics, before proceeding to advance the principle of legislative sovereignty.

To begin with, political constitutionalism rejects the notion of a constitutional order being organised around the supremacy of an entrenched constitutional text. This is because political constitutionalism is at best sceptical of, or at worst rejects, the idea of constitutional politics.[[237]](#footnote-237) This is a logical extension of its belief that in the circumstances of politics, nothing can be beyond the political realm. The supremacy of a constitutional text has several problems from the perspective of political constitutionalism. First, entrenched constitutional texts are frequently presented as containing pre-determined freedoms and rights. Yet political constitutionalism argues it is highly unlikely that these pre-determined values will not be subject to disagreement. Second, constitutions are usually characterised by their permanence; they are intentionally designed to be rigidly entrenched to prevent their content being changed easily.[[238]](#footnote-238) Political constitutionalism’s concerns with entrenchment lie in the temporal aspect of the circumstances of politics and the practical challenges of amending a constitution. Within the circumstances of politics, it is highly likely that the constitution’s content was subject to some disagreement at the time of its drafting and enactment. Consequently, one may expect the content of the constitution to remain contested over time. The problem is that entrenched constitutions are typically difficult to amend. As a means of circumventing the perceived instability and problems associated with the ordinary political process, constitutional drafters commonly establish an amendment process which relies on a supermajority form of decision-making. As has been argued above, political constitutionalists perceive supermajority decision making is viewed as problematic because they believe it risks being bias towards the status quo. Therefore, constitutional entrenchment is seen to disable the current majority from changing their constitution.[[239]](#footnote-239) Over long periods of time, it can result in situations whereby the dead “are ruling the current democratic majorities from the grave.”[[240]](#footnote-240)

By serving as the highest form of law, the supremacy of the constitution also conditions the relationships between the institutions of the state. Political constitutionalism maintains this has undesirable implications for the relationship between the legislature and the judiciary. Political constitutionalism argues that constitutional supremacy gives rise to a relationship between the legislature and judiciary, in which the supreme or constitutional court is ultimately dominant. This is because the supreme or constitutional court within the state is traditionally designated as the constitutional guardian of the text. To uphold the constitution, the courts have the authority to review the compatibility of legislation with the text of the constitution. In the event that legislation is perceived to infringe upon the provisions of the constitution, the courts are usually empowered, by the constitution, to strike down the legislation. Consequently, the supreme or constitutional court becomes the *de facto* supreme institution within the constitutional order. Political constitutionalism objects to this on two grounds. First, as observed above, political constitutionalism suggests judicial decision-making suffers from defects which make it normatively undesirable. Second, the potential for the courts to strike down legislation is considered to be disrespectful to the community which participated in the creation of said legislation.[[241]](#footnote-241)

These problems lead political constitutionalism to make the bold claim that the ordinary democratic process should be constitutional. The logic of this is that since the ordinary political process provides the most effective means of respecting disagreement, then its outputs – legislation – should be recognised as the highest source of law within the state. Political constitutionalism aims to find a way for ordinary democratic decision-making to function as the constitution itself. As Richard Bellamy explains, the constitution should be understood, and operate, like a ship at sea, “employing the prevailing procedures to renew and reform those self-same procedures.”[[242]](#footnote-242) In the pursuit of this goal, the formal distinction between ordinary and constitutional politics dissolves and the ordinary democratic process becomes viewed as a self-constituting process.[[243]](#footnote-243)

In practice, to secure this distinct vision, the legal principle of legislative sovereignty is required.[[244]](#footnote-244) Although it is possible to treat to supremacy and sovereignty as inter changeable terms, they can also convey subtle differences in meaning.[[245]](#footnote-245) Whereas s*upremacy* refers to an institution’s place on the institutional scale of authority found within a constitutional order, *sovereignty* refers to the unlimited law-making power held by an institution.[[246]](#footnote-246) The two are closely associated, in the sense that a legislature derives its supremacy within the constitutional order as a consequence of it being recognised as having legal sovereignty by the other constitutional institutions of the state.

Legislative supremacy is secured through the positive and negative dimensions of the principle of legislative sovereignty. The positive dimension pertains to the right to make or unmake any law within the state.[[247]](#footnote-247) This does not require that the legislature is the sole source of law within the state, but rather that legislation takes effect over and above any other source of law. The legislature is empowered to replace, modify or repeal any form of law within the state.[[248]](#footnote-248) This ensures the principle of contestability in both an ordinary and constitutional sense. The negative dimension holds that no other institution can override or set aside the legislatures outputs.[[249]](#footnote-249) This is significant because it conditions the legislature’s relationship with other institutions of the state. First, the executive’s relationship with the legislature is conditioned by the executive’s need to operate within the legal remits set by the legislature. Thus, when executive actors desire new legal powers, they must seek the consent of the legislature.[[250]](#footnote-250) Furthermore, the legislature delegates to the executive responsibility for administrating the legislature’s policy choices, in doing so creating a corresponding duty on the executive to account for its actions to the legislature.[[251]](#footnote-251) It also defines the relationship between the executive and judiciary, in the sense that the courts are placed under a duty to hold the executive to account on behalf of the legislature.[[252]](#footnote-252) The negative dimension also conditions the courts’ relationship with the legislature and the executive. The courts cannot strike down legislation and are obliged to interpret legislation in line with the legislature’s intentions.[[253]](#footnote-253) When brought together, the positive and negative dimensions of legislative sovereignty help fortify the idea that the outcomes of the democratic process are constitutional and should be respected by the rest of the constitutional order. One might conclude that, legislative sovereignty is an essential ingredient for securing political constitutionalism’s distinct vision of a constitutional order.

#### Manner and Form Legal Sovereignty

Nevertheless, legislative sovereignty gives rise to the paradox of whether the legislature can enact legislation, which *limits itself* and *its successors*. A sovereign legislature must be able to make any law it desires, which could include a law that binds upon itself and its successor; but in enacting such a law, can the legislature still be considered sovereign?[[254]](#footnote-254) Furthermore, if a legislature could bind itself then this would be incompatible with the principle of contestability. Paradoxically, a political constitution cannot work without the principle of legislative sovereignty, but the principle could undermine it. Oddly, this paradox was not considered by the second wave of political constitutionalists; this oversight is perhaps even more unusual given political constitutionalism’s affinity towards the UK’s constitution.

The paradox of legislative sovereignty is a familiar one to public lawyers within the United Kingdom. Albert Venn Dicey presents one attractive but ultimately crude solution to the problem. Dicey maintained a sovereign legislature could not logically bind its successor as “a sovereign power cannot while retaining its sovereign character, restrict its own powers by any particular enactment.”[[255]](#footnote-255) However, Dicey’s solution failed to consider the differences between procedural and substantive limitations.[[256]](#footnote-256) From the perspective of political constitutionalism, ruling out the possibility of legislation which places future legislatures under substantive limits makes sense within the circumstances of politics. Nevertheless, this is less straightforward when considering procedural limitations that change the law-making procedures moving forward. Here Dicey’s solution has two core problems. First, Dicey’s solution is implicitly biased towards the status quo. For Dicey, ruling out procedural changes was not particularly problematic, as Dicey had, at least at one point in time, understood the UK’s constitution as “the climax of political achievement.”[[257]](#footnote-257) Yet Dicey’s constitutionalism was imbued with a conservative attitude; he had hoped Parliament’s design would provide for a “democracy tempered by snobbishness.”[[258]](#footnote-258) Thus, he viewed the constitution and Parliament’s law-making procedures as “an instrument for protecting fundamental rights of the citizens” rather than “an instrument for enabling the community to provide services for the benefit of its citizens.”[[259]](#footnote-259) Hence, Dicey believed the UK’s constitution should not be changed. Nevertheless, in the circumstances of politics it is possible that even legislative procedures can give rise to disagreement.[[260]](#footnote-260) By ruling out the possibility of procedural reforms that alter the law-making process, Dicey’s solution fails to accommodate the principle of contestability in relation to legislative design. Second, Dicey’s solution rules out the possibility for reform, even when reforms are necessary for the survival of the polity. Assuming the constitution at the end of the 19th century was indeed the ultimate political achievement, what does one do when one starts from the position of having a legislature which falls short of Dicey’s interpretation of the late 19th century Parliament? On this understanding, the legislature cannot pass legislation which procedurally binds itself in order to reform a deeply dysfunctional or entirely broken political system.[[261]](#footnote-261) Under Dicey’s solution, there is a real risk that the legislature is disabled from managing disagreement and cannot reform itself resolve this problem.

An alternative solution can be found in the functionalist scholar Ivor Jennings’ rival account of sovereignty. Although in some respects both Dicey and Jennings’ accounts overlap, Jennings departed from Dicey by rejecting sovereignty as a quasi-theological concept,[[262]](#footnote-262) instead maintaining that sovereignty was:

a legal concept… [used] to express relations between Parliament and the Courts. It means the courts will always recognise as law, the rules which Parliament makes legislation; that is rules made in the customary manner and expressed in customary form.[[263]](#footnote-263)

Parliament was constrained by the need to legislate in the ways which aligned with the conditions necessary for a statute to be recognised as valid by the courts. If Parliament legislated in ways that satisfied those conditions, its legislation would be “recognised by the courts, *including a rule which alters this law itself*.”[[264]](#footnote-264) Thus Jennings concluded Parliament could procedurally bind itself by altering the requirements regarding the manner and form in which future legislation was to be enacted. This manner and form conception overcomes the problems associated with Dicey’s solution. Nevertheless, it is subject to one problem, which Dicey’s account avoids.

Jennings’ manner and form conception is agnostic towards the nature of the reforms. On the one hand, it allows the legislature to carry out necessary reforms, but on the other hand, it could be used to entrench certain provisions. For example, the law could require that a super-majority within the legislature or a referendum must be held before a change can recognised as law. Consequently, such legislation would conflict with political constitutionalism’s belief that constitution should be a contingent response to the democratic process.[[265]](#footnote-265) Indeed, Jennings himself drew attention to this controversial possibility, suggesting it was possible to enact legislation which established that an unelected second chamber could only be abolished if a majority of the electorate expressly agree to it, and that said legislation could only be replaced via a referendum.[[266]](#footnote-266) For the manner and form conception of sovereignty to be compatible with political constitutionalism, this risk must be removed or at least mitigated.

Michael Gordon’s recent attempt to normatively justify the manner and form conception of sovereignty is relevant here. Gordon believes that political constitutionalism can justify the manner and form theory.[[267]](#footnote-267) As he reasons, political constitutionalism’s justification for vesting unlimited substantive law-making powers with the legislature, could also explain why the legislature should be trusted with unlimited procedural law-making powers. The ordinary political process will condition how the power is used. First, if legislators used the manner and form theory irresponsibly or intentionally abusively, they could be held to account and possibly removed by their citizens at the ballot box.[[268]](#footnote-268) Second, elections fosters a culture of reciprocity among different political groups within the polity.[[269]](#footnote-269) In the circumstances of politics majorities are unlikely to be static, and a legislative majority may fail to be re-elected or find themselves as the legislative minority following an election. Consequently, if the legislative majority used their procedural law-making powers to entrench certain political settlements, they may soon find themselves facing their rivals using said powers against them.[[270]](#footnote-270) Therefore, even if legislators are unlikely to be held to account by their electorate, they have incentives within the legislative sphere not to exploit their powers. Gordon suggests that as a result, this culture of reciprocity should ensure a political, rather than legal, means of limiting the legislative sovereignty.[[271]](#footnote-271) Third, in the event sovereignty was so regularly abused, the option of revolution remains.[[272]](#footnote-272) The citizens of the state can always use their constituent power to revolt and reform the state. For these reasons, politics has the potential to mitigate the risks of the sovereign power being abused.

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In reflecting on the central case for political constitutionalism, two striking conclusions can be drawn about its institutional content. First, the legislature is clearly intended to serve as the institutional core of a political constitution. It is the central institutional mechanism for expressing political constitutionalism’s belief that the democratic process should be the constitution. Therefore, a striking feature of political constitutionalism is its heavy reliance on legislative institutions; the legislature is indispensable to its vision of how the disagreement should be managed. Yet it is equally striking that there is an absence of any consideration about legislative design. Beyond highlighting how legislative behaviour is conditioned by the fact that legislators are consciously aware that they are accountable to the electorate, the political model is largely silent on how legislative institutions organise political life and shape and channel political action towards responsible ends. Key questions regarding how a legislature should organise the distribution of majority and minority rights, inter-cameral relations, political forms of accountability and oversight are simply not accounted for, within political constitutionalism’s assessment of legislative institutions. Although the central case provides a positive account of the legislature - at least in comparison to other constitutional models - the account is underdeveloped, presenting legislative institutions in a highly abstract and vague way. Ultimately, this fails to capture the subtle and often opaque reality of how legislative institutions shape and channel political activity.

## *The Three Strands of Political Constitutionalism*

The central case revealed the significance of legislative institutions to the political model, but disappointingly provides little insight into how a legislature should be designed according to political constitutionalism. In constructing a central case, one must reflect on the similarities and differences of a phenomenon. In doing so, it becomes possible to identify at least three peripheral interpretations of political constitutionalism within the existing literature. These will be labelled as the *democratic socialist*, *liberal* and *republican* strands of political constitutionalist thought.[[273]](#footnote-273) The relationship between these peripheral strands and the central case is akin to a three-set Venn diagram. This is because, on the one hand, each of these strands overlaps with the others to a sufficient degree, forming the central case, yet on the other hand, each strand is subtly different from the others. These differences stem from the ambiguous nature of political constitutionalism’s claim that the democratic process should be the constitution.[[274]](#footnote-274) Noticeably, what is meant by ‘the ordinary democratic process’ is left open to interpretation. At first glance, this omission appears to be a puzzling oversight on the part of political constitutionalists, since what constitutes ‘an ordinary democratic process’ is clearly pivotal to actualising the political model. Yet on a closer reading, this omission may reflect an attempt to accommodate disagreement about the nature and value of democracy.

Democracy, and the processes used to actualise it, are not easily susceptible to a singular definition per-se, for the very idea of democracy is subject to disagreement. The simplest definition stems from the etymological origins of the word. Democracy originates from the Greek words of *demos –* the people, and *kratos –* rule, to provide the definition of “rule by the people.” Although most would accept this etymological definition, what ‘rule by the people’ requires in practice remains open to interpretation.[[275]](#footnote-275) Throughout history the meanings of democracy, its processes and justifications have evolved and competed with one another. Democracy’s ambiguous nature gives rise to what David Held terms as different *models of democracy.* Each model of democracy is committed to the basic idea of rule by the people, but disagrees over *who the people are*, *what ruling means* and *what processes are required*.[[276]](#footnote-276)

Intentional or not, the political model was never grounded in one specific conception of democracy. Over time, different proponents have sought to ground and justify the political model in their preferred conception of democracy, whether that be through *democratic socialism*, *liberalism* or *republicanism*. Each strand advances the basic political constitutionalist claims but diverges on the finer details about how the political model should operate in practice. Although there is a sufficient degree of consensus about organising the constitution around the idea of legislative supremacy, the strands disagree about the finer intra-institutional arrangements that are required. This begs the question *why do these strands value the legislature* and *what do their claims suggest about its design?* It is important to recognise that because these strands make different and sometimes conflicting claims about the legislature, what constitutes a well-functioning legislature is likely to vary from strand to strand.

### *The Democratic Socialist Strand*

Perhaps the oldest strand of political constitutionalist thought is the by-product of early British socialist thinking.[[277]](#footnote-277) For this strand, the central appeal of political constitutionalism rests in its potential to provide a democratic means of transforming the economic and social conditions of the state. This is because a political constitution can provide the means for ensuring that popular demands can be met without being constrained by the constitution, and maintain a representative and accountable form of governance.[[278]](#footnote-278) Within the UK, this strand is closely associated with the Labour Party, the parliamentary vehicle for the promotion of socialism.[[279]](#footnote-279) This strand finds its modern expression in the works of many public lawyers, such as Keith Ewing, Danny Nicol and to a lesser extent in J.A.G. Griffith, whose values align with the Labour Party. Nevertheless, many of the strand’s values pre-date these writers, dating back to an early 20th century democratic socialist conception of constitutionalism. In practice, the Labour Party has traditionally presented a conservative defence of the political model, through its policies on constitutional reform. Many have criticised the left as being politically radical, but constitutionally conservative.[[280]](#footnote-280) However, this is simply because the political left has been largely satisfied with the UK’s predominantly political constitution. Although many on the left have never expressly spoken of the political model, their claims about how the UK’s constitutional arrangements were normatively desirable for the promotion of progressive socialist policies, chimes with our modern ideas about political constitutionalism.

Griffith’s ‘*The Political Constitution’* might appear to exemplify the democratic socialist strand. After all, Griffith did describe himself as “a Labour Party person and all that.”[[281]](#footnote-281) Moreover, the lecture is commonly viewed as the modern starting point for political constitutionalism. Yet this reading has been forcefully challenged by Martin Loughlin, who maintains that despite Griffith’s affinity to socialism, the lecture should not be interpreted as making normative claims about constitutional design. Loughlin maintains it instead embodies the functionalist tradition’s commitment to studying the constitution in a realistic, scientific and sociological way, which was sceptical of normative theorising.[[282]](#footnote-282) Loughlin also suggests Griffith echoed many pre-existing democratic socialist and functionalist claims within the lecture.[[283]](#footnote-283) These are visible in Griffith’s assertion that Lord Hailsham’s proposed reforms were an attempt to institutionalise limited government, which he describes as the “antitheses to democratic socialism.”[[284]](#footnote-284) Furthermore, Griffith later repackaged much of ‘*The Political Constitution’* in more overtly ideological terms in his later article ‘*The Rights Stuff*.’[[285]](#footnote-285) Here Griffith is considerably more upfront about his ideological commitment to defending the constitutional order from reforms designed to “diffuse political power and leave a Labour Government without the means to achieve its political ends… Under our constitution, electoral success gives legitimacy and authority to strong government. That strength, in the socialist cause, must not be jeopardised.”[[286]](#footnote-286) Consequently, we might view Griffith’s lecture as merely codifying several socialist attitudes towards constitutional design and practice.

The works of Keith Ewing present a modern and explicitly socialist reading of the political model.[[287]](#footnote-287) For Ewing, all constitutions are technically ‘political’ in their origins and their content. Thus, Ewing rejects the idea of an ideologically neutral constitution.[[288]](#footnote-288) He instead reasons that what we identify as the political model is a unique species within the wider genus of liberal democracy. This genus is composed of constitutions that provide for *closed* or *conservative* and those that provide for *open* or *progressive* forms of liberal democracy.[[289]](#footnote-289) In the former, there is reduced “space for contestation and disagreement about what may be core questions” as many political questions are reserved to the judiciary. In the latter, the constitution is more open, in the sense that core questions are kept within the sphere of democratic politics. Support for the political model demonstrates “a preference for a representative and sovereign legislature as the ultimate site of political struggle.”[[290]](#footnote-290) As Ewing explains, the primary purpose of a political constitution is to enable the unimpeded realisation and translation of the citizens’ wishes into law.[[291]](#footnote-291) Consequently, Ewing maintains that the political model is more desirable to a progressive democratic socialist ideology for two reasons. First, although closed or conservative constitutions are theoretically capable of restraining both left- and right-wing governments, history suggests that left-wing governments will face more restraints, due to the often-conservative disposition of the judiciary.[[292]](#footnote-292) Second, the political model enables the people to bring forth significant constitutional, economic and social change within their society. Accordingly, for democratic socialists, the central appeal of the political model is that it provides a sufficiently adaptive constitutional order for delivering progressive socialist policies.[[293]](#footnote-293) To better understand democratic socialism’s affinity with the political model, we must look at the socialist theorists and politicians who have influenced modern political constitutionalists.

The main tenets of democratic socialism can be identified as equality, collectivism and the belief that democracy is both a means to an end and an end in itself.[[294]](#footnote-294) First, socialism is concerned with achieving, albeit loosely defined, economic, social and political equality among the people.[[295]](#footnote-295) Although there is disagreement about the precise meaning of equality, socialism starts from the position that equality entails recognising the equal worth of all individuals.[[296]](#footnote-296) A significant aspect of the socialist conception of equality is how it is intertwined with the concept of liberty. For socialism, liberty is understood in a positive sense; it implies “the ability to act, not merely to resist” and it is only through promoting equality that each individual gains the opportunity to participate within society.[[297]](#footnote-297) On this understanding, greater equality means greater freedom.[[298]](#footnote-298)

Socialism opposes the belief that competitive individualism or *lassie-faire* liberalism should serve as the guiding principle of social-organisation.[[299]](#footnote-299) For Sidney Webb, *lassie-faire* liberalism’s promotion of freedom from interference served to justify the pursuit of individual interests within an openly competitive environment. To maintain this, *lassie-faire* liberalism argued that the individual should be as free as possible from legal restrictions, and that the state should play a minimal role.[[300]](#footnote-300) Socialism in contrast, emphasises the community, rather than the individual, as the central principle of social organisation.[[301]](#footnote-301) Webb theorised that this belief would have three critical implications for social-organisation. First, in the economic context, socialism required the “collective administration of rent and interest, leaving to the individual only the wages of his labour.” Second, in the political context, socialism required “the collective control over, and administration of, all the main instruments of wealth production.” Finally, in the social context, socialism required fraternity, personal service and “the subordination of individual ends to the common good.”[[302]](#footnote-302) For Webb, the capitalist state’s promotion of *lassie-faire* liberalism had hindered fraternity and prevented the people fulfilling their potential function within society.[[303]](#footnote-303)

Socialism is broadly defined by the desire to transition away from capitalism.[[304]](#footnote-304) Yet there is sharp disagreement between the Marxist revolutionist and the gradualist or revisionist traditions.[[305]](#footnote-305) The revolutionary tradition contends an unresolvable class conflict will inevitably lead capitalism to collapse.[[306]](#footnote-306) From this perspective, society is defined by an unstable class conflict between the owners of capital and the workers.[[307]](#footnote-307) The exploitation of the workers by the owners of capital would lead to a crisis of capitalism in which the workers would overthrow the system.[[308]](#footnote-308) Yet the events of the Russian revolution suggest the revolutionary method of transition would require political violence.[[309]](#footnote-309) In contrast, the gradualist (or revisionist) tradition argues for socialism through democratic or constitutional means, resulting in democratic socialism. Unlike the revolutionists, the gradualists view the state as a neutral force, which can be deployed towards both capitalist and socialist ends.[[310]](#footnote-310) Gradualism developed out of the influential works of the German Social Democrat Eduard Bernstein and the British Fabian Society. Bernstein believed that socialism could be achieved through parliamentary and representative democracy.[[311]](#footnote-311) Similarly, the Fabians posited that socialism could be achieved through constitutionalism, understood as the ordinary democratic process.[[312]](#footnote-312)

For Bernstein, democracy meant “the absence of class government… a state of society in which no class has political privilege which is opposed to the community as a whole.”[[313]](#footnote-313) Denouncing the violent revolutionary method, he instead argued democracy should be recognised as both a means and the ends of socialism; “it is a weapon in struggle for socialism and it is the form in which socialism will be realised.”[[314]](#footnote-314) Bernstein stressed that although democratic socialism could not abolish classes, it could instead foster tolerance and cooperation between the classes.[[315]](#footnote-315) First, democracy fostered socialism through the right to vote, which enabled and incentivised individuals to enter into fraternities and cooperate with others within their community.[[316]](#footnote-316) Second, because gradualism views socialism as only attainable through democracy, it must be the case that “to betray democracy is to betray socialism.”[[317]](#footnote-317) On this understanding, once in power a socialist government must be tolerant towards dissent by others.[[318]](#footnote-318) For a democratic socialist government to suppress or reject democracy and its associated political rights, it would be betraying the very idea of democratic socialism. Accordingly, within democratic socialism, even the socialist state and socialism itself is viewed as contestable.

Gradualism accepted that the transition to socialism would take time. Gradualists were committed to what Sidney Webb called the “inevitability of gradualism.”[[319]](#footnote-319) This viewed socialism as the inevitable product of social evolution. The first Labour Prime Minister within the UK, Ramsey Macdonald, stressed that although “the individual is in a hurry, because life is short… social evolution is in no hurry.”[[320]](#footnote-320) In Britain, gradualism became the dominant ideology of the left, in part due to the influential work of the Fabian Society. Democratic socialism in Britain looked positively upon the UK’s constitutional arrangements (recommending only minor modifications).[[321]](#footnote-321) Webb celebrated the constitution, reasoning that “in no other country are statesmen so ready as in England to carry out political proposal pressed upon them from below... the gradual ‘socialising of politics’ is rendered possible by the fluidity of the English Constitution.”[[322]](#footnote-322)

Hence, we can see how democratic socialist attitudes towards constitutionalism began to align with the political model. Proponents of democratic socialism in Britain viewed the constitution as a means by which class-conflict can be managed. The constitution served the interests of the classes who controlled the state. Therefore, a constitution can be used negatively to retain the status quo or positively to change it.[[323]](#footnote-323) Accordingly, proponents of democratic socialism began to view the ordinary political process as serving four closely related purposes in the pursuit of socialism. First, democracy provided a peaceful means of managing the class-conflict.[[324]](#footnote-324) Second, democracy had rendered capitalism vulnerable to being contested; therefore, it ensured capitalism could be replaced by socialism. [[325]](#footnote-325) Third, if the constitution was a tool of the dominant class and democracy allowed for a peaceful change of the class which dominated society, a democratic form of constitutionalism could promote socialism.[[326]](#footnote-326) Fourth, representative democracy ensures that citizens, regardless of their class, will have relatively equal opportunities to influence decision-making, actively participate in political fraternities, and perform their function by standing for political office.[[327]](#footnote-327)

Another similarity stems from democratic socialism’s critical stance on constitutional obstructionism. When constitutional actors within the legislature, such as the second chamber, opposition parties and even Labour MPs, or external to the legislature, for example the courts or the constitutional text – seek to frustrate a socialist government, this is seen as “denying the will of the people and hindering a democratically elected government.”[[328]](#footnote-328) Furthermore, proponents of democratic socialism view obstructionism as distorting the accountability of the government to the people.[[329]](#footnote-329) The governing party is rendered accountable to the electorate, based upon the extent to which it delivers its electoral promises and the consequences of its policies. It can be inferred that proponents of democratic socialism tend to understand how the state should operate through the lens of the *Westminster Model*.[[330]](#footnote-330) This is a set of norms, values and meanings, which prescribes what legitimate governance is within the Westminster system.[[331]](#footnote-331) Significantly, the Westminster Model is defined by its heavy emphasis on the importance of strong government and democratic mandate.[[332]](#footnote-332) Accordingly, democratic socialism emphasises the idea that the constitution should function as “a lubricant, rather than a barrier to social, economic and political change.”[[333]](#footnote-333) Any reforms that undermine the Westminster Model are traditionally viewed as a threat.[[334]](#footnote-334) Hence, democratic socialist thinking tends to align closely with the political model.

Traditionally, proponents of democratic socialism have viewed the judiciary as a potential source of obstructionism.[[335]](#footnote-335) Historically, the left rejected the claim that judicial decision-making was apolitical and judges were neutral arbiters.[[336]](#footnote-336) For the left, the common law was marked by an ideological commitment to individual economic liberty and the defence of private property.[[337]](#footnote-337) Such concerns were no doubt reinforced by Griffith’s detailed study into the conservative tendencies of the British judiciary.[[338]](#footnote-338) Griffith accused the judiciary of wanting to “preserve and to protect the existing order.”[[339]](#footnote-339) This was because the social background from which judges were recruited was a narrow pool of “middle-class professional families, independent schools, Oxford or Cambridge.”[[340]](#footnote-340) Controversial judgments such as *Roberts v Hopwood*[[341]](#footnote-341) and others further fuel the left’s concerns.[[342]](#footnote-342) In *Hopwood*, the left-wing council of the London Borough of Poplar raised the minimum wage for both their male and female workers to £4. The district auditor responded by placing a £5,000 surcharge on the councillors, on the grounds that such a rise meant the payments ceased to be wages and the rise was thus contrary to the *Metropolis Management Act 1885*.[[343]](#footnote-343) The councillors sought to quash the surcharge, arguing that their electoral mandate justified their discretion under the Act.[[344]](#footnote-344) The councillors’ arguments were rejected in the House of Lords. Lord Atkinson controversially denounced the councillors for considering in their decision “eccentric principles of socialistic philanthropy, or by a feminist ambition to secure equality of the sexes in the matter of wages in the world of labour."[[345]](#footnote-345)

Additionally, democratic socialists were largely apathetic towards the idea of constitutional entrenchment.[[346]](#footnote-346) This is in large part a consequence of their general satisfaction with the constitutional flexibility afforded by parliamentary sovereignty. By vesting legal sovereignty with the legislature, the constitutional order provides the means for radical socialist transformation and simultaneously a means of preventing capitalist elements of the state from directly challenging or frustrating socialism.[[347]](#footnote-347) The prominent Labour politician Stanford Cripps described the absence of an entrenched constitution as “our greatest asset, it should enable the constitution to adapt itself momentarily to the desires and wishes of the people.”[[348]](#footnote-348) This apathy was also a product of a predominantly economic attitude towards issues of governance. Left-wing governments were simply more concerned with addressing economic issues than rather constitutional questions, such as whether to enact a written constitution.[[349]](#footnote-349) Interestingly, social democrats perceived bicameralism as both an obstructionist tool and a method of constitutional entrenchment. Laski for example described bicameralism as a constitutional “protective armament of vested interests.”[[350]](#footnote-350) More recently, Nicol has advanced a more forceful left-wing critique of constitutional entrenchment as a means of economic entrenchment.[[351]](#footnote-351) Nicol suspects entrenchment is a means of securing neo-liberalism.[[352]](#footnote-352) He criticises entrenchment as promoting “capitalism first, democracy second.”[[353]](#footnote-353) Nicol insists that constitutions must provide a relatively level playing field for all political ideologies to compete on.[[354]](#footnote-354) Ewing provides a more nuanced view on entrenchment. He accepts entrenchment could also secure fundamental social rights.[[355]](#footnote-355) However, his concern with entrenchment rests with how the judicial branch might interpret these social-provisions to frustrate their effectiveness.[[356]](#footnote-356)

Proponents of democratic socialism traditionally adopt the attitude that legislative design should primarily be concerned with enabling the elected government of the day to implement its programme.[[357]](#footnote-357) As Harold Laski maintained, the legislature should foster “a government which can govern.”[[358]](#footnote-358) Democratic socialism’s commitment to strong government is further underpinned by the perception that socialism demands a “far higher tempo” of legislation.[[359]](#footnote-359) Accordingly, for democratic socialists, legislative design should prioritise *efficiency* over *effectiveness*. As Alexandra Kelso posits, reformers who emphasise efficiency seek “to streamline the workings of [the legislature], to ensure that the government’s legislative programme is secured expeditiously and to maximise the use made of scarce [legislative] resources.”[[360]](#footnote-360) Hence, efficiencyimplies a desire to speed up the legislative process in favour of the governing majority.[[361]](#footnote-361) In contrast, promoters of *effectiveness* seek to enhance the legislature’s ability to scrutinise and oversee the government’s actions.[[362]](#footnote-362) Although efficiency and effectiveness are not always in competition with one another, they can often clash.[[363]](#footnote-363) In such circumstances, the democratic socialist strand prioritises efficiency.

Democratic socialism’s commitment to efficiency and rejection of obstructionism is perhaps most vividly represented in the constitutionalism of Stafford Cripps.[[364]](#footnote-364) Cripps was anxious that the supporters of capitalism would go “to almost any lengths to defeat Parliament” if a socialist party held a majority within it.[[365]](#footnote-365) Controversially, he argued that an incoming Labour government would need to immediately put before Parliament an Emergency Powers Bill. If enacted, this would empower ministers to carry out their electoral promises solely via Ministerial Orders. Cripps posits that the bill should be drafted to prevent the courts challenging it (although he did not explain how this could be achieved).[[366]](#footnote-366) In the event that the bill faced serious obstructionist tactics by the opposition parties or the House of Lords – which he lambasts as “the stronghold of capitalism,”[[367]](#footnote-367) Cripps boldly contended, “it would probably be better and more conducive for a Socialist Government to make itself temporarily into a dictatorship until the matter could again be put to the test at the polls.”[[368]](#footnote-368) Despite the extreme and authoritarian implications of this plan,[[369]](#footnote-369) it also highlights the considerable amount of emphasis that proponents of British democratic socialism place on electoral accountability.

### *The Liberal Strand*

The liberal strand of political constitutionalism is presented by the legal philosopher Jeremy Waldron. Although he has never used the term ‘political constitutionalism,’ nor engaged with other political constitutionalists, his work has had a remarkable influence in the development of the political model. Accordingly, Aileen Kavanagh describes Waldron as the high priest of the modern political constitutionalist school of thought.[[370]](#footnote-370) In *Law and Disagreement* and recently in *Political Political Theory,* Waldron presents a compelling defence of the political model from the perspective of liberal political theory. At a general level, liberalism is considered to be premised on an *individualistic, equalitarian, universalist and meliorist* understandingof social arrangements.[[371]](#footnote-371) Liberalism is individualistic due to its emphasis on the moral primacy of the individual over the collective. It is equalitarianin its belief that individuals should have equal moral status. Liberalism is universalistic in its belief that there is a moral unity of the human species and it melioristic in its belief that human progress will yield improvements in the social and political arrangements of society.[[372]](#footnote-372) On a closer reading, liberalism is characterised by its various nuances and tensions. Although this thesis does not examine these nuances and tensions, it does not downplay their existence. Instead, it focuses on Waldron’s own distinct conception of liberalism. Waldron describes his conception as just “one view of the cathedral,” as inevitably his perspective of liberalism shares some similarities and differences with other rival conceptions.[[373]](#footnote-373)

Waldron describes liberalism as a “conception of freedom and of respect for the capacities and the agency of individual men and women” that necessitates the need for social arrangements to “either be made acceptable or be capable of being made acceptable to every last individual.”[[374]](#footnote-374) The etymological connection between liberalism and ‘liberty’ reveals liberalism is about having faith in and respecting the individual’s capacity to engage in moral thought.[[375]](#footnote-375) Therefore, liberty is bound up with the notion of individual autonomy. Most liberal theorists understand liberty either in a negative sense - the freedom to “be left to do or be what he is able to do or be, without interference by other persons” - or in a positive sense – the freedom as self-mastery “to lead one prescribed form of life.”[[376]](#footnote-376) Importantly, Waldron rejects this dichotomy, instead viewing liberty as the individual’s capacity to engage in “the untrammelled exercise of powers of individual deliberation, choice and intentional initiation of action.”[[377]](#footnote-377) Accordingly, liberty is subjectively dependent on the individual’s own reasoning. As Waldron reasons, “our sense of what it is to have and exercise freedom is bound up with our conception of ourselves as persons and of our relation to value, other people, society, and the causal order of the world.”[[378]](#footnote-378)

Liberty has important connotations for the enforcement of social conduct by social arrangements. For Waldron, liberty is violated or attacked by a certain type of rule. *Imposed rules* are those which lack the consent of the individual, and in doing so fail to recognise “the capacity of human agents to determine for themselves how they will restrain their conduct.”[[379]](#footnote-379) In contrast, *consented rules* are restraints that the individual consents to. Importantly, consent can be actual or hypothetical in form.[[380]](#footnote-380) Unlike imposed rules, consented rules recognise the rights of individuals. Liberty also necessitates the need for social arrangements and rules to be justified to the individual living under them.[[381]](#footnote-381) As Waldron posits, “if life in society is practicable and desirable, then its principles must be amenable to explanation and understanding, and the rules and restraints that are necessary must be capable of being justified to the people who are to live under them.”[[382]](#footnote-382) Therefore, social arrangements become legitimised when morally autonomous individuals rationalise and consent to them. For Waldron, liberalism demands a society “chosen by the people living under it, something whose main features are as intelligible to them as the charter of a club of which they are founding members, designed by them in order to serve the purpose that bought them together in the first place.”[[383]](#footnote-383) These liberal notions of consent and justification animate Waldron’s commitment to the political model.

In *Law and Disagreement,* Waldron posits that when a community is subject to the circumstances of politics – any situation which requires morally autonomous individuals to engage in collective actions in order to reach collective goods - it will need a contestable and justifiable decision-making framework. The circumstances of politics are simply a product of each and every individual’s capacity to engage in moral reasoning. Therefore, the community’s decision-making framework must respect each and every individual’s different and competing forms of reasoning. Waldron insists this can be achieved through a process that allows each and every individual *the right to participate* in decisions affecting their community.[[384]](#footnote-384) Such a decision-making process should produce outcomes that are consentable and justifiable to the community. For Waldron, this can only be achieved through the ordinary political process. Significantly, within this conception of the ordinary democratic process, the legislature plays a central role. For Waldron, legislative decision-making provides a framework which

embodies a conviction that these issues of principle are ours to deal with, so that even if they must be dealt with by some institution which comprises fewer than all of us, it should nevertheless be an institution that is diverse and plural and which, through something like electoral accountability, embodies the spirit of self-government, a body in which we can discern the manifest footprints of our own original consent.[[385]](#footnote-385)

Many liberal theorists, including Friedrich Hayek, John Rawls and Ronald Dworkin, theorise that certain rights and freedoms that are essential for the preservation of individual liberty should be protected through constitutional entrenchment and judicial review.[[386]](#footnote-386) Waldron in contrast rejects this belief, arguing that entrenchment and strong-form judicial review undercut each and every individual’s right to participate.[[387]](#footnote-387)  Accordingly, entrenchment conflicts with liberalism’s commitment to respecting human agency. Waldron maintains entrenchment embodies a mistrustful attitude towards individual reasoning. Mistrust is “implicit in [the] view that any alternative conception might be concocted by elected legislators next year or in ten years’ time is so likely to be wrong-headed or ill-motivated that his own formulation must be elevated immediately beyond the reach of the ordinary legislative revision.”[[388]](#footnote-388) Furthermore, entrenchment creates the risk of imposed rules, biasing the reasoning of one group of individuals over another, and over time forcing the living to be subject to rules imposed by the dead.[[389]](#footnote-389) Similarly, the overriding or disabling effects of judicial review upon legislation fail to respect autonomy. As Waldron advances, respect for autonomy “is lost when an unelected and unaccountable individual or institution makes a binding decision” on the people by overruling their reasoning.[[390]](#footnote-390) Consequently, allowing judges to engage in political decision-making and to override the views of the legislature risks producing *imposed rules.* In such circumstances, Waldron concludes it will be difficult to explain to the morally autonomous individuals of a community why the judiciary should be allowed to make decisions which contradict the individual’s own reasoning.[[391]](#footnote-391)

For the liberal strand, the supremacy of the legislature symbolises the supremacy of each and every individual’s right to self-govern their community. As Waldron reasons, “it is precisely because I see each person as a potential moral agent, endowed with dignity and autonomy, that I am willing to entrust the people en-masse with the burdens of self-governance.”[[392]](#footnote-392) In *Law and Disagreement,* the right to participate in self-governance is understood as a means of expressing human dignity and autonomy. However, in *Law and Disagreement,* Waldron presents the legislature in an extremely vague way. Although Waldron praises the legislature for its size and diversity of opinion, his account never moves beyond vague details. His account lacks any serious consideration about the legislature’s design. For example, Waldron does not reflect on the most common features associated with modern legislative institutions, such as political parties, committees and bicameralism. Keith Whittington rightly criticises Waldron as unwilling to consider basic aspects of institutionalized politics and institutional design.[[393]](#footnote-393) As Whittington remarks, Waldron “often treats institutions as largely indistinguishable except for the number of individuals included within them, as if a legislature were simply a statistical sample of the general population rather than a distinct organization.”[[394]](#footnote-394) Nevertheless, in the more recent *Political Political Theory,* Waldron is more aware of the importance of legislative design. The central idea of Waldron’s *Political Political Theory* project is to analyse the ways in which political institutions such as the legislature can house, shape and channel the management of disagreement.[[395]](#footnote-395)

In *Political Political Theory,* Waldron makes an important claim regarding legislative design in relation to political constitutionalism. He contends that political constitutionalism’s case for legislative supremacy and against constitutional entrenchment and strong-form judicial review should be conditional upon four assumptions and “if any of the conditions fail, the argument may not hold.” [[396]](#footnote-396) The first assumption is that the democratic institutions are in good working order. The second assumption is similar, in that the judicial institutions must also be in good working order. The third assumption is that the political community is committed to the idea of individual and minority rights. Finally, Waldron assumes the community will disagree about what these rights require.[[397]](#footnote-397) For our purposes the first assumption is particularly significant because it explicitly acknowledges that legislative design is paramount to the central case for political constitutionalism. The political model requires not only universal adult suffrage in free and fair elections, but also a well-functioning legislature. Legislative institutions within a political constitution must be under constant review and be capable of reforming themselves.[[398]](#footnote-398) This begs the question, what is a well-functioning legislature according to Waldron?

In *Political Political Theory,* Waldron advances that a well-functioning legislature should be designed to adhere to seven core principles.[[399]](#footnote-399) First, the legislature should be recognised as “an institution publicly dedicated to making and changing the law.”[[400]](#footnote-400) This requires transparency in the decision-making process. Transparency matters for the community, because it ensures that the legislature must publicise “what is being done in their name and give them information regarding appropriate deployment of their political energies.”[[401]](#footnote-401) Transparency helps citizens understand where they should focus their efforts and their right to participate in the self-governance of the state. It incentivises democratic participation through the democratic process associated with the legislature.[[402]](#footnote-402) It also fosters respect for the principles of consent and justification in a tacit sense, as legislators seek to justify why said laws are made in the interests of those affected.[[403]](#footnote-403) Second, a *duty of care* must be institutionalised within the law-making process. A duty of care is necessary because law affects the conditions of liberty by imposing sanctions and demanding obedience from morally autonomous individuals.[[404]](#footnote-404) Therefore, legislative design should be concerned with preventing “reckless or hasty law-making.”[[405]](#footnote-405) We might infer that Waldron believes that legislative design ought to emphasise effectiveness over efficiency.[[406]](#footnote-406) Indeed, he suggests a duty of care can be achieved through slowing down and layering the decision-making process.[[407]](#footnote-407) Third, Waldron contends that the legislature should maximise the diversity of opinions during deliberations.[[408]](#footnote-408) Hence, it should provide sufficient opportunities for different groups and individuals to participate and deliberate, as far as practically possible.

Fourth, the legislature must respect disagreement, through institutionalising the concept of the loyal opposition.[[409]](#footnote-409) Given the circumstances of politics, it would be improper for the legislature’s design to suppress disagreement within its own structure, in the name of some artificial consensus.[[410]](#footnote-410) Instead, the legislature should encourage disagreement and competition. Additionally, the legislature will need to provide the incentives necessary for ensuring the losers in any given decision remain committed to the overall decision-making framework. Legislatures can do this by providing minority or opposition groups rights which allow them to continue to dissent.[[411]](#footnote-411) As Waldron argues, the goal should be to ensure “opposition is not construed as disloyal” by the winners of any decision.[[412]](#footnote-412) Waldron describes his fifth principle as “responsive deliberation” by legislative actors. As will be argued in subsequent chapters, Waldron is advocating that the legislature should incentivise values of deliberative democracy within its design. In particular, Waldron is keen to incentivise the deliberative value that participants must be willing to yield to superior arguments.[[413]](#footnote-413) Waldron’s concern is that the value of debate is ultimately limited if participants adopt an intentionally monolithic attitude towards their own preferences. Sixth, Waldron maintains that the legislature must be governed by a formal set of procedural rules.[[414]](#footnote-414) His final principle advocates that legislative design should promote and secure the norms of political equality and majority decision-making.[[415]](#footnote-415)

Waldron makes two additional and closely related claims with regards to legislative design. First, the design of the legislature ought to incentivise respect for the separation of powers. It would however be inaccurate to assume this must require some sort of personal separation or the implementation of checks and balances between the legislature, the judiciary and the executive branch. This is because Waldron’s conception of the separation of powers is associated with how the coercive power of the state is deployed against individuals. For Waldron, the point of the separation of powers is to secure the idea that institutions have their own distinct functions to perform within an articulated-form of governance.[[416]](#footnote-416) The separation of powers is interpreted as being intertwined with the rule of law principle that “no-man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner.”[[417]](#footnote-417) The ‘ordinary legal manner’ is understood as referring to the way in which the state deploys its powers, either through differentiated and articulated forms of governance. Undifferentiated governance occurs when the state fails to distinguish between the various forms of its own power in the deployment of coercive force.[[418]](#footnote-418) In contrast, articulated governance requires the deployment of coercive force to be channelled through various stages as part of “an orderly succession of phases.”[[419]](#footnote-419) Accordingly, the separation of powers demands that “the legislature, the judiciary and executive must each have its separate say before the state’s power impacts on the individual.”[[420]](#footnote-420)

At first glance, articulated governance appears to be more of an inter-institutional design issue; the constitution must ensure state power is deployed through a process of various constitutional institutions. Yet on a closer reading, this has important intra-institutional implications. This is because the integrity of each institutional role within the process must be maintained from the over-reach of other institutions. Waldron contends the legislature’s distinct role in this process is to deliberate and vote on the general rules of the community.[[421]](#footnote-421) Furthermore, legislation should be concerned with the general population, rather than specific individuals, which is usually associated with the executive’s role. In terms of institutional design, articulated governance requires the legislature’s role within the process to be reinforced. Traditionally, one method of ensuring a separation of powers is to prevent executive and judicial actors from being members of the legislature (and vice versa).[[422]](#footnote-422) Interestingly however, Waldron suggests his conception of the separation of powers does not require a presidential system. Rather it is compatible with a parliamentary system, so long as the members of the executive within the legislature have sufficient incentives to ensure they do not confuse their roles during the law-making process.[[423]](#footnote-423) Once again, Waldron emphasises that legislative design ought to promote legislative effectiveness over efficiency. Articulated governance does not require limited government *per-se* but rather demands an institutional design capable of slowing down the state’s ability to deploy its powers.[[424]](#footnote-424)

Second, Waldron advances bicameralism as a design feature capable of promoting both the principles discussed above and articulated governance. To begin with, Waldron contends that bicameralism institutionalises the ‘*Tristram Shandy Principle,*’ that any significant course of action must be debated twice, first *drunk* and then *sober*.[[425]](#footnote-425) Waldron hypothesises that drunk and sober deliberation have different benefits. Whereas drunk deliberation brings “a bit of vigor and spirit” to the decision-making process, sober deliberation ensures “a dimension of prudence and discretion.”[[426]](#footnote-426) Waldron maintains that we need both forms of deliberation in our decision-making process. Accordingly, bicameralism is considered the primary means of securing these forms of deliberations within the law-making process. Furthermore, Waldron argues that it is wrong to assume that the community can ever be perfectly represented by a single chamber and electoral process. A second chamber allows for an “additional layer of representation… scrutiny and accountability” within the legislature.[[427]](#footnote-427) Finally, bicameralism can be used to promote articulated governance by reducing the likelihood of executive dominance over the legislative process.[[428]](#footnote-428) In doing so, Waldron considers bicameralism to be a design feature capable of further slowing down the legislative process, allowing for greater legislative effectiveness.

Although *Political Political Theory* paints a clearer picture of what a well-functioning legislature looks like according to the liberal strand of political constitutionalism, there are still some problems. First, Waldron only provides the designer with a basic set of directions and hints. This is because Waldron fails to sufficiently explain how these principles can be achieved in practice. For example, how does one promote a duty of care or the need to compromise within the legislature? Furthermore, Waldron rarely reflects on whether his assumptions about the effects of bicameralism, deliberation and the loyal opposition are empirically supported. Second, Waldron’s refined account continues to neglect common features of legislative politics, such as committees, political parties and agenda setting rights. Third, it is never particularly clear if Waldron has a specific real-world legislature in mind as a desirable example of a well-functioning legislative institution.

Interestingly, one can also detect a subtle shift in how Waldron values democracy. Whereas in *Law and Disagreement,* democracy is seen as a means of promoting autonomy, in *Political Political Theory,* the democratic process is valued as a means for protecting individual autonomy from the state’s interference. This is reflected through the ways in which many of Waldron’s claims emphasise limiting the state’s power, through legislative means. Oddly, Waldron never explains why this change in perception has occurred. However, one potential answer may be found in Waldron’s 2008 Maxim Institute lecture *Parliamentary Recklessness,* which was published in between *Law and Disagreement* and *Political Political Theory.* [[429]](#footnote-429) In ‘*Parliamentary Recklessness’* Waldron evaluates the institutional design of the New Zealand Parliament. Significantly, Waldron concluded that in his view the New Zealand Parliament falls below his expectations of how a well-functioning legislature ought to operate. In particular, Waldron criticises the parliament for being dominated by the executive branch and for placing too great an emphasis on efficiency, resulting in reckless decision-making.[[430]](#footnote-430) Furthermore, Waldron laments the weak status of its parliamentary committees and the absence of a second chamber. As a result, Waldron appears to be implying the political model should not follow the institutional design of the New Zealand Parliament. Perhaps unsurprisingly, the claims made in *Political Political Theory* aim to remedy many of these deficiencies. To conclude, the liberal strand provides the legislative designer with some design objectives. Nevertheless, it does not provide much guidance on how these objectives can be incentivised through the institutional design of the legislature.

### *The Republican Strand*

The final strand of political constitutionalism considered here grounds the model within the norms of neo-republicanism. Both Richard Bellamy and Adam Tomkins advance that the republican norm of non-domination can only be achieved through the political model.[[431]](#footnote-431) Yet their beliefs appear to be an outlier within the broader republican literature, as many republican theorists argue against a constitutional order being organised around the supremacy of the legislature.[[432]](#footnote-432) Interestingly, Bellamy and Tomkins apply republicanism in different ways to justify the political model. These differences have important implications regarding how each author reflects on questions about legislative design. Before examining Bellamy and Tomkins’ accounts of political constitutionalism, we must explore the distinctive nature of the republican norm of *freedom as non-domination.*

Republicanism is often presented as an alternative to liberalism.[[433]](#footnote-433) Although both republicanism and liberalism emphasise the concept of *liberty*, republicanism presents its own distinct understanding of the concept.[[434]](#footnote-434) Republican theorists emphasise how non-domination differs from liberalism’s conception of liberty as the freedom from interference. [[435]](#footnote-435) For Republicanism, freedom requires the absence of domination rather than interference.[[436]](#footnote-436) Domination can occur in relationships if and only if one actor in the relationship has power over the other actors, in the sense that they have the capacity to interfere with another on an *arbitrary basis*.[[437]](#footnote-437)

Domination has three constituent parts. First, one actor in the relationship must have the actual capacity to interfere with another. As the prominent republican theorist Philip Pettit explains, the capacity to interfere refers to *any* *intentional act* which makes things worse for those being interfered with. [[438]](#footnote-438) Importantly, as Pettit highlights, although interference seeks to make things worse, it should not be confused with morality, as interference “need not always involve a wrongful act: coercion remains coercion, even if it is morally impeccable.”[[439]](#footnote-439) Moreover, there must be an actual, as opposed to virtual, capacity for interference. Thus, the dominating actor must be capable of exercising their ability to interfere.[[440]](#footnote-440) Second, the dominating actor must be capable of interfering on an *arbitrary basis*.[[441]](#footnote-441) This refers to the *arbitrium* circumstances where the dominating actor is freely able to choose when to, or when not to, interfere with another.[[442]](#footnote-442) In *arbitrium* circumstances, the dominating actor has no obligation to track the interests of those affected by their choice.[[443]](#footnote-443) In essence, they are free to interfere at their own pleasure. Thus, *arbitrium* describes the conditions in which the dominated actor has no control or say in what may or may not be done to them.[[444]](#footnote-444) The third element is that domination can vary in the scope of the choices it covers. A slave is likely to be dominated by their master in every field of choice. Yet domination can also occur in narrower circumstances. For example, a husband may dominate his wife within the walls of their home but not beyond it.[[445]](#footnote-445)

Consequently, freedom as non-domination has two significant implications. First, domination can be understood to occur in both a substantive and procedural sense. In the former, the arbitrary interference occurs but in the latter, it does not have to actually happen.[[446]](#footnote-446) Domination describes the capacity to interfere arbitrarily, even if the dominating actor never intends to or does not actually interferes with another.[[447]](#footnote-447) Thus domination exists where there is the mere “possibility of arbitrary interference, be that effectively realised or not.”[[448]](#footnote-448) In such circumstances, the dominated lives at the mercy of the dominator. Accordingly, republicans commonly use the idea of slavery as a prime example of domination. In the relationship between the master and his slave, the master is free to interfere with their slave “at will and with impunity.”[[449]](#footnote-449) Thus, where one is at the mercy of another, they are a slave.[[450]](#footnote-450) As Pettit reminds us, the relationship is still one of domination, even if the master is kind toward their slave, the slave lives in the knowledge their master could suddenly turn on them. [[451]](#footnote-451)

Second, unlike freedom from interference, freedom from domination means interference does not always equate to domination.[[452]](#footnote-452) Interference only aligns with domination when the action is arbitrary. Therefore, to achieve freedom as non-domination, one needs a form of security against the arbitrary interference of others. Importantly, interference is considered non-arbitrary if the power-holding actor is forced to “track the interests and ideas of the person suffering the interference.”[[453]](#footnote-453) Therefore, *arbitrium* circumstances can be mitigated through placing constraints on those capable of interfering. Pettit identifies two types of constraints for preventing the arbitrary exercise of power. The first type establishes preconditions on the exercise of power. These preconditions aim to encourage the power holder to consider the interests of the affected party and filter out unsuitable acts.[[454]](#footnote-454) The second type of constraint applies penalties on the power holder for committing certain acts of interference.[[455]](#footnote-455) In essence, the avoidance of domination requires the power-holder to be rendered accountable for their actions. A significant benefit of freedom being understood through the lens of non-domination is that, in the context of the modern state, it allows some forms of interference by the state to be considered legitimate. As a result, freedom as non-domination avoids the problems associated with the liberal conception of freedom as non-interference. Taken to its logical extremes, freedom from interference is impractical for modern governance, as any form of interference by the state, even if the state interferes to protect or promote certain public goods, is viewed as problematic. The republican notion of freedom as non-domination is valuable because it avoids this problem, by legitimising the exercise of state power to interfere within certain circumstances.[[456]](#footnote-456) Freedom as non-domination has been particularly appealing to political constitutionalists like Bellamy and Tomkins, as a means of justifying the political model. Therefore, a republican conception of political constitutionalism advances that the value of democracy is that it prevents domination.

For Bellamy, in the circumstances of politics, domination can only be avoided by a decision-making process capable of meeting two conditions. First, it must show and promote equal respect and concern towards the citizens of the state. Second, it cannot privilege certain individuals and their views as superior over others.[[457]](#footnote-457) Accordingly, Bellamy theorises that domination cannot be avoided by constitutional arrangements designed to depoliticise the decision-making process. In the circumstances of politics to demarcate ahead of time, certain rights or rules as beyond politics, or to insist that the rights and rules of the state be decided by non-political forums, produces domination.[[458]](#footnote-458) Therefore, constitutional entrenchment and judicial review increase the likelihood of the citizenry being dominated. In response, Bellamy posits that the constitution should be organised so that the citizens can self-govern their community. This requires a procedural form of public reasoning, which aims to show equal concern and respect towards all involved.[[459]](#footnote-459) For Bellamy, ensuring that political decision-makers ‘hear the other side’ is the key to ensuring this form of public reasoning.[[460]](#footnote-460) Bellamy maintains this can be achieved through establishing a balance of power between “rival aspirants” and incentivising these rivals to compete for the support of the citizens.[[461]](#footnote-461) Bellamy concludes that only the ordinary democratic process is capable of delivering this. Therefore, the constitution should be organised around the idea that the “democratic process is the constitution.”[[462]](#footnote-462)

The ordinary political process promotes non-domination in three ways. First, ordinary democratic decision making provides a collective method, premised on the notion of equal participation. This is achieved through providing each and every citizen one vote each, regardless of who they are or their views on a given matter.[[463]](#footnote-463) In doing so, the ordinary democratic process avoids domination by treating and respecting each and every citizen’s view with equal weight in the decision-making process.[[464]](#footnote-464) Second, the ordinary democratic process is premised on majority rule. Here Bellamy echoes Waldron’s defence of majority rule as a practical, statistical and neutral method of collective decision-making.[[465]](#footnote-465) Third, Bellamy highlights how the ordinary democratic process ensures an organic balance of power, in the sense it ‘institutionalises contestation’ between rival political parties.[[466]](#footnote-466) These parties play a pivotal role in Bellamy’s conception of the ordinary democratic process. Bellamy defends the role of parties through illuminating the ways in which parties are incentivised to track the views of citizens and hear the other side. Bellamy considers large mainstream parties as broad churches; coalitions of different minority groups working together to pursue broad policy objectives.[[467]](#footnote-467) Majority rule incentivises these parties to track the views of citizens and develop a sufficiently wide and viable coalition of voters.[[468]](#footnote-468) To build a successful winning majority, parties will need to accommodate a sufficient degree of compromise and tolerance of competing views within themselves.[[469]](#footnote-469) Since the attainment of power will require the need to appeal to the widest range of voters, rival parties will challenge each other and respond to each other’s claims, thus incentivising them to hear the other side’s views. Importantly, parties provide a link between the people and the exercise of state power.[[470]](#footnote-470) When one party (or a coalition of parties) wins a legislative majority and enacts legislation, said legislation should be understood as “a series of compromises brooked by a winning coalition of different minorities.”[[471]](#footnote-471) Bellamy maintains that through regular competition, those playing the political game, such as the politicians, are incentivised to maintain a stable set of rules.[[472]](#footnote-472)

Furthermore, through the continuous need to track public opinion, the ordinary political process can police itself. Elections encourage rival parties to scrutinise one another.[[473]](#footnote-473) When in power, the governing majority is accountable for its actions via the electoral process, as they are forced to face the possibility of being ousted and replaced by a rival at the next election.[[474]](#footnote-474) As Bellamy highlights, this method of accountability incentivises the need to hear the other side and compromise, since “to attain and stay in office, politicians will need to recruit and retain quite diverse support.”[[475]](#footnote-475) Taking these features together, Bellamy concludes that the ordinary democratic process, premised around the idea of competing rival parties, sufficiently provides a practical and non-dominating decision-making framework.

Remarkably, the legislature does not appear to be a prominent feature within Bellamy’s account. He largely interprets the ordinary democratic process as a never-ending and self-sustaining electoral cycle. Within this interpretation, the legislature is only afforded a small part to play. First, Bellamy contends the legislature should reflect and carry out the decisions made by the electorate at the previous election.[[476]](#footnote-476) Therefore, Bellamy infers that the electoral process serves to set the agenda, and that legislators should behave as delegates of the people. Second, although Bellamy briefly acknowledges that the legislature could play a role in fostering compromise and reducing disagreement, he does not explain how the legislature could do this in practice, nor how it could foster equal concern and respect for competing views.[[477]](#footnote-477) This might suggest Bellamy considers legislative design to be unimportant. However, there is reason to doubt this. Bellamy’s advocacy for a balance of power via partisan competition, rather than a separation of powers, suggests he does recognise the importance of institutional design. For Bellamy, the central problem with the separation of powers is that it cannot provide sufficient incentives necessary to prevent the arbitrary exercise of power. As Bellamy maintains, the separation of powers does not provide sufficient incentives for institutions to check on each other, since each institution’s dominant ideology might converge. Moreover, Bellamy insists it does not provide these institutions with any incentives to track the interests of the citizens.[[478]](#footnote-478) Therefore, the separation of powers may allow the institutions of the state to collectively, or in isolation, become a source of domination. Furthermore, Bellamy suggests that the separation of powers is likely to have a distorting or frustrating effect on the ordinary democratic process, as it allows institutions to shift responsibility or blame to other actors.[[479]](#footnote-479) Therefore, Bellamy posits that constitutional arrangements traditionally associated with promoting a separation of powers, such as presidential, bicameralism or federal arrangements, undermine the balance of power. [[480]](#footnote-480) He concludes that a parliamentary legislature must institutionalise the need to hear the other side, through allowing parties to compete with one another within a specific location. [[481]](#footnote-481) In this sense, Bellamy is clearly aware that institutional design shapes the exercise of political power. However, he resists engaging with further questions of legislative design. As a result, like Waldron, Bellamy presents the legislature in an extremely vague way.

Tomkins has also used republicanism, albeit differently from Bellamy, to justify the political model. Most notably, Tomkins’ account presents a republican reading and defence of the UK’s constitution. Although Tomkins accepts, like Griffith, that the UK’s constitution is predominantly political, he is deeply critical of Griffith’s anti-theoretical approach. As he laments, “Griffith’s defence of the political constitution was entirely descriptive,” failing to defend its normative value.[[482]](#footnote-482) For Tomkins, political accountability should be recognised as the normative foundation of the UK’s constitution, expressed through the convention of ministerial responsibility. The central appeal of this convention for Tomkins is that it relies on a democratic and effective political form of accountability.[[483]](#footnote-483) Moreover, Tomkins places considerable emphasis on Griffith’s claim that political decision-making should be taken by politically accountable actors, rather than judges.[[484]](#footnote-484) He caricatures legal constitutionalism as an attempt to devalue political accountability and replace it with less effective legal methods.[[485]](#footnote-485) For these reasons, Tomkins sought to deploy republicanism as a means of highlighting the value of political accountability. On this basis, political accountability is the primary means by which domination is avoided. Tomkins maintains “the centrepiece of the republican constitutional structure is accountability: those in positions of political power must be accountable to those over (and in whose name) such power is exercised.”[[486]](#footnote-486) By rendering the government contestable via political forms of accountability, the government is incentivised to track the interests of those who would be affected by the exercise of the state’s power.[[487]](#footnote-487) On this interpretation, domination is avoided by ensuring the government is, on a daily basis, forced to account for its actions to Parliament, as a means of retaining Parliament’s support.[[488]](#footnote-488) Just as the Government is accountable to Parliament, Parliamentarians are in turn accountable to the electorate.[[489]](#footnote-489)

The legislature plays a significant role within Tomkins’ conception of the political model, as it is the central means of holding the executive to account. Tomkins has even gone as far as advancing the claim that we should abandon viewing the legislature as a law-making body; instead, we should see the legislature as a scrutineer of government.[[490]](#footnote-490) Accordingly, the legislature should be understood as having a constitutional duty to scrutinise and oversee the executive’s behaviour. Unfortunately, the biggest problem in Tomkins’ republican reading of the UK constitution is his assessment of the Westminster Parliament. On the one hand, Tomkins often speaks approvingly of the Westminster Parliament for successfully institutionalising political accountability to a large extent.[[491]](#footnote-491) Similarly to Bellamy, Tomkins also favours parliamentary systems, as he claims parliamentary legislative institutions are superior at holding the executive to account than their presidential counterparts.[[492]](#footnote-492) In particular, Tomkins focuses on Parliament’s power to withdraw support from the executive at any given moment. Tomkins rightly notes that although this power is rarely exercised, it nevertheless has a subtle anticipatory effect on the behaviour of government ministers.[[493]](#footnote-493) Furthermore, Tomkins has provided a welcome re-assessment of Parliament’s performance during the Major and Blair governments, rebutting the crude caricature of Parliament as subservient to the whims of the executive.[[494]](#footnote-494) On the other hand, Tomkins often appears disillusioned with the Westminster Parliament. In particular, partisan politics are a source of grievance.[[495]](#footnote-495) Whereas parties are the main vehicle for promoting accountability within Bellamy’s account and the democratic socialist strand,[[496]](#footnote-496) Tomkins contends that parties dilute Parliament’s ability to hold the executive to account and protect the interests of the citizenry.[[497]](#footnote-497) He complains that party politics and party whips incentivise parliamentarians to engage in partisan point scoring. Therefore, Tomkins worries that when voting on government proposals, parliamentarians prioritise the interests of their party over the common good. He maintains, “if the government can control the commons, then clearly the ability of the commons to freely and fully scrutinise the government and to hold it account is in danger of being compromised.”[[498]](#footnote-498) Instead, he asserts, “there should be no institutional means – save for seeking to justify the merits of their policies in open parliamentary debate – by which the government is able to secure parliamentary support.”[[499]](#footnote-499)

On this basis, it is unsurprising that Tomkins approves of legislative arrangements that seek to institutionalise a less partisan environment. In particular, Tomkins flags committees and bicameralism as desirable examples of this. For Tomkins, committees provide a valuable “forum in which parliamentarians feel free and are able to co-operate across the party divide, rather than routinely and unthinkingly to divide along party lines.”[[500]](#footnote-500) Similarly, he suggests, if a second chamber is elected or at least indirectly elected, it could also foster a desirable “deliberative and contestatory democracy” within the legislature.[[501]](#footnote-501) Ultimately, there is clearly a major paradox in Tomkins’ analysis of the Westminster Parliament, in that his desire for a less partisan legislature directly contradicts the style of politics the Westminster Parliament purposively institutionalises.[[502]](#footnote-502) Despite Tomkins’ approval of it, the Westminster Parliament logically cannot be considered his ideal legislative design.

### *Other Strands?*

It is reasonable to consider whether there are any other strands of political constitutionalist thought within the existing literature. First, should the ‘reflective wave’ of political constitutionalism be considered a strand? As was discussed in chapter one, the reflective wave is considered the most recent phase of research into political constitutionalism and is concerned with analysing the political model’s internal tensions, implications, strengths and weaknesses, as well as developing new ideas.[[503]](#footnote-503) However, this thesis contends the reflective wave cannot be considered as a strand of political constitutionalist thought. Marco Goldoni and Chris McCorkindale describe the reflective wave as a nebula, rather than a constellation.[[504]](#footnote-504) Whereas a constellation is a group of stars forming a recognisable pattern or shape, a nebula is a cloud of gas and dust in space; inherently the nebula’s cloud is less shapely and often blurred. Goldoni and McCorkindale consider the third wave as a nebula “which can be identified, despite its uncertain and blurred boundaries, by observing certain traits common to the debate.”[[505]](#footnote-505) The reflective wave explores a broad range of questions regarding the emergence, development and preservation of political constitution norms, both within the domestic and international sphere. One may say the reflective wave shares the same starting point – the ideas expressed within the first and second wave of political constitutionalism – but it expands outwards in multiple directions by critiquing, re-appraising, refining and applying political constitutionalist ideas.[[506]](#footnote-506) Consequently, these different contributions do not coalesce around the same conclusions as the each of the strands do. The reflective wave is not a strand because its outputs are not unified.

Second, does the political model appeal to other political theories, such as conservativism? Both Ewing and Loughlin have observed that as the left has lost interest in the political model, the right has become more interested in it.[[507]](#footnote-507) In response, Loughlin lambasts some political constitutionalists for attempting to appropriate the political model as a means for the right to re-instate their conservative vision of the constitution. Loughlin argues that “having lost the support of the judiciary, now that the traditional guardians of conservative normativist values have been won over to liberal normativism, conservative normativists, assuming the mantle of political constitutionalists, now seek to bolster the authority of Parliament.”[[508]](#footnote-508) Yet as Ewing rightly concedes, the left has never had an exclusive claim on the political model.[[509]](#footnote-509) The central case of political constitutionalism accommodates various political ideologies. Inevitably, the notion of a constitutional order that allows for the relatively unimpeded delivery of various ideological and democratic supported policies is, for better or worse, bound to appeal to many different and competing ideologies. While the central case of political constitutionalism is ideologically agnostic, the different strands of political constitutionalism are certainly not.

The political model is particularly appealing to modern conservatives who adopt a rosy interpretation of the Thatcher Government. As Aileen Kavanagh highlights, “the Thatcher era showed that strong Executive government under a political constitution could favour the Right as well as the Left. Although it might lead to socially progressive policies on a good day, it could also be used to strengthen the power of already powerful elites, enabling them to evade proper restraints on their power.”[[510]](#footnote-510) Accordingly, modern conservatives believe one of the key lessons of the 1980’s is that a “Thatcherite exertion of sheer will power is sufficient to implement radical reforms.”[[511]](#footnote-511) In this sense, modern conservatives mirror the left’s optimistic belief that securing 40 percent of the vote would allow them to radically transform (or perhaps more aptly reduce) the state.[[512]](#footnote-512)

A more detailed examination of the political model’s compatibility with conservativism is found in the works of Graham Gee. In an early article, Gee draws out some intellectual similarities between Griffith’s and the conservative philosopher Michael Oakeshott’s claims about politics.[[513]](#footnote-513) More recently, Gee has advanced that political constitutionalism is capable of straddling multiple ideological traditions and was historically dependent upon a broad-based consensus between both conservativism and democratic socialism.[[514]](#footnote-514) For Gee, the conservative interpretation of the political model broadly aligns with the central case for political constitutionalism but is justified through conservative values, such as intellectual imperfection, scepticism, traditionalism and organicism.[[515]](#footnote-515) Though as Gee concedes, the modern right’s open embrace of political constitutionalism is in part a reaction to two changes in the constitution. First, it is a reaction to the breakdown of a cross-party ideological consensus regarding the constitution. Second, it is also a reaction to a rise of judicial power, undermining a conservative vision regarding the appropriate balance between judicial and political authority within the constitution.[[516]](#footnote-516) The right-leaning *Judicial Power Project* (of which Gee is a prominent member) functions as an intellectual vehicle for arming members of the Conservative Government and Party with critiques of judicial judgments that echo certain aspects of political constitutionalism.[[517]](#footnote-517) Nevertheless, currently the conservative strand of political constitutionalism is at an embryonic stage of development, and therefore will not be considered within the scope of this thesis.

## *Political Constitutionalism’s Two Approaches to Legislative Design*

Legislative institutions are at the heart of the political model. They are pivotal in three senses. First, legislative institutions are considered the only institution capable of actualising political constitutionalism’s decision-making framework. Second, the legislature is empowered to remake both its external constitutional surroundings and internal structures through its power to make and unmake any laws. In essence, it is the institutional gateway through which constitutional change occurs. Third, in the absence of external constitutional constraints, the legislature must organise and self-regulate political action in the periods between elections. For these reasons, we can now see why political constitutionalism has sought to defend and articulate a positive and accurate account about the constitutional significance of legislative institutions. Yet, political constitutionalism is simultaneously vulnerable to being accused of presenting a reductive account of legislative institutions. As the central case of political constitutionalism demonstrated, the model is prone to presenting legislative institutions in a simplistic and imprecise manner. On this understanding, designing a well-functioning legislature is not a particularly demanding task. The central case suggests political constitutionalism naïvely views legislative design as nothing more than a simple exercise of ensuring there is a common meeting site for the elected representatives to meet, debate and vote on issues regarding the management of disagreement. Unfortunately, the peripheral strands do not move us much further beyond a simplistic account of legislatures. Each of the strands, albeit to various degrees, failed to seriously reflect upon issues of legislative design. This begs the question of why political constitutionalism has only presented a simplistic account of legislative institutions. This final section argues the answer to this lies with how the different strands of political constitutionalism have or perhaps more precisely have not engaged with the question of legislative design. It is possible to detect two approaches to envisaging the legislature: a *minimalist* andan *exceptionalist approach.* Regrettably, both these approaches are flawed in that they demonstrate and reinforce at best an apathetic, and at worst an ignorant, attitude towards legislature design. Consequently, they reveal that the existing political constitutionalist literature is insufficiently institutional in its content.

The first trend is the minimalist approach, which is intentionally apathetic towards questions of legislative design. This approach takes the view that since the circumstances of politics can pervade all aspects of the constitution, political constitutionalism should prescribe “no more than the bare minimal conditions for political equality and accountability and non-domination.”[[518]](#footnote-518) From this perspective, if the political model was over prescriptive it would cease to respect the circumstances of politics, as anything it prescribes could potentially be disagreed with by the people. However, this does not necessarily mean legislative design should be a no-go area for political constitutionalism. As Graham Gee and Grégoire Webber stress, the minimalist approach still requires that “certain things, albeit minimal should happen.”[[519]](#footnote-519) First, it requires a procedural approach to constitutional design, leaving the substantive ends of the constitution open to the people to determine.[[520]](#footnote-520) These ‘minimal things’ obviously must include establishing a basic decision-making framework capable of actualising political equality, majority rule and contestability. In practice, this still requires some basic level of electoral and legislative design. Second, electoral system and legislative institutions must be left open to being reformed in the future.[[521]](#footnote-521) On this basis, to adopt an apathetic attitude to legislative design, prescribing only an intentionally vague and highly abstract blueprint of a legislature is actually desirable.[[522]](#footnote-522) This minimalist approach is particularly noticeable in Bellamy’s conception of the republican strand and Waldron’s conception of the liberal strand.

The problem with the minimalist approach is that it downplays the complexity of legislative institutions, which in turn distorts the amount of prescription needed. It is unclear from either Bellamy’s or Waldron’s account how minimal our prescriptions need to be. Indeed, both Bellamy and Waldron appear to disagree on this question. As noted above, in *Political Political Theory*, Waldron’s minimal prescriptions became considerably more demanding than those he had offered previously and were considerably more prescriptive than those suggested by Bellamy. Logically, we must prescribe the *essential* minimal features of legislative design necessary for enabling the legislative debate, voting and the production of authority statutes. But what is essential depends on how we understand the relationship between political actors and political institutions.

From the behaviouralist perspective, political outcomes are determined by political inputs, and thus by the personal preferences of the political actors engaged in the decision-making process.[[523]](#footnote-523) These preferences are what matters, and they are exogenous of the political process.[[524]](#footnote-524) On this understanding of politics, the design of political institutions such as legislatures, are of minor importance within the process, in that they are assumed to have little to no influence on political outcomes. For the behaviouralist, the legislature is simply a black box, the place where inputs are magically converted into outputs.[[525]](#footnote-525) On this interpretation, there is no need for our prescriptions to be too demanding. We simply need to establish a formal site (the black box) that brings together political actors and thus whatever we can cobble together should be sufficient.[[526]](#footnote-526)

Alternatively, the relationship between political actors and political institutions can be viewed from the institutionalist perspective. Whereas the behaviourists view institutions as having no significant impact on political behaviour, institutionalists reject this understanding of politics.[[527]](#footnote-527) Instead, they view an institution as “a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances.”[[528]](#footnote-528) Institutionalism is premised on two assumptions. First, human behaviour is driven by internalized prescriptions about what actions are considered socially acceptable in a given situation; this is what leading institutionalists James G. March and Johan P Olsen label ‘the logic of appropriateness.’[[529]](#footnote-529) Second, political institutions provide political actors with a collection of embedded rules, practices, narratives, roles and resources that define what is appropriate behaviour for certain roles and in certain situations.[[530]](#footnote-530) Taken together, institutions organise political life by shaping and channelling the actions and behaviour of political actors. Institutionalism contends that political actors engage in internal calculations about what actions are required of them, how their behaviour conforms with rules, and what are the foreseeable consequences of their actions.[[531]](#footnote-531) As a result, institutions, such as legislatures, are really a partly autonomous force within the political process because they shape and channel political action. This does not mean the institution completely overrides or replaces the individual’s ability to determine their own behaviour. Institutions ensure individuals are free to make choices that remain within the parameters of the institutional values.[[532]](#footnote-532) Moreover, political actors are still free to break the rules, if they willing to accept the consequences of their actions.[[533]](#footnote-533) Through establishing these rules, practices, narratives, roles and resources, institutions serve to simplify and organise political life.[[534]](#footnote-534) These rules, practices and narratives can be both procedural and substantive in nature. On this understanding, legislative institutions organise political life in ways that enable complex and competing political inputs to be changed into the political outputs necessary for the management of disagreement.

In adopting an agnostic attitude towards legislative design, the minimalist approach risks undermining its own defence of the legislature by unintentionally characterising the legislature as a magic box. Avoiding questions of legislative design results in an impoverished account of how legislative institutions organise political life. A more institutionally sensitive attitude offers a means by which political constitutionalism can present a more fruitful and realistic understanding of legislatures. However, there is an important caveat here, in that institutionalism requires accepting the fact that prescribing even the bare minimum conditions will ultimately require prescribing a significant amount of detail regarding how a legislative institution should be designed and reformed. It requires political constitutionalism to engage in a demanding exercise of reflecting on and identifying the procedural rules, practices, narrative, and resources necessary for organisation of political life and management of disagreement. This involves confronting trade-offs and weighing up competing design options. The task of the legislative designer is to institutionalise rules, practices, narratives, roles and resources through the institution’s design. This is of course an important task for any constitutional drafter, but it is even more critical for those working within the context of a political constitution. This is because in rejecting traditional external checks, the political model pins its hopes upon the idea of a self-regulating legislature. A political constitution is more heavily reliant upon institutional rules, practices, narratives and resources than other constitutional models. Therefore, this is an unavoidable compromise for political constitutionalism. It is unsurprising that Waldron moved towards demanding prescriptions. This reflects a realisation that the secret ingredients of a well-functioning legislature are far more onerous than his initial account had implied. A well-functioning legislature is not a given, and as we shall see in subsequent chapters, legislative institutions vary in their design.

If the minimalist approach is flawed because it prescribes too little, the *exceptionalist* approach is flawed because it prescribes too much, without sufficiently justifying its design choices. This is because the *exceptionalist* approach advances that the UK’s Westminster Parliament represents the most normatively desirable design. This approach is seen in the democratic socialist strand and in Tomkins’ republican account. The *exceptionalist* approach does not share the minimalist approach’s concerns about prescribing the bare minimum, as it is clearly comfortable prescribing that legislative design should aim to mimic the design of the Westminster Parliament. This approach avoids the weaknesses of the minimalist approach by accepting that detailed design prescriptions will be necessary. This implies a recognition that legislative design matters. Nevertheless, this approach suffers from a different set of problems. The most obvious pitfall of this approach is that it suffers from an excessive tendency to narrowly identify the political model with British parliamentary democracy.[[535]](#footnote-535) As Paul Scott contends, political constitutionalists have failed to consider “those instantiations of political constitutionalism which are common to all democratic constitutions or are entirely alien to the British system.”[[536]](#footnote-536) Because of this tendency, the *exceptionalist* approach adopts a distinctively un-comparative and ahistorical attitude towards questions of legislative design. By narrowly conflating the political model with the British political system, the *exceptionalist* approach struggles to justify why the Westminster Parliament should serve as the design template for how a legislative institution within a political constitution. It is un-comparative in that it fails to acknowledge or explore potential alternative ways for designing a legislature. It does not explore whether these alternatives might provide a more desirable method of promoting political constitutionalist norms, nor does it sufficiently justify why the institutional rules, practices, narratives and resources that are institutionalised within the Westminster Parliamentary are desirable. It is also ahistorical, in that it fails to recognise that the design of the Westminster Parliament is a product of political actors, explicitly or implicitly, responding to difficult and unavoidable design choices. Because it favours a pre-existing legislative set-up, there is no appreciation or consideration given to the craftsmanship involved in the creation and reform of the Westminster Parliament. The *exceptionalist* approach may be correct in its view that the Westminster Parliament offers the most desirable design template for a legislature within a political constitution, but this needs to be justified. To make this case, one would need to analyse the design choices and trade-offs required to institutionalise a legislature akin to the Westminster Parliament, and justify why these design choices were more normatively desirable then the other potential options.

## *Conclusion*

To conclude, this chapter has presented a critical literature review on political constitutionalism to identify the institutional content of the political model. The central case for political constitutionalism contends that in the circumstances of politics, the political community will need to establish a procedural egalitarian decision-making framework. This decision-making framework needs to be designed around the norms of political equality, majority rule and the principle of contestability. Political Constitutionalism advances that the ordinary democratic process should be the constitution, and the legislature is an indispensable feature of the ordinary democratic process. Accordingly, legislative institutions are the institutional core of the political model. This chapter also identified that there are various strands of political constitutionalism within the existing literature – democratic socialism, liberal and republican – with each strand grounded within different understandings of democracy, and each strand maintaining that legislature is the institutional core of a political constitution, albeit for different reasons.

Yet, as this chapter has also revealed, despite the model’s positive focus on the legislatures, it can still be criticised for presenting a reductive and underdeveloped understanding of the legislature. By adopting either a *minimalist* or *exceptionalist* approach towards the question regarding what a normatively desirable legislature is, political constitutionalists have resisted reflecting on questions of legislative design. As a result, the existing political constitutionalist literature tends to understand legislatures as largely interchangeable in their institution design. If the value of the political model comes from its distinctive, positive and illuminating focus on the legislature, then its value has yet to be fully realised. The existing literature has failed to sufficiently recognise how for better or worse, legislative institutions organise political life, and their design matters because it determines how they organise political life. Legislative institutions organise political life through shaping and channelling political action and political behaviour.

To rectify this, we must analyse how political constitutionalism can respond to questions of legislative design. We can hypothesise that because the strands of political constitutionalist through articulate different understandings about democracy and legislatures, they should present different responses to our central research question of how legislative institutions should be designed according to political constitutionalism. Accordingly, this hypothesis is tested across the next four chapters.

# III

# *The Role of the Legislature according to Political Constitutionalism*

If the potential value of political constitutionalism comes from its positive and illuminating attitude towards legislative institutions, then this potential has been suppressed because its proponents have insufficiently reflected on how legislative design affects the management of disagreement. To remedy this deficiency, political constitutionalism must become more institutional. This requires analysing how political constitutionalism can respond and be applied to questions of legislative design. As explained in chapter one, this will be achieved by applying Giovanni Sartori’s method of constitutional engineering to questions of legislative design.[[537]](#footnote-537) Constitutional engineering views institutions as incentive-based structures capable of shaping and channelling political life in ways that produce specifically desired results when appropriately designed.[[538]](#footnote-538) On this basis, designing a legislature requires identification of the different design choices or options available, before proceeding to critically analyse which of these design choices will be best suited for bringing about one’s desired goal or set of outcomes.[[539]](#footnote-539) Accordingly, to apply political constitutionalism to questions of legislative design, the designer must begin by identifying their end goal; *the legislature’s role within political process*. At first glance, answering this question may appear to be straightforward. Yet as this chapter demonstrates, legislative institutions can be designed to perform different roles within political life. The designer first must determine what the legislature’s prescribed role should be, before working out how to design the institution to perform this prescribed role. Therefore, this chapter asks, *what should the legislature’s role be within the ordinary democratic process according to political constitutionalism?*

However, one might reasonably object that given what some might regard as political constitutionalism’s procedural focus, it would be inappropriate for the model to prescribe a goal or outcome.[[540]](#footnote-540) Indeed, as was noted in the previous chapter, this kind of logic underpinned why some political constitutionalists have resisted considering questions of legislative design. However, political constitutionalism is not purely procedural, in that it does actually prescribe that some minimal things are required. It prescribes that we must develop a well-functioning political system, one that is capable of respecting and promoting political equality, majority rule and contestability through its procedures.[[541]](#footnote-541) Political constitutionalism simply recognises that in the circumstances of politics, it is inappropriate to prescribe the substantive ends of politics (e.g. specific policies) and argues that these substantive ends should be not beyond political contestation. It accepts that a certain degree of procedural-based prescriptions will be necessary for the management of disagreement. In the context of this thesis, institutional design goals should not be equated with claims about the predetermined ends of politics. Rather, they should be understood as prescriptions regarding the necessary procedures for managing disagreement via the institutional organisation of political life. The design goal refers to the desired role of the legislature within the ordinary democratic process that one can logically deduce from the existing literature on political constitutionalism.

The structure of this chapter is as follows. Section one posits that legislatures perform multiple functions, often simultaneously, within the ordinary democratic process. Beyond their well-known law-making function, they also function as a linkage device between the citizens and the state, as a legitimiser of state power, as an enabler or constraint upon the executive, and as an environment for political training and development*.* Section two contends that although most legislatures within democratic societies preform these core functions, the way these are performed varies from state to state, as legislatures are institutionally different from one another in their design. Section two draws upon comparative legislative studies, in particular the influential work of Nelson Polsby, to explore how most legislatures perform either a ‘transformative’ or ‘arena’ type role within their polity.[[542]](#footnote-542) Polsby observed that transformative legislatures reshaped and transformed political inputs into law. In contrast, arena legislatures performed a different role within the ordinary politics, as they lacked the ability to re-shape political inputs; instead their role was to provide a formal venue for shaping public debate. Importantly, designing a legislature to perform either a transformative or arena role will result in trade-offs in how the legislature shapes and channels political action. These trade-offs relate to how their core functions are performed in relation to the management of political disagreement. Finally, section three reconceptualises political constitutionalism’s understanding of the ordinary democratic process from a minimalist to deliberative reading of democracy. This is necessary to determine and demonstrate how the different strands of political constitutionalism embrace more or less different understandings about what the legislature’s role should be within the ordinary democratic process. Accordingly, section three argues that whereas the republican and democratic socialist strand favour an arena/debating role, the liberal strands favours a transformative/working role.

## *Central Functions of Legislatures*

Before determining what the legislature’s role should be, it is worthwhile to reflect on the functions legislatures perform. Sometimes there can be a tendency, intentional or otherwise, to understand legislatures as performing one core function. For example, Montesquieu’s separation of powers theory posited that the power of the state should be horizontally divided and assigned to separate institutions - the legislature, the executive and judiciary – based upon their institutional competence.[[543]](#footnote-543) Under this theory, the legislature was assigned the function of making laws. This idea continues to resonate today. In their recent book defending legislatures, Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Francisco J. Urbina and Bradley W. Miller all advance that the legislature’s function is to “act deliberately in response to reasons to change the law.”[[544]](#footnote-544) Indeed, as Richard Ekins remarked in an earlier book, “the reason to create and maintain a legislature is so that some agent shall have the capacity to choose how to change the law.”[[545]](#footnote-545) Similarly, within British public law,[[546]](#footnote-546) various scholars such as J.A.G. Griffith, Dawn Oliver, Adam Tomkins and Stephen Laws insist that the legislature’s function is to monitor the actions of the Government.[[547]](#footnote-547) Unfortunately, there is a risk that such claims could be read as misconstruing what legislatures do, in that they imply a mono-functionalist approach to understanding legislatures. This is problematic because it can result in unrealistic expectations about what legislatures do and fails to capture the reality that real world legislatures are multi-function institutions, capable of performing multiple functions, often simultaneously.

There is also a risk that a mono-functionalist approach sets legislatures up to automatically fall short of our normative expectations. For example, Richard Ekins has defended the legislature through presenting an interesting argument that the authority of legislative intentions should be derived from legislators responding to good reasons for changing the law.[[548]](#footnote-548) However, he also suggests legislators may fail to reason, if they take into account other inappropriate considerations when voting to change the law, such as taking into account their own self-interests.[[549]](#footnote-549) The problem with this claim is that since legislatures will often perform multiple functions simultaneously alongside their law-making function, it is highly likely that what Ekins considers improper considerations will inevitably influence reasoning. For example, a traditional hallmark of a parliamentary legislature is that any vote on whether to change the law can simultaneously become a vote of confidence on the current government.[[550]](#footnote-550) It is therefore plausible to imagine in such circumstances that the self-interests both of members of the governing majority and of the opposition influence their considerations about voting to change the law. Consequently, Ekins’ claim presents an unrealistic understanding. Similarly, Tomkins claims holding the executive to account should be the legislature’s function.[[551]](#footnote-551) However, this understanding struggles to reconcile those common situations in which a majority of legislators want to enable the executive by voting for an executive bill because they agree with the executive.[[552]](#footnote-552) These issues serve to highlight the weaknesses of a mono-functionalist approach to understanding legislatures. Mono-functionalism creates false expectations about what legislatures should do, which feeds the *legislative* *decline thesis* discussed in chapter one.[[553]](#footnote-553) The decline thesis reduces our confidence in the legislature, through establishing false or impossible expectations about what legislatures do. Mono-functionalism’s implicit claim that legislatures should only perform one function fails to represent reality and only helps undermine our confidence in legislative institutions. Instead, we must accept that legislatures are institutions capable of performing numerous functions, often simultaneously. We must accept that those functions will sometimes be in harmony, and sometimes in tension with one-another.

Moving beyond a mono-functionalism understanding requires constructing a central case regarding what legislatures do. As discussed in chapter two, the central case method gives explanatory priority to those functions which are universally manifested to a high degree within the context of democratic states.[[554]](#footnote-554) Of course, it is inevitable that many legislatures will perform some culturally or historically specific functions within their states. However, these can be considered marginal instances, which under the central case method are not given explanatory priority.[[555]](#footnote-555) By reviewing both classical constitutional theory and modern legislative studies, one can identify and reflect upon both normative and descriptive accounts of the functions which legislatures perform within the democratic process. Using both is important, because constitutional theory and legislative studies are connected. The normative accounts of classical constitutional theory not only influenced the education of political actors but also established the foundational paradigms for the initial development of legislative studies.[[556]](#footnote-556) In part, legislative studies are concerned with determining whether classical constitutional theory accounts are empirically correct, as well as researching other important questions about whether legislatures perform additional functions. Indeed, through empirical and comparative research, legislative studies have identified new and more modern legislative functions. The functions presented here are *law-making, linkage, enabling and constraining the executive, legitimation* and *political training*. Importantly, both the *law-making* and *linkage* functions refer to a subset of closely related functions. The *law-making* function consists of policymaking and or the authorisation of policy into law. The *linkage* function refers to a sub-set of closely related and interlinked functions: *representation*, *communication* and *accountability*. These functions are predominantly preformed through the medium of repeating cycles of debating and voting. These functions should not be alien to political constitutionalist or public lawyers. As highlighted in chapter one, conceptual models can be valuable for simply rendering explicit or clarifying what we already know.[[557]](#footnote-557) Therefore, the intention here is simply to remind us about the functions that legislatures perform, include those we may have forgotten or not fully appreciated thus far.

### *The Law-Making Function*

The first and perhaps most obvious function that legislatures perform is making law. This function is reflected in the etymological origins behind the word ‘legislator’. In Latin, *legis* is noun for *lex* meaning law and *lator* refers to the noun *lātor,* meaning proposer.[[558]](#footnote-558) Broadly interpreted, the process of making law contains many different aspects, such as creating policy, amending bills, repealing laws and authorising new laws. Within traditional constitutional theory, there is a general acceptance that the power to make and unmake law should be primarily vested in the legislature, as it is institutionally equipped to represent the political community. The people, through their constituent power, delegate the governing of their community to the state through the legislature.[[559]](#footnote-559) Indeed, under the classic notion of the separation of powers, the legislature is considered the only institution suited to making law.[[560]](#footnote-560) Consequently, constitutional theory has traditionally viewed legislatures as indispensable institutions within the state for the management of disagreement. [[561]](#footnote-561) Nevertheless, law-making is rarely exclusively performed by the legislature. In some constitutional orders, the executive may engage in law making via executive orders.[[562]](#footnote-562) Similarly, the courts may create laws through the development of legal principles and norms as part of their legal judgments. This begs the question, what is distinctive about the ways in which legislative institutions engage in law making?[[563]](#footnote-563)

This requires reflection on how legislative institutions shape and channel political action through the legislative process. The legislative process describes a series of events between the conceiving of a policy to its final enactment.[[564]](#footnote-564) As we shall see, depending on its design, the legislature may engage in some or all aspects of the legislative process. For example, some legislatures are designed to play an active role within the legislative process, creating and substantially reshaping policies into law. However, some legislatures perform a more passive role, by simply authorising policies produced by others into law. Whether legislative institutions are well-suited to engage in the technical process of making law within the modern state is debatable. For example, John Stuart Mill suggested that legislatures were unfit to engage in the policy-making aspects of the legislative process. Mill felt policymaking was a function that should be performed by another institution - what he calls a ‘commission of legislation’ - that would draft bills for the legislature to then authorise into law.[[565]](#footnote-565) Modern legislative studies suggests that although some legislatures actively engage in the policy-making aspects of the legislative process, others perform a more passive or reactive role by authorising bills that are proposed by the executive, akin to Mill’s suggestion.[[566]](#footnote-566) As Jean Blondel explains, once the content of laws shifted away from the production of general rules to more complex rules designed to regulate social and economic issues, many legislatures became reactive to the wishes of the executive branch, preferring to authorise proposals developed by the executive.[[567]](#footnote-567) Although law-making is without a doubt their *raison d'être* function, it is not the only function that legislatures perform within their political community.

### *The Linkage Function*

Legislatures also function as an important link between the people and the state. Linkage refers to how legislative institutions perform the three closely intertwined sub-functions of *representation*, *accountability* and *communication*.

#### Representation

Legislatures were originally established as an institutional forum for representing the views of important social groups within the state. During the middle ages, monarchs established legislatures as an institution for fostering unity and the perpetuation of the state.[[568]](#footnote-568) Through establishing and maintaining a legislature – an institution intended to gather the monarch and the representatives of important social interests within the community together - early monarchs sought to reduce internal tensions and gain consent for the taxation required for acts of war and the state’s defence. The legislature became an important source of early constitutionalism, providing a means of constraining and enabling the exercise of state power.[[569]](#footnote-569) By refusing to give consent to the monarch’s proposals, the legislature acted as a potential constraint upon the monarch’s power.[[570]](#footnote-570) Conversely, the legislature enabled the monarch’s ability to govern by giving consent to the monarch’s proposals, which conferred upon them a greater degree of legitimacy than perhaps would have existed otherwise.[[571]](#footnote-571) In this regard, the representative function that early legislatures performed allowed the evolution of representative government to occur. Legislative institutions provided a “halfway between no control of the executive by the people and complete control of the destinies of the country by the people themselves.”[[572]](#footnote-572) This representative form of governance sailed between the dangerous rocks of absolute monarchies, oligarchies and dictatorships and the impracticalities associated with direct democracy.

With the introduction of universal suffrage, the representative function has evolved. In part due to the increased suffrage, modern legislatures now represent a greater diversity of social interests that exist within the community. Whereas medieval legislatures represented social interests determined by wealth and nobility, modern legislatures predominantly function to represent interests determined and expressed by established geographical constituencies.[[573]](#footnote-573) The now common presence of competing political parties also further enhances the legislature’s representative function. As chapter five explores, through bicameralism, legislatures can also represent federal, vocational and nobility interests.[[574]](#footnote-574) Although within modern constitutional orders, the role of the monarchy has either been completely eradicated or severely reduced to a ceremonial role, legislatures remain an important source of control on the executive branch (see below). Within political science, the representative and accountability aspects of the legislature’s linkage function are often captured through the lens of the *Principal-Agent* model. [[575]](#footnote-575) According to this model, citizens, as *principals*, delegate the governance of their community to their legislative *agents*. The legislature is considered an *agent* of the citizens, and simultaneously the legislature is also a *principal* in its own right.This is because legislatures delegate to the executive *agents* the administration of their policy choices. Therefore, the principal-agent model presents a simplified image of the relationship between the citizens and the state, in which the legislature functions as a vital link between the two. [[576]](#footnote-576)

#### Accountability

Accountability is the second aspect of the linkage function. Legislatures perform this function by providing scrutiny and oversight over significant political actors, both within the legislature itself and external to it, for example, members of the executive branch. Historically, in exchange for giving consent to the monarch’s proposals, the monarch would allow the legislature to scrutinise and even challenge its proposals before voting on them.[[577]](#footnote-577) Similarly, the legislature would more generally oversee the monarch’s behaviour on behalf of the societal interests it represented. Consequently, constitutional theory places particular emphasis on the legislature’s function to check the executive. For example, both Bagehot and Mill emphasised the importance of the legislature in promoting accountable governance. Bagehot posited that the legislature was under an obligation to ensure the executive could only go where the legislature and nation would allow it.[[578]](#footnote-578) Similarly, Mill argued that the legislature’s duty was to “watch and control the government, to throw light of publicity… on its acts.”[[579]](#footnote-579) Within political science, the accountability aspects of the legislature’s linkage function is also often viewed through the lens of the principal-agent model. It posits that every act of delegation by a principal to an agent creates a corresponding duty on the agent to account for their behaviour to the principal. Therefore, the legislature is accountable to those interests it represents, and the executive is accountable to the legislature for how it has administered the legislature’s policy decisions. Once again, the legislature functions as a vital link between the citizens and the state.[[580]](#footnote-580)

#### Communication

Finally, linkage also entails that the legislature functions as a means for communication between the people and the state. Within traditional constitutional theory, this is subtly captured in WalterBagehot’s account of the House of Commons. Bagehot perceptively recognised that effective representation and accountability requires the legislature to function as a communicator in two senses. In the first, Bagehot argued that the House of Commons had an “informing function,” which meant in order to represent the nation, the legislature would need to inform the sovereign of the polity’s grievances and concerns.[[581]](#footnote-581) Bagehot understood that effective representation entailed more than a ceremonial presence of important social interests. Representation required those social interests to be given a voice. Accordingly, the legislature functioned as a transmitter for carrying information upwards from the people to the state. In the second sense, Bagehot argued that the legislature had a “teaching function,” in that “it ought to teach the nation what it does not know.”[[582]](#footnote-582) Although Bagehot most likely advocated this function as a means of tempering rising suffrage by emphasising a separation between parliamentary and popular sovereignty, he astutely highlights the downwards aspect of communication. As Bagehot rightly notes, the legislature “cannot be placed in the middle of society without altering that society,” for its actions and inactions inevitably feed political disagreement.[[583]](#footnote-583) Therefore, the legislature also functions as a transmitter for carrying information downwards from the state to the people. It attempts to inform the people what has been done to manage their community, and it tells them what can and cannot be done moving forward.

It is important to recognise that modern legislatures communicate often multiple conflicting messages. This is because they communicate messages on behalf of rival political parties: majority and minority groups or the government and the opposition. As the political scientist Samuel Beer observed, the legislative communication is vital for mobilising consent. According to Beer, two common reasons why policies failed was because their advocates had either failed to mobilise sufficient consent to enact the policy, or because once the policy had been enacted, they failed to maintain consent for the legislation going forward. In response, Beer reasoned that consent operated on a pre- and post-legislative stage. In the pre-legislative stage, those advocating policy needed to be successful during the election in order to have sufficient consent to implement the policy.[[584]](#footnote-584) Significantly, Beer observed that in the post-legislative stage this initial consent was not sufficient to keep the policy on the statute books. First, there was inevitable disconnect between initial policy offered to voters and final product because the final policy is not drafted by the citizens. In essence, Beer reminds us that enacted law may fall short of the community’s initial expectations. Second, not every policy choice can receive the prior consent of the community. [[585]](#footnote-585) Inevitably, unforeseen decisions will need to be taken after the election. To combat this, those who support the legislation must mobilise consent for policy after the elections.[[586]](#footnote-586) Once the legislature has voted on a policy, the battle to win over the public is not over. The government majority will need to ensure its legislators understand and can defend the policy, so they can communicate to the people why the policy is desirable. Yet at the same time, those opposed to the policy will be seeking to undermine consent for the legislation before the next election. Consequently, the communication’ aspects of the linkage function requires the legislature to function as a vital platform for rival aspirants of power to communicate information regarding the policy choices before the community, their candidates and the performance of the government, in the periods between elections.

### *Executive-Legislative Relations*

Democratic legislative institutions perform the important function of providing legislative authority to the executive branch, either through a *hierarchical* or *transactional* form of executive-legislative relations.[[587]](#footnote-587) Within constitutional theory, this function is traditionally captured through the parliamentary vs presidential (and more recently, the semi-presidential) distinction. The former was classically captured in Bagehot’s claim that “the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers.”[[588]](#footnote-588) That is to say, executive-legislative relations were incessantly linked through the cabinet’s need to retain the support of a legislative majority.[[589]](#footnote-589) In contrast, the former is premised on Montesquieu’s claim that the prevention of tyranny required a constitutionally mandated separation of powers between the branches of the state.[[590]](#footnote-590) This resulted in a form of executive-legislative relations that was defined by a separation of functions and membership between the legislature and the executive branch. In practice, the Westminster Parliament and US Congress are traditionally regarded as the ideal examples of these systems.[[591]](#footnote-591) These classical accounts establish the basic distinction behind these models, although it remains possible to identify further differences.[[592]](#footnote-592) The choice over whether to adopt a parliamentary or a presidential system is often presented as one of the most important and enduring decisions that must be taken when establishing a modern constitutional order, as each system is understood to condition different forms of executive-legislative relations, each of which has its own strengths and weaknesses.[[593]](#footnote-593) In most states, the basic form of executive-legislative relations is formally established within the text of the constitution. Nevertheless, in practice executive-legislative relations will be informally conditioned by political practice, conventions and judicial opinions.[[594]](#footnote-594)

For our purposes, it is important to reflect on how the legislature’s function of providing legislative authority to the executive branch operates differently under each system. Within an ideal parliamentary system, there will be a *hierarchical* form of executive-legislative relations because the executive is inferior to the legislature; its authority is conditional upon its ability to retain the support of a legislative majority.[[595]](#footnote-595) In contrast, within an ideal presidential system, the executive is elected separately from the legislature. This means both the legislature and the executive are incentivised to engage in a *transactional* form of executive-legislative relations in the pursuit of their goals.[[596]](#footnote-596) Of course, if we think of the Westminster Parliament and the US Congress as the ideal examples of these systems, we must recognise that although most legislatures are influenced by these ideal types, they are not identical. Accordingly, executive-legislative relations are often far more complex. For example, in practice *hierarchical* relations are extremely dependent on a single party having a majority to govern.[[597]](#footnote-597) However, within many parliaments, coalitions or minority governments are the norm. Within these parliaments, the majority is constructed out of a coalition of competing parties engaging in transactional bargaining with one another. As a result, it is possible to have parliamentary systems which formally establish a *hierarchical* form of executive-legislative relations, but whichin practice rely more upon what resembles a *transactional* form of executive-legislative relations.[[598]](#footnote-598) Similarly, it is also theoretically possible for a presidential system to informally resemble the hierarchicalform of executive-legislative relations. For example, if the legislature and executive have identical policy preferences, there is little need for the two branches to engage in transactional bargaining.[[599]](#footnote-599) Alternatively, an executive may appoint a coalitional cabinet in the hope of increasing the likelihood of successful transactions occurring within a fragmented legislature.[[600]](#footnote-600) In such circumstances, executive-legislative relations may informally resemble a hierarchical form of executive-legislative relations. Therefore, we can conclude that these different forms of executive-legislative relations reveal that regardless of whether a legislature operates within a parliamentary or presidential system of government, legislatures perform the key function of enabling or constraining the authority of the executive branch. In essence, one central function of a legislative institution is to set the parameters in which the executive can operate.[[601]](#footnote-601)

### *d) The Legitimation Function*

The legislature functions as an important source of legitimacy for the exercise of state power. As discussed above, legislatures were initially established to legitimate the actions of the monarch. With the rise of modern democracy, their capacity to legitimate exercises of state powers has increased. Nevertheless, the subtle complexities of this legitimation function are often taken for granted in modern democratic states. Robert Packenham’s study of the legitimacy of the Brazilian Military Dictatorship of 1964-85 casts important light on how legislatures function as a source of legitimacy.[[602]](#footnote-602) Following the coup, the military pursued constitutional reforms, which rendered the legislature powerless.[[603]](#footnote-603) As a result, Packenham was able to observe how the legislature functioned to legitimate the actions of the Brazilian state in three distinct ways. Packenham labelled these as *manifest, latent*, and *safety valve* forms legitimation.[[604]](#footnote-604) The manifest form of legitimation is the most commonly recognised. It occurs when the legislature consciously chooses to approve legislation.[[605]](#footnote-605) However, in the context of Brazil, the lesser-known forms of legitimation were also visible. The *latent* form of legitimation was a product of the legislature trying to function as it had prior to the coup, despite being rendered powerless by the coup. Legislators voted and debated the government proposals in regular, uninterrupted meetings as they had done prior to the coup. Although they were ultimately ineffective at confronting the military, their actions helped develop the illusion that the government was being checked up on, which in turn helped legitimise the government’s actions. Importantly, as Packenham reasons, this latent form of legitimacy suggests legislators are not aware they are performing this aspect of the legitimation function.[[606]](#footnote-606) Finally, the *safety valve* function occurred when deep divisions developed among military government. By debating and voting, it allowed different groups to vent steam and avoid violence, which in turn gave legitimacy to military government.[[607]](#footnote-607)

### *e) The Training Function*

Legislative institutions also function as an environment for political training, socialisation and development. For some, becoming a legislator is their ultimate career goal. For others, it is just a step towards their ultimate career goal. In either case, the legislature provides a training ground for new members to learn the norms of the elites, political skills, and to acquire visibility and prestigious resources to aid their goals, whether that goal be as a legislator or in another career path.[[608]](#footnote-608) In particular, within parliamentary systems, the legislature functions as an indispensable training ground for future members of the government. In parliamentary systems, becoming a member of parliament and developing enough political support within it is often a prerequisite for a successful career in government.[[609]](#footnote-609) Moreover, the legislature can organise political life in ways that incentivise stable legislative parties. In turn, these parties provide “a talent pool of decision makers from which the government of the day is staffed.”[[610]](#footnote-610) They are microclimates in which “the careers in future governments of the day are made and broken.”[[611]](#footnote-611) Furthermore, most legislatures are also sufficiently large to provide members with opportunities to specialise in certain policy areas.[[612]](#footnote-612) In particular this can be achieved through structural features such as committees. Additionally, legislators may use the skills developed within the legislature for political roles outside of the legislature itself, such as regional governor or mayoral positions.[[613]](#footnote-613)

## *2. Comparative Legislative Models*

Having identified the central functions that are typically performed by democratic legislatures, we can now proceed to analyse how differences in legislative design affect the ways in which these functions are performed, and the overall role of the legislature within the ordinary democratic process. Although identifying the central functions casts light on what legislatures do, it does not reveal much about how these functions are performed or prioritised. While these functions are performed in most democratic legislatures, this does not necessarily mean that all democratic legislatures are the same.[[614]](#footnote-614) This thesis contends that legislatures must be understood as institutions that organise political life. An institution is a “relatively enduring collection of rules and organised practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances.”[[615]](#footnote-615) Accordingly, any variation in design of legislatures and the ways in which they organise political life must be the intentional or unintentional product of different institutional rules, practices and narratives.[[616]](#footnote-616) Institutionalisation refers to “the process by which organizations and procedures acquire value and stability” and occurs as the result of different institutional actors, intentionally or unintentionally, responding to necessary design choices placed before them.[[617]](#footnote-617) These choices perpetuate and complexify the institution’s capacity for shaping and channelling political action. Therefore, through institutionalisation, legislative institutions develop rules, practices and narratives which determine how their central functions are to be performed, and whether certain functions are prioritised at the expense of others. Since legislative institutions can become institutionalised in different ways, we should expect that this has implications for the legislature’s role within the ordinary democratic process found within their state.

It is possible to identify similarities and differences regarding the roles that legislatures have within the ordinary democratic process found within different democratic states. Traditionally, constitutional scholars are most familiar with the basic parliamentary and presidential typology discussed above. However, this typology is rudimentary, insofar as it merely informs about whether a constitutional order embraces a separation or fusion of powers between the legislature and the executive. While this typology may reveal that the national legislatures of UK and Spain are similar because they are both parliamentary legislatures, it does not reveal much about how they perform their central functions.[[618]](#footnote-618) In contrast, legislative scholars have a long history of developing richer typologies to aid political scientists in the classification and study of the different roles that legislatures perform within the political process of their respective states. These typologies usually distinguish between two different legislative roles that operate as poles at either end of a continuum. For example, Max Weber compared the virtues of *working* parliaments (*abeitsparlament*) and *talking* parliaments (*redeparlament*).[[619]](#footnote-619) Webber observed that a working parliament incentivised political leadership through committees that could share “in the work of government and the control of the administration.”[[620]](#footnote-620) In contrast, he posited a talking parliament would only incentivise demagogic skills.[[621]](#footnote-621) Scandinavian scholars deploy a similar typology of *debating* and *working* parliaments.[[622]](#footnote-622) American legislative scholars such as Nelson W. Polsby and Michael Mezey have also developed their own typologies. Polsby distinguished between *transformative* legislatures whose role was to “mould and transform proposals from whatever source into law” and *arena* legislatures, whose role was to provide a “formalized setting for the interplay of significant forces in the life of a political system.”[[623]](#footnote-623) Largely overlapping with Polsby’s typology, Mezey differentiated between *active* and *reactive* legislatures.[[624]](#footnote-624)

Of these various attempts to construct a legislative typology, Polsby’s contribution stands out as offering several important and valuable contributions to legislative studies. First, Polsby’s typology, and his seminal work on the institutionalisation of United States Congress,[[625]](#footnote-625) were pioneering contributions, that helped lead to the resurgence of institutionalism within American political science.[[626]](#footnote-626) Second, Polsby’s typology is valuable because it highlights how different institutional variables and features affect political outcomes. In doing so, it provided a guide for future micro-level research into legislative institutions. As we shall see, Polsby’s typology is useful because it explains how transformative and arena legislatures are the product of different institutional designs that shaped and defined the legislature’s role within their respective political orders. In doing so, the typology served to direct scholars towards studying specific aspects of the legislature design.[[627]](#footnote-627) Failure to heed Polsby’s advice can result in a flawed understanding of legislatures.[[628]](#footnote-628) For example, when analysing an arena legislature, one should not focus one’s attention on studying the same features that should be studied when analysing a transformative legislature. Nor should one expect to observe similar results to those one would find when studying a transformative legislature. Third, and in part because of the shift that Polsby helped bring about, there have been no new typologies developed capable of replacing Polsby’s.[[629]](#footnote-629) Despite being forty years old, Polsby’s typology remains the current torchbearer within modern legislative studies. Fourth, Polsby’s transformative and arena distinction is heavily inspired by two of the most influential legislatures in the world. For Polsby, the United States Congress represented the apex transformative legislature and the UK’s Westminster Parliament represented the apex arena legislature. These legislatures are particularly influential because they are the perceived originators of the separation and fusion of powers. As a result, the rest of the world modelled their legislatures upon the designs of Congress and Westminster.[[630]](#footnote-630) Importantly however, Polsby also emphasised that most legislatures are adaptations, rather than carbon copies of these legislatures, hence they should fall somewhere between the two within his typology’s continuum.[[631]](#footnote-631)

Polsby’s typology is particularly valuable for this thesis’s central research question of determining how a legislature should be designed according to political constitutionalism. Although the transformative and arena types were intended to serve as descriptive labels for classifying different legislatures, they can also be re-purposed as competing normative models representing different understandings about what the legislature’s role should be within the ordinary democratic process. Thus, we can see them as different normative understandings about how the legislature should organise political life, and how its central function should be performed. For example, one may conclude upon reflection that a transformative legislature is more desirable than an arena legislature or vice versa. Furthermore, because Polsby’s typology also explains why certain aspects of legislative design result in either a transformative or arena form of institutionalisation, the typology can serve as a guide to legislative designers in addressing micro-design questions. Therefore, this typology can guide us in determining which institutional features should be adopted or reformed to ensure that the legislature performs its prescribed role within the ordinary democratic process.

### *Transformative Legislatures*

According to Polsby’s typology, transformative legislatures have three distinctive characteristics: they can make and remake bills; they have complex internal structures; and their legislators are highly autonomous. To understand what this entails requires reflecting on Polsby’s reasoning for highlighting them. The first characteristic Polsby highlighted was that transformative legislatures have a remarkable amount of control within the law-making process. Transformative legislatures possess “the independent capacity, frequently exercised, to mould and transform proposals from whatever source into law.”[[632]](#footnote-632) This entails that the legislature has the formative ability to create and develop its own policies and the transformative ability to amend and reshape as it sees fit any policies placed before it. Thus, transformative legislatures perform their law-making function in the broadest sense, as they are capable of functioning as both a policymaking and policy authorising institution. In this sense, a transformative legislature will play a far more proactive role in the management of disagreement. Furthermore, through frequently making and re-making bills, the transformative legislature is implied to be resistant to demands of the executive. Transformative legislatures can actively place their own demands upon the executive. They do this by developing their own policies or through subverting and altering the executive’s proposals with their own policy preferences and they can simply resist the executive’s policy demands. In this regard, a transformative legislature is highly independent from the executive branch. This raises the question of why transformative legislatures are capable of engaging in both policymaking and actively re-shaping executive proposals. Polsby reasoned that this is the product of two distinctive characteristics in their institutional design.

The second characteristic that Polsby emphasised was that transformative legislatures have highly complex internal structures.[[633]](#footnote-633) This simply means that a transformative legislature has developed a sufficiently complex set of internal rules, practices, narratives and resources that enable and **incentivise legislators to engage in policy making and the transformation of political inputs that must pass through the legislature.**[[634]](#footnote-634) **These** rules, practices, narratives **and resources transform inputs by establishing a complex set of hurdles that political inputs must overcome to become law. For example,** Polsby **describes how those who believe that all their proposals will need to become law is a substantial majority, will quickly find out within the context of a transformative legislature that this alone will not suffice. In a transformative legislature, “no bill can reach the floor, save by a number of alternative clearance systems” such as receiving the approval of various committees,** party whips **and bicameral actors.**[[635]](#footnote-635) **To overcome these institutional hurdles, political actors will need to develop detailed strategies, based on the appropriate rules and norms in their given circumstance.**[[636]](#footnote-636) **Accordingly, the legislature’s internal structure is the locus of power in the context of the transformative legislature.**[[637]](#footnote-637) **In particular, Polsby emphasised that the development of a strong and autonomous committee system is a prerequisite for a transformative legislature.**[[638]](#footnote-638) **This is because the committees incentivise expertise and continuity of interests that enable the legislature to form and transform policies.**[[639]](#footnote-639) **Polsby noted that committees promote a deliberative style of political behaviour that has transformative properties.**[[640]](#footnote-640) **The bi-partisan nature of committees provides a deliberative environment, which incentivise their membership to engage in negotiation and compromise. Therefore, within a transformative legislature, one should expect the committee system to be the** primary **site for policy creation and transformation. Inevitably, this implies a transformative legislature has a highly decentralised internal structure.**[[641]](#footnote-641)

The third characteristic is that individual legislators within transformative legislatures have a high degree of independence from their party.[[642]](#footnote-642) This is because, with their emphasis on internal structures, in particularly bi-partisan committees, the importance of political parties is reduced within transformative legislatures. Political parties are institutions in their own right, in that they provide rules, norms, narratives and resources that organise political life through tight party discipline. For example, political parties provide the means for individual legislators to pursue their goals. Political parties can also provide constraints; by refusing to provide legislators with resources; by sanctioning legislators; and control whether individuals are (re)selected to represent the party. [[643]](#footnote-643) Within the context of a transformative legislature, in the event of a conflict between the incentives and institutional logics provided by their party and the legislature’s internal structure, the latter will normally prevail. This is because party incentives and logics are unable to outweigh and override those provided by the legislature’s internal structure. The transformative legislature’s structure provides individual legislators with greater opportunities to engage in policymaking, political training and socialisation. Consequently, in the context of the transformative legislature, one would expect to see legislative majorities to be highly coalitional and flexible to change.[[644]](#footnote-644) Building on Polsby’s typology, Amie Kreppel contends that transformative legislatures may have a fourth characteristic: constitutional autonomy.[[645]](#footnote-645) If legislative autonomy is incentivised by the constitution mandating a separation of powers, then a congressional legislature may potentially have greater autonomy than its parliamentary counterpart operating under a constitutionally mandated fusion of powers.[[646]](#footnote-646) This is because under the separation of powers, the fate of individual legislators is not formally connected to the survival or fall of the current executive. Nevertheless, this does not mean a transformative legislature is impossible within parliamentary systems. Polsby contended that the Dutch parliament had a moderately transformative role within the Dutch political system. This is because the highly coalitional nature of political life within Dutch Parliament allowed for the transformation of political inputs via transactional executive-legislative relations.[[647]](#footnote-647)

Taken together, these characteristics suggest the role of a transformative legislature is to channel political demands towards more consensual outcomes. Thus, the transformative legislature attempts to manage political disagreement through incentivising competing political actors, with competing political demands, to compromise with one another within the institution itself. The role of a transformative legislature is akin to a thermostat. A thermostat is capable of both reading the surrounding room temperature and changing it. Similarly, a transformative legislature is capable of both reading the political temperature of its surrounding political environment and actively changing it through organising political life in ways that encourage compromise in the process of turning political inputs into law.[[648]](#footnote-648)

### *Arena Legislatures*

Arena legislatures are characterised by the dominance of political parties, lower levels of individual legislator autonomy, and their emphasis on political debate. These characteristics are implicit in Polsby’s description of an arena role as a formal environment for “the interplay of significant political forces in the life of a political system.”[[649]](#footnote-649) By significant external forces, Polsby means the major classes, interests, values and groups found within the polity and which are represented by political parties.[[650]](#footnote-650)

First, political parties are locus of power within arena legislatures.[[651]](#footnote-651) This means that political parties, rather than the legislature’s internal structure, provide the dominant incentives and logics that shape the political behaviour of individual legislators. However, this does not mean arena legislatures lack an internal structure; rather their internal structure enables the political parties to dominate.[[652]](#footnote-652) Arena legislatures have not developed the internal structures capable of providing the incentives and logics necessary for challenging those provided by the political parties.[[653]](#footnote-653) The development of the legislature’s internal structure “has been imposed for the convenience of political parties in operating [the legislature] as a necessary tool of the government of the day.”[[654]](#footnote-654) Indeed, the UK Westminster Parliament reflects this design mentality; as Tony Wright highlights, “all the essential features of the House of Commons are structured by the realities of parties.”[[655]](#footnote-655) Furthermore, the leadership of the main political parties within arena legislatures have strong incentives to retain their position, by resisting or blocking reforms, which empower the individual legislators to use legislative resources to challenge their dominance.[[656]](#footnote-656) Consequently, whether political action or inaction occurs within the arena legislature is ultimately at the discretion of the political parties.

Since parties dominate, arena legislatures have highly centralised and hierarchal structures. Policy development and agenda setting powers are concentrated within the hands of the leaders of the majority party or coalition. Although committees may exist within arena legislatures, they will be considerably weaker than their transformative counterparts. Polsby maintains this is reflected in C. E. S. Franks’ account of the committee systems within the Canadian and British Parliaments.[[657]](#footnote-657) Franks observed that the dominant parties viewed the development of strong committees as a threat to their commitment to responsible government.[[658]](#footnote-658) Subsequently, both the governing and opposition parties ensured there was a high turnover in the committees’ membership to prevent individual legislators specialising.[[659]](#footnote-659) This therefore deprived the committees system of the knowledge and resources required to significantly influence legislation. As a result, it appears that arena legislatures are designed in ways that incentivise outsourcing the performance of central functions to the political parties.[[660]](#footnote-660)

Polsby explains that policy development and political training are entirely outsourced to the parties to perform, rather than being performed through the legislature itself, as parties “provide a talent pool of decision-makers from which the government of the day is staffed.”[[661]](#footnote-661) Parties are also the primary means by which scrutiny and oversight of the executive is performed. This is illuminated in Anthony King’s seminal article on executive-legislative relations.[[662]](#footnote-662) In discussing executive-legislative relations within Polsby’s apex arena legislature, the UK’s Westminster Parliament,[[663]](#footnote-663) King observed that political parties are vital to holding the executive to account through two distinct modes of executive-legislative relations. The *intraparty mode* refers to a situation in which the executive faces pressure from within its own legislative party. The ordinary members of the governing majority and their party leaders are locked in a symbiotic relationship. The ordinary members need their leaders to govern well in order to achieve their goals (re-election, specific policies, ministerial careers etc) and party leaders acting as the executive need their ordinary members to support them and defend them from criticism, both within and outside the legislature.[[664]](#footnote-664) Since fulfilling their individual goals requires their party/coalition to remain the governing majority, ordinary legislators within the governing party are incentivised to scrutinise and oversee how their party leaders are governing the nation and to ensure, as Bagehot would put it, that they go only where “the nation will follow.”[[665]](#footnote-665) Elsewhere, King observes the executive also interacts (or is in conflict) with the opposition.[[666]](#footnote-666) In the *opposition mode* of executive-legislative relations, the opposition parties who contest the executive and governing majority’s authority and public support through publicly scrutinising and overseeing their behaviour, in hopes of increasing their own electoral standing. Accordingly, the legislature’s accountability function can be outsourced to the political parties to perform through their intraparty and opposition modes of interaction with the executive. Similarly, political parties have a near monopoly on providing political socialisation and training to legislators. For these reasons, it is unsurprising that the second characteristic of the arena legislature is that it reduces the amount of autonomy that each individual legislator has from their party. The arena legislature’s internal structure is simply unable to provide individual legislators with sufficient incentive to act against the interests of their party. If an individual legislator wishes to succeed in their goals, working with their political party is the best strategy. Thus, parties are easily able to incentivise discipline through their own internalised structures.

The third characteristic of arena legislatures is that they place a premium on political debate. This is another consequence of the dominating presence of political parties. Since arena legislatures have highly centralised and hierarchal structures that result in weak committees, the main chamber is the focal point of most political activity. What Polsby refers to as the “interplay between significant political forces” represents the considerable emphasis that the political parties place on their linkage function within arena legislatures.[[667]](#footnote-667) As Polsby highlights, “debate means the ventilation of opinion for education of the country at large. It also functions to mobilise interest groups and to proclaim loyalties not only within the chamber but also between those inside parliament and their allies outside.”[[668]](#footnote-668) In this regard, arena legislatures clearly emphasise the theatrical aspects of political activity. They are institutions that in many ways operate like a theatre, in that they incentivise their actors (legislators) to perform to an audience (the nation).[[669]](#footnote-669) Furthermore, Polsby’s claims about arena legislatures aligns closely with Mill’s claim that the legislature’s role should be to serve as “the nation’s Committee of Grievances and its Congress of Opinions; an arena in which not only the general opinion of the nation, but that of every section of it.”[[670]](#footnote-670) Therefore, within this understanding, the governing majority acting through a single specialised committee (in Parliamentary systems, through the cabinet) will serve as Mill’s law commissioners.[[671]](#footnote-671) This unique committee will draft bills based on external interests which its members represent, before submitting to the legislature to authorise into law.[[672]](#footnote-672) Accordingly, the arena legislature only performs the authorising aspect of the law-making process. Given that the arena legislature is unable to transform the government’s bills, the legislative process functions more as an important ceremonial ritual for legitimising the exercise of state power. The legislative process functions as a means of producing a manifest form of legitimation for the governing majority’s decisions, through the majority giving democratic consent to the proposed changes to the law. At the same time, it also functions as a means of producing a latent form of legitimation, through allowing the opposition to publicly express their dissent towards the changes.

One might reasonably enquire whether arena legislatures support behaviourism’s belief that institutions cannot affect political outcomes. As discussed in the previous chapter, behaviourism implicitly views legislatures as black boxes capable of seamlessly translating political inputs (competing political demands) into outputs (laws). Although exogenous factors are decisive in arena legislatures, this does not support behaviourism’s view that institutions do not matter. This is because exogenous factors can only be decisive as long as the institution's rules, practice and narratives allow them to be. Arena legislatures are not black boxes; they are institutions that are institutionalised in ways which have enabled the political parties, and the exogenous interests they represent, to be decisive in determining political outputs.

To conclude, arena legislatures perform two closely related roles. First, the arena legislature’s role is to represent and carry out the decisions made externally to the legislature, i.e. the decisions taken by the electorate at the ballot box. Second, the arena’s other role is to act like a debating society or theatre, in that it should incentivise its members to perform for an external audience. It emphasises public debates that aim to mobilise support within the audience for and against proposed responses to the circumstances of politics. Consequently, the arena’s role is also to shape public discourse in the periods between elections.

### *Design Trade-Offs*

Polsby’s typology reveals how transformative and arena legislatures perform different roles within ordinary democratic process. The transformative legislature’s role is to channel competing political demands through the legislature in ways that incentivise compromise. In contrast, the arena legislature’s role is to carry out the decisions made at the previous election and simultaneously shape public discourse in preparation for the next election. Most democratic legislatures will be tilted towards one side or the other of the continuum established by Polsby’s typology. Importantly, the two competing roles cannot be reconciled with one another because they are the products of radically different institutional designs. This presents political actors with a significant design choice – *should they design their legislature in a way that incentivises a transformative or an arena role*? Polsby refrains from passing judgment about which role is more desirable. Nevertheless, his typology implies that both transformative and arena legislatures are subject to significant design trade-offs in the way they operate. Through reflecting on these design trade-offs, we can make a more informed choice about what the legislature’s role should be according to political constitutionalism.

If a legislature is designed to perform a transformative role, there are several risks involved in the ways that the legislature will operate. These include the potential for *political gridlock*, *less public-focused legislation* and *distorted accountability*. These problems are the trade-offs of the transformative legislature’s highly complex and decentralised internal structure. Transformative legislatures rely on strong committee systems, bicameralism and floor leaders to develop and transform policies into law. However, these can also act as veto players within the ordinary democratic process. Legislative scholar George Tsebelis defines veto players as “individual or collective actors whose agreement is necessary for a change in the status quo.”[[673]](#footnote-673) In every political order, there will be a range of veto players, whose unanimous agreement is required to change the status quo.[[674]](#footnote-674) These include institutional actors, such as heads of state, the legislature as a whole, bicameral chambers, legislative committees, federal bodies and constitutional courts, as well as partisan actors, such as political parties found within the polity.[[675]](#footnote-675) Within the legislature, veto players will decide whether desired political outcome occurs or not.

A transformative legislature’s internal structure creates significantly more veto players than its arena counterpart does. On the one hand, the increased number of veto players might produce a more consensual form of decision-making; as any proposed bill will need to be approved by more than just a bare majority, it will need to be approved by the various veto players. Those supporting the bill will have to bring forth a proposal which is acceptable to all of the relevant veto players.[[676]](#footnote-676) This may incentivise the ‘transformation’ of political inputs, as the bill’s supporters work towards reaching a consensual and stable policy outcome, through justifying their proposals in relation to the public good, compromising and negotiating with other legislative actors who might be apathetic or opposed to the bill. On the other hand, the increased number of veto players can produce political gridlock, as getting the unanimous agreement of all the various veto players can prove difficult to achieve. If some veto players favour the status quo, they can act as a veto-gate; blocking for better or worse certain changes.[[677]](#footnote-677) Consequently, the potential for political gridlock favours the status quo.

Veto players may also incentivise the legislative production of private-regarding outcomes.[[678]](#footnote-678) One strategy to overcome problematic veto players is to engage in anticipatory behaviour, whereby the bill’s supporters recast their own proposals ahead of time to meet a veto player’s preference. In doing so, they hope to ensure the bill is not challenged at a later stage. This is similar to what Alec Stone Sweet observed within certain European states that had strong judicial power. Stone Sweet observed that governments will draft their bills in ways which attempt to pre-empt the bill being challenged by the courts.[[679]](#footnote-679) In a similar vein, given the prevalence of veto players within a transformative legislature, it is not implausible to imagine bills being tailored to align with the preferences of certain veto players. However, as Mathew McCubbins has theorised, the more that veto players are present within the legislative process, the more likely it will be that policy-making becomes predominately private- regarding. This is because supporters of the bill will attempt to pay off the veto players with specifically tailored and concentrated policy benefits to ensure the bill passes.[[680]](#footnote-680) These may include specific amendments or policy positions designed to appease the wishes of the veto player. In contrast, McCubbins suggests, where there are fewer veto players, policymaking will be more public-regarding, as there will be less need to pay-off certain political actors within the legislature.[[681]](#footnote-681) Therefore, although a transformative legislature may produce more consensual policies, it may also produce more private-regarding policies designed to appease the interests of certain political actors.

The increased number of veto players may also distort political accountability in two ways. First, it may create issues of transparency. To navigate potentially problematic veto players, those wishing to pursue their goals will need to deploy strategies to ensure the internal structure works in their favour. However, there is also the risk that this internal structure incentivises backdoor deals, which makes political behaviour less transparent. Furthermore, it might incentivise political actors to engage in blame shifting. In some circumstances, it may be reasonable to publicly blame a veto player for preventing a change in the status quo. However, it is equally possible for a legislator to promise voters unrealistic or flawed promises that they actively know will be watered down or blocked by a veto player at a later date. In this regard, the bill’s proposers may be intentionally acting irresponsibly towards their voters. This could be dangerous, if the bill proposers are seeking to undermine the legitimacy of ordinary democratic process through a form of anti-democratic populist behaviour.[[682]](#footnote-682)

The problems associated with multiple veto players are likely to be reduced in the context of an arena legislature because their highly centralised and hierarchal internal structure results in significantly less veto players. However, arena legislatures offer their own risks, such as the potential for *the executive to dominate the legislature* and *the cartelisation of the party system*. Both are a potential consequence of the arena legislature’s highly centralised internal structure, which enables political parties to dominate. The arena legislature’s role is to carry out the electorate’s wishes, expressed through the distribution of seats awarded to the political parties within the chamber. Its internal structure enables the parties to dominate, through substantially reducing the opportunities individual legislators have to act against their parties’ interests and develop their own agenda. Consequently, while an arena legislature may have a committee system, its committees are deprived of the institutional resources necessary to act as veto players.

Although a weak committee system might avoid the problems associated with the transformative legislature, it may also weaken the legislature’s ability to resist the executive or leaders of the governing majority’s proposals in certain circumstances, where it may be in the public’s interest for those policies to be resisted. We must be careful not to conflate the arenas role in carrying out the electorate’s wishes with the idea that the executive or leaders of the governing majority are always acting in the interest of the citizens. We cannot assume their policies will have always received the prior consent of the electorate or that said policies are sufficiently well developed when they are placed before the legislature to authorise. The assumption that all policies have received the prior consent of the electorate is highly unrealistic. The simple reality is that not all political decisions can be foreseen and consented to ahead of time. Political actors and the electorate often cannot foresee the sudden outbreak of war, terrorism, natural disasters, or economic and political crises. In reality, often the most difficult and painful decisions will come after the election.[[683]](#footnote-683) In such circumstances, the belief that the legislature’s role is to simply authorise every policy put before it into law begins to look shaky. Neither the legislature nor the executive can exclusively claim to represent the interests of the citizens.

The assumption that the executive and the governing majority is a “fount of almost all wisdom” is also questionable.[[684]](#footnote-684) The very idea that the policies of the executive and governing majority leaders must be approved by the legislature implies that this cannot be case. While the legislature may delegate to executive or senior party agents the responsibility of policy making, this act of delegation cannot be premised on the naïve belief that the agent will always act appropriately. Without sufficient institutional opportunities, incentivise and mechanisms, it becomes more difficult for legislators within the arena legislature to develop the knowledge and resources necessary to resist policies that might harm the polity. This is the design trade-off of having fewer veto players. As Anthony King and Ivor Crewe argue, the lack of veto players in the context of arena legislatures means that “it is every bit as easy to take the wrong decisions as it is to take the right one.”[[685]](#footnote-685) Although the citizens retain the power to potentially punish the executive or leaders of the governing majority at the ballot box, this will provide little consolation to those most adversely affected by a flawed policy that the legislature could have prevented. When an unforeseen event occurs requiring legislation, citizens are dependent on their legislative representatives to adequately scrutinise policies on their behalf, as the citizens have not given their prior consent to said policies and will suffer the consequences of poor policy-making. Unfortunately, the arena legislature appears less capable of providing the scrutiny necessary to reduce the risk of poor policy-making by the executive/governing party. This is not suggesting a transformative legislature will also not make mistakes, but rather there is a greater risk of reckless legislating in the context of the arena legislature. In this regard, it might be argued that arena legislatures are less desirable for those who contend that the value of democratic decision-making comes from its ability to protect fundamental rights and freedoms.[[686]](#footnote-686)

Another problem of arena legislatures is that by outsourcing to the political parties the responsibility for performing so many of their central functions, there is a risk that an over-reliance on these parties may allow them to manipulate the ordinary democratic process against the interests of the political community. Much like legislatures, different political parties have different institutional arrangements. As a result, the effectiveness of any function outsourced to the political parties will be dependent on political parties’ institutional rules, practices and narratives. The performance of these functions will be in a state of flux, changing after each periodic election, as the election’s result reshapes the composition of the governing majority and opposition.

Importantly, political parties are not necessarily democratic institutions. A further complication is that as institutions, political parties change and evolve over time.[[687]](#footnote-687) Many political parties are hierarchical organisations that allow the small elite at the top of the party structure to wield considerable power and influence over the party’s policy platform and their members’ careers within the party and the legislature. Since democratic choice is always between the policy options provided by the parties, there is a risk that party elites may actively seek to supress the influence of voters in the policy-making process.[[688]](#footnote-688) There is the risk that the party elites can distort the community’s choices by keeping certain policies off the table to preserve those aspects of the status quo that benefit their goals. For example, they may refuse to introduce electoral or institutional reforms, which may allow previously ignored or actively discriminated minorities to influence the political process. As Polsby notes, in the arena legislature, the party elites will be reluctant to introduce any reforms that diminish their power.[[689]](#footnote-689) In this regard, the supposed flexibility and self-regulation of the ordinary democratic process is actually weakened. Furthermore, arena legislatures may increase the risks of the political parties cartelising the ordinary democratic process. Cartel parties are established parties which use “collusion and cooperation” to freeze out new competition and provide resources and policies which ensure the established parties continue to thrive.[[690]](#footnote-690) Therefore, by allowing political parties to dominate, there is a risk that the arena legislature actually enables party leaders to preserve a potentially unrepresentative or corrupt political system through engaging anti-democratic cartel behaviour.[[691]](#footnote-691)

## *3. Determining the Legislature’s Role*

Legislatures perform similar functions; but their role within the ordinary democratic process varies based on their institutional design. Transformative and arena legislatures perform different roles within the ordinary democratic process. The transformative legislatures *transform* preferences through fostering compromise, and the arena legislature *formally authorises* the decisions made by the electorate in law and shapes future public debates. Both are the product of divergent approaches to institutional design, which cannot be fully reconciled with one another. Their design also involves trade-offs. Transformative legislatures are vulnerable to the problems associated with multiple veto players. Arena legislatures are susceptible to being dominated or manipulated by the executive and party elites. Although the field of legislative studies provides valuable insights absent from the existing political constitutionalist literature, it does not determine what the legislature’s role should be within a political constitution. The previous chapter observed the existence of three distinctive strands of political constitutionalist thought – democratic socialist, liberal, and republican – each of which project different and somewhat limited understandings about legislative institutions. This raises the question; *is there unity among political constitutionalists about the legislature’s role or do the different strands advocate more or less different roles?* To answer this, we must first reflect on how political constitutionalism understands the ordinary democratic process.

### *Understanding the Ordinary Democratic Process*

Determining the legislature’s role within a political constitution requires reflecting on the legislature’s role within the ordinary democratic process as a whole. In chapter two, it was argued that the political model presents a distinctive approach to constitutional design, because it advocates that the ordinary democratic process should be the constitution.[[692]](#footnote-692) Political constitutionalists envisage this ordinary democratic process as having two main stages: an *elective stage* anda *legislative stage.* In the former, the citizenry *en masse* engages in an electoral decision-making process to select their legislative representatives; in the latter, those legislative representatives engage in intra-institutional decision-making regarding the management of the state. Although this suggests that the elective and legislative stages are in some kind of a relationship, it does not reveal its exact nature. The way of addressing this ambiguity necessitates understanding the ordinary democratic process in a systemic and deliberative manner. *Systemic* in the sense that we must recognise the ordinary democratic process as a whole and understand how the different stages reflect a division of labour within the system.[[693]](#footnote-693) *Deliberative* in the sense that we must recognise how the democratic process contains debating and voting aspects. Under this systemic deliberative conception of ordinary democratic decision-making, it is easier to see how transformative and arena legislatures perform different roles within this division of labour. Unfortunately, many political constitutionalists have insufficiently engaged with deliberative democracy. For example, prominent political constitutionalists such as Richard Bellamy and Jeremy Waldron have at times appeared sceptical of deliberative democracy.[[694]](#footnote-694) However, many political constitutionalists neglect considerations about deliberative properties of democracy. Consequently, as Marco Goldoni observes, political constitutionalists tend to embrace a minimalist (also known as an aggregative) conception of democracy.[[695]](#footnote-695)

The minimalist conception draws upon Joseph Schumpeter’s influential definition of democracy as little more than a set of institutional arrangements “for arriving at political decisions in which individuals acquire the power to decide, by means of a competitive struggle for the people’s vote.”[[696]](#footnote-696) In presenting the minimalist conception of democracy, Schumpeter sought to purge any notion of the common will or good from the idea of democracy, on the grounds these were unachievable.[[697]](#footnote-697) Instead, Schumpeter maintained democracy served two basic functions: to produce and to evict governments.[[698]](#footnote-698) Although this conception of democracy has its defenders,[[699]](#footnote-699) Goldoni criticises political constitutionalism for embracing this minimalist conception of democracy, because it diminishes political constitutionalism’s understanding of the ordinary democratic process.[[700]](#footnote-700) The central problem with the minimalist conception is that it presents a narrow *voting-centric* conception of democratic politics.[[701]](#footnote-701) This is because it is underpinned by two key assumptions. First, individuals hold fixed preferences, which cannot be changed by the political process. Second, these preferences can be aggregated through fair mechanisms and by political actors to produce optimal outcomes.[[702]](#footnote-702) Accordingly, if preferences are fixed and simply need to be aggregated, democratic decision-making is reduced to just the act of voting, and institutional design becomes concerned with the question of voting mechanisms. As a result, the minimalist conception of democracy presents a crude image of actual political decision-making. It overlooks the fact that in practice democratic decision-making always involves more than just voting. The reality is that citizens and legislators spend considerably more time deliberating with one another the issues of the day, than they do actually voting on those issues. Of course, this is not suggesting that voting is an insignificant aspect of the ordinary democratic process, but rather it is simply to acknowledge that in practice we spend only a small fraction of our time voting. Voting is important because it is the point in the ordinary democratic process in which citizens and legislators must stop debating and vote in order to reach a decisive decision. Most of our time is spent deliberating with one another. Yet as critics point out, a minimalist conception does not require citizens and legislators to justify their preferences, nor does it actually require them to listen and engage with one another.[[703]](#footnote-703) Consequently, minimalist democracy’s vote-centric understanding fails to present an attractive or accurate account of ordinary democratic politics.

In contrast, deliberative democracy presents an alternative and perhaps more attractive *talk-centric* understanding of ordinary democratic politics.[[704]](#footnote-704) Within democratic theory, deliberative democracy has emerged as an opponent of the minimalist conception. The central advantage of using a deliberative conception of democracy is that it helps us reflect on how the ordinary democratic process operates through both voting and deliberating. For deliberative democrats, the legitimacy of political decisions comes less from the act of voting and more from the act of deliberation.[[705]](#footnote-705) As a result, deliberative democracy seeks to offer a more “expansive interpretation of representative democracy.”[[706]](#footnote-706) Nevertheless, the literature on deliberative democracy is vast and often unwieldly. Deliberative democrats tend to disagree about what constitutes a legitimate deliberative process, as each scholar tends to emphasise different aspects of deliberation and different processes. As a result, this thesis primarily relies on a conception of deliberative democracy as expressed by the leading deliberative democrats Amy Gutmann and Dennis Thompson[[707]](#footnote-707) and political scientists Jurg Steiner, Andre Bachtiger, Markus Sporndli and Marco R. Steenbergen.[[708]](#footnote-708) These are selected for two reasons; first, they are selected to reflect normative and empirical dimensions of deliberative democracy. Whereas Gutmann and Thompson have sought to present a normative account of deliberative democracy, Steiner *et al.* have sought to address concerns that there is a lack of empirical evidence to support the claims that deliberation makes a difference.[[709]](#footnote-709) To do this, Steiner *et al.* distilled from the existing literature an account of deliberative democracy, which can be deployed for empirically measuring the deliberative qualities of different institutional arrangements. As a result, Steiner *et al.*’s *Discourse Quality Index* (DQI) is widely recognised as the leading empirical research into deliberative democracy, and has the approval of several leading deliberative democrats.[[710]](#footnote-710) Moreover, the *DQI is* particularly useful for the purposes of this thesis, as it is used in chapter four to analyse the deliberative quality of different legislative institutional arrangements. Second, the literature on deliberative democracy has become large and unwieldy, with multiple others including Joshua Cohen, James Fishkin and Jürgen Habermas presenting their own accounts of deliberative democracy.[[711]](#footnote-711) In response, both accounts present broadly similar central cases for deliberative democracy, by extracting from the literature those deliberative principles, norms and values that are manifested to a high degree across the literature.

For Gutmann and Thompson, deliberative democracy emphasises four characteristics of deliberative decision-making. First, Gutmann and Thompson emphasise the importance of reason giving. As they contend, deliberative democracy seeks to respect the autonomy of individuals, through ensuring that the process in which laws are enacted requires individuals and their representatives to present and respond to reason.[[712]](#footnote-712) This reason giving should involve an “appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonable reject.”[[713]](#footnote-713) Importantly, these principals can be both procedural and substantive in nature, because they too are subject to deliberation. For Gutmann and Thompson, principals ought to be “morally and politically provisional… open to revision in an ongoing process of moral and political deliberation.”[[714]](#footnote-714) Second, deliberative democracy promotes publicly accessible forms of reasoning. By this, Gutmann and Thompson claim that reason giving requires a public form of reciprocity among citizens and their representatives. In essence, deliberation occurs in public, rather than in one’s own mind, and must be somewhat understandable to those involved.[[715]](#footnote-715) Third, deliberation should always aim towards reaching a decision that is binding for some period of time. As they posit, “participants do not argue for argument’s sake,” they are deliberating over a decision that must be taken. Consequently, at some point in time, deliberation must cease, and a decision must be taken.[[716]](#footnote-716) The fourth and final characteristic that Gutmann and Thompson emphasise is significant, in that it suggests deliberative democracy is potentially complementary with political constitutionalism. Similar to political constitutionalism, Gutmann and Thompson’s understanding of deliberative democracy shares in the belief that all decisions are provisional in nature. As they argue, “although deliberation aims at a justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future.”[[717]](#footnote-717) Gutmann and Thompson stress that once a decision is taken deliberation can resume, if individuals desire it. In this regard, deliberative democracy and political constitutionalism can be united in their belief that management of disagreement must remain dynamic.[[718]](#footnote-718) For Gutmann and Thompson, deliberative democracy seeks to manage the circumstances of politics through *economising moral disagreement*, through encouraging individuals to justify their reasoning, in the hope that they can minimise the differences between their own views and their opponents’.[[719]](#footnote-719)

Steiner *et al.* distil six similar characteristics from the existing literature on deliberative democracy. First, ideally the decision-making process should involve the equal and public participation of all citizens.[[720]](#footnote-720) Deliberative Democrats believe ordinary democratic process can practically achieve this, if it ensures “the flow of communication between public opinion, institutionalized elections and legislative decisions [that guarantees] influence and communication power are transformed through legislation into administrative power.”[[721]](#footnote-721) Second, deliberation requires those involved to express their views in a truthful way.[[722]](#footnote-722) In essence, ideal deliberation requires that individuals do not attempt to deceive each other about their true intentions. Third, ideal deliberation requires individuals to justify their claims in a logically coherent manner.[[723]](#footnote-723) As Steiner *et al.* hypothesise, deliberative democrats appear to assume “the tighter the connection between the premises, the more coherent the justification is and the more useful it will be for deliberation.”[[724]](#footnote-724) Fourth, arguments should be expressed in terms of the common good, rather than solely in terms of the self-interest of the individual arguing that point.[[725]](#footnote-725) Fifth, ideally individuals should be willing to listen and respect others involved in the process.[[726]](#footnote-726) In an ideal deliberation, respect ought to be given, to a high degree, in three dimensions: to the *individual* or *group* making the argument, to their *demands* and to any to *counterarguments* that arise*.[[727]](#footnote-727)* Sixth, in an ideal deliberation, participants’ preferences should not be static, but rather open to change during the course of the deliberation.[[728]](#footnote-728) This is because the better argument cannot exist prior to act of deliberation. The purpose of deliberation is the search for the better argument. Accordingly, participants cannot engage in deliberation with a monolithic set of preferences, they must be willing where necessary to compromise or yield to “the unforced force of the better argument.”[[729]](#footnote-729)

It should be noted that some political constitutionalists have been sceptical of deliberative democracy’s interpretation of democratic decision-making. The two most prominent examples are found in Richard Bellamy’s *republican* and Jeremy Waldron’s *liberal* accounts of political constitutionalism. Although both Bellamy and Waldron believe deliberative democracy’s aim of reason-focused deliberation is laudable, they are critical of some deliberative democrats who contend that ideal deliberation must produce a consensus.[[730]](#footnote-730) For example, leading deliberative democrat Joshua Cohen has suggested, “ideal deliberation aims to arrive at a rationally motivated consensus.”[[731]](#footnote-731) Bellamy and Waldron view this as unrealistic, because in the circumstances of politics, disagreement is likely to prevent a consensus being achieved. Therefore, to demand that a decision-making process must produce a consensus is unrealistic. From this Bellamy and Waldron infer that deliberative democrats must view any failure to produce a consensus as a deficiency of the democratic process; “a sign of malign intent, ignorance or stupidity on the part of those concerned.”[[732]](#footnote-732) Unfortunately, both Bellamy and Waldron misconstrue Cohen’s argument. Cohen goes on to argue, “even under ideal conditions there is no promise that consensual reasons will be forthcoming. If they are not, then deliberation concludes with voting, subject to some form of majority rule.”[[733]](#footnote-733) Cohen does not suggest that majority decision-making is a sign of bad faith; it is simply a recognition by those deliberating that a decision must be reached. Cohen’s point merely emphasises the idea that deliberation *before* voting is ultimately more desirable than the minimalist belief that democracy should involve nothing more than just the act of voting. Similarly, Gutmann and Thompson reject the suggestion that deliberation must produce consensus.[[734]](#footnote-734) Instead, they maintain deliberative democracy has a more modest aim, of reducing disagreement. Those who engage in deliberative democratic decision-making are seeking “to clarify and narrow their deliberative disagreements without giving up their core moral commitments.”[[735]](#footnote-735) Similarly, Steiner *et al.* read Cohen’s quote as meaning “consensus is merely an aim and not an absolute necessity.”[[736]](#footnote-736)

However, Bellamy has another important criticism of deliberative democracy. He criticises some deliberative democrats for believing that consensus (or at least the economisation of disagreement) can only be achieved in practice through the courts, citizen juries and citizen assemblies.[[737]](#footnote-737) This is an important point, as many leading deliberative democrats have tended to favour these institutions, over those institutions found within the ordinary democratic process. For example, John Rawls famously described the US Supreme Court as the exemplar of public reasoning.[[738]](#footnote-738) Elsewhere, James Fishkin contended that small citizen juries can provide superior forms of public reasoning.[[739]](#footnote-739) Nevertheless, as Bellamy rightly highlights, the central concern with these alternative forums is that they are vulnerable to being captured and manipulated by elites. Those who can control the agenda and membership can subtly steer decisions towards certain goals, at the expense of the citizenry’s actual views on the matter.[[740]](#footnote-740) Moreover, such alternative forums may not provide the citizens with sufficient reason “to defer to the decisions of these bodies – no matter how deliberative and consensual they may be.”[[741]](#footnote-741) Nevertheless, despite his scepticism, Bellamy does acknowledge that the ordinary democratic process is capable of public reasoning.[[742]](#footnote-742) Moreover, he does suggest later that democratic deliberation may help reduce levels of disagreements between competing forces.[[743]](#footnote-743) Thus, we can conclude that while political constitutionalism’s first objection to deliberative democracy can be disregarded, its second objection ought to encourage deliberative democrats to reflect on how the ordinary democratic process, as opposed to the courts and mini-publics, can be deliberative.

More recently, the literature on deliberative democracy has taken a “systemic turn.” Whereas the early literature tended to focus on single forums, the systemic approach to deliberative democracy reflects on the deliberativeness of large-scale democratic systems. [[744]](#footnote-744) This systemic understanding recognises that the democratic process performs various complex functions across the system as a whole, through a division of labour, across various distinguishable and differentiated component parts.[[745]](#footnote-745) Accordingly, the ordinary democratic process should be understood as a system, which manages political conflict through a network of institutions, associations and sites of contestation. A systemic reading of deliberative democracy is concerned with how such systems, as a whole, can provide a talk-centric approach to the management of disagreements.[[746]](#footnote-746) As advocates for this approach suggest, not every component has to fill a deliberative function optimally; rather such deliberative functions can be distributed across multiple component parts.[[747]](#footnote-747) From a design perspective, the major advantage of this approach is that it recognises weaknesses within one part can be compensated by the strengths of other parts within the system.[[748]](#footnote-748) Accordingly, some parts of the system will by their design and operation be better suited to certain aspects of deliberation than others. A deliberative system should distribute deliberation across different stages, including stages for debates on the broad issues, more moderately focused debates on the agenda, highly focused technical debates on specific issues within the agenda, and a final decision-making stage in which either a consensus is reached, or a vote is taken on the specific issue.[[749]](#footnote-749)

For our purpose, adopting this systemic conception of deliberative democracy is useful in two ways. First, it allows us to flesh out political constitutionalism’s understandings about the ordinary democratic process. It enables us to move beyond the shallow minimalist conception of representative democracy, to a more sophisticated and attractive deliberative conception. This systemic and deliberative reading enables us to reflect on how the ordinary democratic process contains opportunities for both deliberating and voting, which work together to ensure the system as a whole provides for a talk and vote centric method of managing disagreement. Second, it also enables us to reflect on the role of legislatures within this larger system. We have already observed how transformative and arena legislatures perform different roles within their political orders. The important point is that both types of legislature contribute to a deliberative system in different ways.

Every deliberative system will need a *binding decision-making stage*; the point in the process whereby a binding decision about the laws regulating the political community must be taken. Interestingly, the institutional design of the transformative and arena legislature suggests this *binding decision stage* differs within ordinary democratic process based upon the legislature’s role. The transformative legislature’s role is to *transform* the competing preferences of the community to foster compromise. Consequently, within a system which allows the national legislature to perform a transformative role, the electoral system cannot be the *binding decision-making stage* within the process. Rather, that role is reserved to the legislature. The transformative legislature is institutionalised in ways that promote and reflect the belief that the legislature is and should be the ultimate *binding decision-making stage* within the system. In contrast, the role of an arena legislature is to *formally authorise* the decisions made by the electorate and shape future public debate. Accordingly, arena legislatures are institutionalised in ways which reflect a narrative that the electoral system is the ultimate *binding decision-making stage* within the system. In systems where the legislature performs a transformative role, both voters and their legislators’ preferences are not fixed. In contrast, in systems where the legislature performs an arena role, voters’ preferences are not fixed. However, the legislature’s preferences are considered to be relatively fixed to reflecting the choices made by the electorate. Nevertheless, the arena legislature incentivises technical deliberation about how to effectively implement the electorates’ decisions. Its institutional rules, practices and narratives neither enable nor encourages legislators to disregard the decisions of the electorate based upon their own intra-legislative deliberations. Of course, in both transformative and arena legislatures, the preferences of legislators do not need to be fixed when it comes to deliberating on whether certain issues should be on the agenda in the future. Obviously, in the context of the arena, the legislators are considerably more beholden to the present agenda that was determined by electorate.

Using the DQI, the next chapter will analyse how legislative institutions can organise political life to promote a style of deliberation required within transformative legislature. For now, it is worth reflecting on how deliberation can occur within the ordinary democratic process when the legislature performs an arena role. Robert Goodin’s systemic deliberation - or as he calls it, a *deliberative Schumpeterian* account of representative democracy[[750]](#footnote-750) - demonstrates how deliberation operates within those systems whereby the legislature performs an arena role. For Goodin, the political parties are central to promoting deliberation. His conception of a deliberative system contains four stages. First, there is an intra-party stage, where deliberation occurs within the caucus rooms of each of the political parties. This deliberation is about establishing the party’s political programme. Second, there is the legislative stage. Here Goodin focuses on the communication aspect of the linkage function, by emphasising how rival political parties use legislative debate as a means of publicly presenting their positions on certain issues. Third, deliberation on a mass scale occurs between and during elections, as parties and voters actively deliberate about which of the competing party’s policy programmes should become the legislative agenda. Finally, Goodin suggests that in certain circumstances, there may be post-election bargaining if the electorate produces an indecisive outcome i.e. it fails to produce a clear majority for any one of the competing parties.[[751]](#footnote-751) In essence, Goodin’s account suggests even though the arena legislature might not be the binding decision-making stage within the ordinary democratic process, it still contributes to deliberation in a significant way, through its institutionalised emphasis on political parties and political debate.

### *Transformative or Arena?*

Having reconceptualised the ordinary democratic process as both a talk and vote centric system of managing disagreement, the final task is to determine whether the strands of political constitutionalism advocate a transformative or arena role for the legislature, within their respective conceptions of the ordinary democratic process. As argued in chapter two, the political model was never grounded in one specific conception of democracy. Instead, different proponents grounded the political model within different understandings of democracy. This resulted in three main strands of political constitutionalist thought: liberalism, republicanism and democratic socialism. Although these strands overlap with one another with regard to the basic tenets of the political model, they subtly diverge on finer details about how the political model should operate in practice. Indeed, chapter two highlighted that these strands present different, albeit reductive understandings, about legislatures. This final section argues that the strands disagree about the legislature’s role within the ordinary democratic process. Whereas the liberal strand favours a transformative role, the democratic socialist and republican strands favour an arena role. This is a consequence of each strand’s proponents understanding ordinary democratic process differently from one another, which results in divergent expectations about the legislature’s role within their conception of the political model. Since political constitutionalism has not sufficiently engaged with legislative studies, the existing literature makes no explicit claims about whether the legislature should perform a transformative or arena role. Nevertheless, some of the existing literature’s claims can be reinterpreted in light of Polsby’s typology to help determine what they believe the legislature’s role ought to be. Consequently, the claims made here are based on the interpretations within this thesis of the existing literature. It may be the case that political constitutionalists may disagree with the conclusions drawn here. Nevertheless, in making this argument, this thesis hopes to at least provoke proponents of political constitutionalism to reflect and render more explicit their assumptions about the legislature.

#### The Liberal Strand

The liberal strand contends that the political model provides a normatively desirable form of constitutional organisation for respecting the belief that individuals are “potential moral agents, endowed with dignity and autonomy.”[[752]](#footnote-752) The liberal strand is expressed solely through the works of Jeremy Waldron. Importantly, of all the strands considered in this thesis, the liberal strand articulates the most detailed account about how the legislature should operate. Waldron’s recent *political political theory* approach demonstrated a more conscious attempt to reflect on issues of legislative design. This thesis contends that the liberal strand believes the legislature should play a transformative role within the ordinary democratic process. This claim is based upon three pieces of evidence that can be extracted from the liberal strand’s claims about the legislature. First, the liberal strand explicitly advances that the legislature should foster compromise. Second, the legislature’s design should promote articulated government – the slower deployment of state power. Third, the relative absence of parties within the liberal strand’s account of ordinary democratic politics. Taken together, this suggests that the liberal strand believes the legislature should play a transformative role.

First, the liberal strand explicitly argues that the legislature should perform a deliberative and binding decision-making role within political process. This is articulated through Waldron’s seven principles of legislation, which were discussed in chapter two.[[753]](#footnote-753) While many of these principles are essentially neutral, in the sense that they could be institutionalised and promoted via a transformative or arena legislature, two principles are distinctively more compatible with a transformative conception. These are the *principle of responsive deliberation* and the *duty of care principle*.[[754]](#footnote-754) The principle of responsive deliberation essentially advocates that principles of deliberative democracy, such as those highlighted by Gutmann, Thompson and Steiner *et al*, should apply to legislative decision-making.[[755]](#footnote-755) Nevertheless, as we have pointed out above, both transformative and arena legislatures are capable of promoting deliberative norms in different systemic ways. Yet significantly, Waldron contends that legislative decision-making should be both the deliberative and *binding decision-making* stages within the ordinary democratic process. As Waldron posits:

It is… important that views voiced in the legislature not be held as frozen positions, with no possibility of change or compromise. Opinions must be held as opinions and therefore open to elaboration, argument, correction and modification… Sometimes this will mean that individuals must be prepared to abandon positions they have taken, at other times it will mean that parties of legislators must be willing to reconsider positions they have staked out.[[756]](#footnote-756)

Accordingly, in making this claim, Waldron’s understanding of the legislature’s role within political order can only align with the idea of the legislature performing a transformative role. As argued above, unlike their arena counterparts, transformative legislatures are specifically institutionalised to foster compromise. Arena legislatures would struggle to achieve the kind of the deliberation that aims to produce compromise, because they are institutionalised to reflect the belief that the outcomes of the electoral decision-making stage should be binding upon the behaviour of its legislators. Consequently, this infers a preference towards a transformative legislature.

Second, Waldron advocates the principle of duty of care via articulated governance. This is the idea that legislatures must have a duty of care when legislating, to avoid imposing unnecessary constraints and burdens on autonomous individuals.[[757]](#footnote-757) As Waldron hypothesises, one way to ensure this duty of care is achieved through articulated governance. This is the idea that by channelling the exercise of state power through various intra institutional arrangements, these slow down, but do not prevent, the deployment of power.[[758]](#footnote-758) In essence, through taking a slower and more careful approach, the legislature can protect autonomous individuals from reckless or unnecessarily attacks. The transformative legislature’s highly complex internal structures are particularly well suited to promoting this articulated form of governance. As Polsby noted, transformative legislatures are distinguished by their highly complex internal arrangements, which act as a set of complex hurdles for the deployment of political power.[[759]](#footnote-759) **In contrast, the internal structure of the arena legislature may appear less suitable for promoting articulated governance. Whereas the institutional design of transformative legislatures emphasises effectiveness, arena legislatures emphasise efficiency. Arena legislatures serve the interest of the political parties. In particular, their institutional rules, practices and narratives aim to promote expediency in attainment of the** government’s policy goals.[[760]](#footnote-760) Consequently, there is a risk that arena legislatures are less effective at promoting the duty of care.

Finally, we can infer the liberal strand’s preference for a transformative role is based upon how it perceives political parties. As argued in the previous chapter, although the liberal strand has presented the most detailed account of the legislature, it nevertheless has several reductive qualities. One such reductive quality is, as Nancy Rosenblum pointed out, the fact that political parties are largely absent from Waldron’s account of the legislature.[[761]](#footnote-761) Of course, political parties are present in both transformative and arena legislatures. Nevertheless, political parties have a less significant part to play within a transformative legislature. As was noted above, the transformative legislature’s institutional rules, practices and narratives create opportunities and incentives for individual legislators to act independently of their parties.[[762]](#footnote-762) In contrast, in arena legislatures, parties dominate the internal structure and play a critical role in performing several important legislative functions. Accordingly, the absence of, or more accurately reduction in emphasis placed upon political parties within the liberal strand may suggest its conception of the legislature aligns more closely with belief that legislature should perform a transformative role within the ordinary democratic process.

#### The Democratic Socialist Strand

Both the democratic socialist and republican strands of political constitutionalism appear to believe the legislature should perform an arena like role. To briefly recap, the democratic socialist strand presents a socialist reading of the political model. It advances that the political model provides a normatively desirable form of constitutional organisation for the pursuit of socialist goals. This strand developed out of an early 20th century left-wing reading and subsequent defence of the UK’s constitutional order. There are three pieces of evidence that suggest the democratic socialist strand believes the legislature should perform an arena role. First, the strand’s conservative defence of the UK’s constitutional order. Second, broadly speaking, the democratic socialists have emphasised strong government as a means of promoting socialist goals. Third, the considerable emphasis the strand places on the political parties as vehicles for representing class interests.

First, the democratic socialist strand has traditionally presented itself as a conservative defender of the UK’s predominantly political constitution. For the most part, those on the left have largely been satisfied with the form of constitutional organisation found within the UK, including the design of its Westminster Parliament. Inevitably, this satisfaction has been closely tied to the political fortunes of the Labour Party, the parliamentary vehicle for the promotion of socialism.[[763]](#footnote-763) As Peter Dorey observed, both Labour Parliamentarians and Democratic Socialist scholars have tended to emphasise the importance of legislative efficiency over effectiveness.[[764]](#footnote-764) This tendency projects itself in the belief that the legislature’s primary function is to support - or at least not actively hinder - the executive, in carrying out its legislative programme, which has received the prior consent of the electorate.[[765]](#footnote-765) Consequently, the democratic socialist strand has shown a strong affinity towards the Westminster model’s focus on strong government and democratic mandate.[[766]](#footnote-766) This broad satisfaction with the Westminster Parliament is important, because Polsby considered the Westminster Parliament to be the purest example of an arena legislature.[[767]](#footnote-767) Second, and closely related, the arena legislature’s institutional rules, practices and narratives are conducive towards strong government. The argument here is largely the inverse of those made above in relation to the liberal strand. Whereas the transformative legislature’s highly complex institutional rules, practices and narratives emphasise legislative effectiveness, the arena’s institutional rules, practices and narratives are designed to serve the interests of political parties and the government.[[768]](#footnote-768) Therefore, the arena’s institutional rules, practices and narratives do not seek to hinder the government in carrying out its legislative programme. Instead, the arena’s institutional rules, practices and narratives provide suitable conditions for the kind of strong government that democratic socialists crave. Therefore, through their support for strong governance via legislative efficiency, we can infer the democratic socialist strand’s preference for legislature performing an arena role within the ordinary democratic process.

Finally, the democratic socialist strand places considerable emphasis on the importance of political parties. This is most obviously the reflected by the pivotal role that democratic socialists assign to the Labour Party. Democratic socialism within the UK has traditionally viewed the Labour Party as primarily vehicle for capturing the state.[[769]](#footnote-769) The importance of parties is also reflected in the strand’s commitment to the Westminster Model. Moreover, the importance of parties is also visibly expressed in Danny Nicol’s defence of political parties within the political constitution.[[770]](#footnote-770) Although parties are central to the functioning of the arena legislature, they play a lesser role within transformative legislatures, which incentivise greater individual legislator autonomy. Within transformative legislatures party discipline is weak. For Nicol, weak party discipline (or its complete absence) is problematic. Nicol posits that parties function as “the fundamental cord of accountability that links British governments to the electorate.”[[771]](#footnote-771) The electorate create the governing majority, based on their support for a party’s proposed policy programme. Therefore, the governing majority is held to account by the electorate based upon its ability to ensure its policies are successfully delivered.[[772]](#footnote-772) Moreover, Nicol contends strong party discipline functions as the central mechanism by which individual legislators can hold the executive to account. The parties’ policy programme and broad ideology functions as a barometer, by which individual legislators can assess the appropriateness of the executive’s behaviour. [[773]](#footnote-773) As Nicol contends, intra-party methods of communication and accountability mechanisms enable these individual legislatures to put pressure on the executive for concessions. [[774]](#footnote-774) In essence, the considerable emphasis placed upon political parties closely aligns with an arena conception of the legislature’s role, whereby parties are dominant and central to the legislature’s ability to carry out its core functions, such as policy-making and promoting accountability.

#### The Republican Strand

The republican strand posits that the political model provides a normatively desirable form of constitutional organisation for avoiding domination. For republicanism, domination refers to one’s capacity to arbitrarily interfere with another.[[775]](#footnote-775) This thesis contends that this strand *mostly* appears to suggest that the legislature should perform an arena role within the ordinary democratic process. The word ‘mostly’ reflects the tension detected in chapter two about how different republican political constitutionalists view ordinary democratic politics. The republican strand is articulated by Richard Bellamy and Adam Tomkins. However, both authors deploy republicanism in different ways to justify the political model. This results in each author presenting different understandings about the legislature and democratic politics. Therefore, while there is strong evidence to suggest Bellamy favours the arena role, Tomkins’ understanding is far more complex and somewhat contradictory in nature. In response, this thesis contends that Tomkins’ conception of the republican strand supports a modified arena role, which will be explained further below.

Although Bellamy makes very few claims about the nature of the legislature, his support for an arena role can be inferred from the vital role he assigns to political parties in the avoidance of domination. Bellamy envisages party competition as the key to promoting a balance of power and public reason. Parties function to capture and represent the main political divisions in society.[[776]](#footnote-776) From here, the legislature’s role is to institutionalise a rivalry between competing parties, which in turn promotes the need to hear the other side.[[777]](#footnote-777) Bellamy envisages the legislature operating as an arena for “the interplay of significant political forces in the life of a political system.”[[778]](#footnote-778) In essence, it is a space for the political parties to compete. Bellamy’s conception of policy-making also aligns with an arena conception. For Bellamy, policy-making occurs through the parties, rather than through the legislature. Policy-making is a product of coalition building, which is central to Bellamy’s defence of majority rule. As noted in Chapter Two, Bellamy maintains that successful coalition building yields successful electoral results. It also normally produces a legislative programme for parties prior to them being elected/re-elected, as the proposed legislative programme forms the basis of each party’s pitch to voters.[[779]](#footnote-779) Accordingly, policymaking is outsourced to the political parties. This implies an arena role, as unlike the transformative legislature, which engages in policymaking from within its internal structure, policymaking occurs externally in the context of the arena legislature. Moreover, Bellamy posits the legislature should refrain from placing its preferences above those of the electorate. As he contends, “on most issues of public policy, the agenda has been set at the general election and parliament’s role is to reflect voting in that popular arena.”[[780]](#footnote-780) Consequently, Bellamy implies the legislature should act as a formal authoriser and fine tuner of legislation, rather than a law-making body. This again suggests the legislature should perform an arena role within the ordinary democratic process. Finally, Bellamy’s preference for the arena may also be reflected in the absence of any consideration about the internal structure of the legislature, beyond acting as a formal space for political parties to compete.

Tomkins’ account of the legislature is far more difficult to categorise. On the one hand, Tomkins seeks to present a normative reading of the UK Constitution and places considerable emphasis on the Westminster Parliament. As noted above, the Westminster Parliament is considered a pure arena legislature.[[781]](#footnote-781) Yet on the other hand, Tomkins appears critical of how political parties dominate the Westminster Parliament. For Tomkins, parties distort the legislature’s ability to hold the executive to account, as party discipline reduces the autonomy of individual legislators.[[782]](#footnote-782) As was noted in the previous chapter, Tomkins believes the main way to achieve this is by removing whips, improving the committee system and promoting a strong second chamber.[[783]](#footnote-783) Accordingly, we can infer from his account, a preference for legislative effectiveness over efficiency. Yet as Chapter Two argued that some political constitutionalists adopt an exceptionalist approach to legislative design, by simply prescribing that legislatures should emulate the Westminster Parliament without reflecting on the institutional rules, practices and narratives found within its design.[[784]](#footnote-784) Nowhere are the flaws of approach more apparent than in Tomkins’ work. The fundamental tension that Tomkins’ defence and criticisms of Westminster Parliament both fail to recognise is that the Westminster Parliament has been - intentionally and unintentionally - designed to perform an arena role within the ordinary democratic process. It is designed to allow the political parties to dominate.[[785]](#footnote-785)

To conclude, at worst we may say Tomkins’ contradictory claims about the legislature’s role are simply irreconcilable. At best, we might say Tomkins advocates a modified arena role. It is important to remember that Polsby’s typology is a continuum; many legislatures will be somewhere in between the transformative and arena poles. When a legislature is designed to perform a modified arena role, it has   
institutional rules, practices and narratives that provide for a weaker form of party discipline, granting individual legislators with opportunities to express a greater degree of autonomy from their parties. However, within a modified arena, individual legislators are deprived of the institutional rules, practices and narratives necessary to create policy and substantially transform legislation. Therefore, a modified arena would combine insights from the institutional designs of both transformative and arena legislatures.

## *Conclusion*

In conclusion, this chapter has interrogated political constitutionalism’s understandings about the legislature’s role within the ordinary democratic process. It has sought to demonstrate how democratic legislatures perform a similar set of core functions in different ways. These differences result in legislatures performing different roles within their respective political orders. Whereas the transformative legislature *transforms* preferences to foster compromise, the arena legislature *formally authorises* the decisions made by the electorate and shapes future public debate. There is no unity of thought among the different strands of political constitutionalism about what the legislature’s role within the ordinary democratic process should be. The liberal strand advances that the legislature should perform a transformative role within the ordinary democratic process. In contrast, the democratic socialist and republican strands took a different view. They claimed the legislature should perform an arena role within the ordinary democratic process. Ultimately, the strands disagree over whether the legislature’s role should be to modify or simply carry out the preferences of the political community. Consequently, transformative and arena legislatures organise political life in substantially different ways. Nevertheless, whether a legislature performs a transformative or arena role within the ordinary democratic process depends on how legislative designers intentionally (or unintentionally) respond to a series of design issues.[[786]](#footnote-786) Therefore, the next chapter analyses how legislative designers can organise political life in ways that incentivise the legislature to perform either a transformative or arena role within a political constitution, through the distribution of legislative resources.

# IV

# *Legislative Design and Distribution of Legislative Resources*

The political model is valuable because of its distinctive focus on legislative institutions. Yet because political constitutionalists insufficiently reflected on questions of legislative design, the model’s full potential has yet to be fully realised. This is a significant shortcoming, as legislative design organises political life by providing political actors opportunities and constraints.[[787]](#footnote-787) Despite placing legislative institutions at the heart of their model, political constitutionalists have neglected to reflect on the implications of institutional design on the exercise of political power. In response, chapter three analysed political constitutionalism’s understandings about the legislature’s role within a constitutional order. It observed that legislative scholars distinguished between two types of legislatures.[[788]](#footnote-788) The role of the transformative legislature was to transform electoral inputsthrough fostering compromise. In contrast, the arena legislature performed a different role, representing electoral inputs by formally authorising them into law and providing an arena for shaping future public debates. Chapter three detected a lack of unity among the different strands of political constitutionalism regarding what the legislature’s role ought to be. Whereas the democratic socialist and republican strands of political constitutionalism favoured an arena role, the liberal strand favoured a transformative role. Having determined what the ideal role of the legislature should be, the question turns to how to ensure that the legislature performs its prescribed role according to the strands of political constitutionalism.

Accordingly, this chapter asks *how should a legislature organise political life according to political constitutionalism*? This means analysing how legislative design should organise political life through conditioning the amount of access that different political actors have to vital legislative resources. This will highlight how designing the legislature to perform either an arena or transformative role inevitably involves confronting trade-offs involved in the balancing of legislative resources. Accordingly, this chapter enriches political constitutionalism’s understanding of how institutional design affects the intra-institutional dynamics of legislative politics.

The structure of this chapter is as follows. Section one examines what it means to describe a legislature as an ‘institution’ and why institutions matter in political life. Institutions should be understood as “the rules of the game.”[[789]](#footnote-789) They are organisational structures, necessary for the management of politics. Legislative institutions cannot function if they cannot organise political life. Therefore, legislative designers must ensure their legislature provides an organisational structure. Yet, as section two contends, legislative designers must confront design choices regarding the distribution of legislative resources between the majority and minority and between the main chambers and the committees. The distribution of these resources will determine how the legislature organises politics. In doing so, section two illuminates some of the important trade-offs involved in the organisation of legislative institutions. Finally, section three analyses how these rights and resources can be differently distributed, to incentivise the legislature to perform either an arena or transformative role within the constitutional order. This will analyse design choices regarding who controls the legislative agenda, majority and minority rights, and the division of labour between the main chamber and committees.

## *Organising Politics through Political Institutions*

It is important to clarify the significance of describing legislatures as institutions. In the study of public law, it is commonplace to describe important constitutional bodies as institutions, but it is less commonplace for public lawyers to explicitly explain the significance of this description.[[790]](#footnote-790) For example, consider why the Westminster Parliament is recognised as an institution? Perhaps at one level, we might describe it as an institution because of the brass plate outside the building denoting it is an institution of the state, or because of the historical significance attached to the building.[[791]](#footnote-791) Yet on another and much deeper level, we might describe it as an institution because we recognise that what happens inside the building is distinctive. For example, we can observe that political actors behave differently within the Westminster Parliament from the way they might behave outside. We can also observe that political actors behave differently within the main chamber, in comparison to the ways they behave within the committee system. It is important to recognise that describing a body or group as an institution signifies that the actors within it are organised and behave in specific ways. As a result, an institution is a distinctive form of organisation capable of shaping and channelling political life.

Within political science, the significance of institutions is reflected by institutionalism as a method of political analysis. Proponents of institutionalism are animated by the belief that the organisation of political life through institutions not only matters, but matters more than anything else that could explain the behaviour of political actors.[[792]](#footnote-792) Therefore, proponents of institutionalism aim to present a theoretically and empirically informed account of how and why institutions matter within political life.[[793]](#footnote-793) Leading institutionalists James March and Johan Olsen define an institution as a “relatively enduring collection of rules and organized practices, embedded in structures of meanings and resources that are relatively invariant in the face of turnover of individuals and relatively resistant to idiosyncratic preferences and expectations of individual and changing circumstances.”[[794]](#footnote-794) These rules and structures are a product of institutionalization, whereby routine practices “acquire value and stability” over time through the habitual behaviour of political actors.[[795]](#footnote-795) In this regard, institutions matter because they organise political life by providing political actors with standard operating procedures, which express particular values and power relationships within the organisational environment.[[796]](#footnote-796)

March and Olsen theorised that the reason political actors follow institutional rules, practices and narratives is because of the “logic of appropriateness.”[[797]](#footnote-797) This is the belief that the behaviour of political actors is determined by their internalized prescriptions about what is socially acceptable in a given scenario.[[798]](#footnote-798) Institutions provide political actors with rules, practices and narratives,[[799]](#footnote-799) which political actors can perceive as “natural, rightful, expected and legitimate.”[[800]](#footnote-800) Institutions connect political actors with institutional prescriptions about what can be considered appropriate behaviour in a given situation.[[801]](#footnote-801) Therefore, when in a highly institutionalised environment, political actors engage in a process of matching their identity and situation with the prescribed institutional rules, practices and narratives. This process is determined by the political actors’ ability to recognise what is appropriate behaviour in their given situation, based upon their past experiences, knowledge or intuitions.[[802]](#footnote-802) In essence, institutions matter because they organise political life through prescription of appropriate behaviour. Institutional prescriptions provide political actors with a greater degree of certainty about the present and future behaviour of other actors within their institution.[[803]](#footnote-803)

Nevertheless, one must account for several important issues. First, institutions may prescribe appropriate behaviour which is not the same as morally right behaviour. As March and Olsen suggest, unethical behaviour such as engaging in ethnic cleansing and family blood feuds can be recognised as appropriate behaviour by actors.[[804]](#footnote-804) Consequently, institutions can promote deep injustices and power imbalances between different political actors and groups. Second, for better and worse, what is and is not appropriate behaviour in a given situation can be ambiguous.[[805]](#footnote-805) For example, in new or unprecedented situations, political actors may need to engage in the constructive reinterpretation of established rules to move forward.[[806]](#footnote-806) Third, institutional prescriptions can be in a state of harmony or in dissonance with one another.[[807]](#footnote-807) Thus political actors can find themselves facing multiple conflicting rules, which require them to follow one over the other. Finally, political actors may actively resist or adapt rules to serve their own goals.[[808]](#footnote-808) These ideas will be returned to in chapter seven, but for now we must simply remember that any rules, practices and narratives that we might prescribe cannot cover every possible situation that might arise. As Vivien Lowndes and Mark Roberts stress, in practice institutions are rarely perfect, and instead all institutions, at some point in time and in some circumstances, can have defective aspects in their design.[[809]](#footnote-809) While institutions may not always perfectly organise political life through their prescriptions, it is nevertheless significant that in each of the circumstances above, the political actors still have to acknowledge the existence of institutional rules within their internal behavioural calculus.

Although institutions can be less than perfect at times, effective institutions organise political action in ways which allow the institution to continue to function and perpetuate its own existence. Accordingly, as Gerhard Loewenberg and Samuel C. Patterson stress, “a legislature would be unable to make collective decisions if it was merely an assemblage of men and women… what converts these individuals into a body able to act is a structure for the organisation of work and a set of rules by which it can proceed.”[[810]](#footnote-810) Therefore, we must recognise that the capacity to organise political life is an inherent aspect of being a legislature.

In the context of designing legislative institutions, the designer must strive to ensure their legislative institution organises political life in ways which are capable of achieving two objectives necessary for the perpetuation of the institution. The first objective is to ensure, as a bare minimum, the legislative institution organises political action in ways which overcome the circumstances of politics. As argued in chapter two, the circumstances of politics describe a situation in which a political community accepts that in order to continue, they must reach a decision about their common decision-making framework or a course of action “even in the face of disagreement about what that framework, decision or action should be.”[[811]](#footnote-811) Therefore, a legislative institution must organise political life in ways which allow the institution to provide an effective decision-making framework capable of producing outcomes necessary for the management disagreement. It is important to recognise that the norms of political constitutionalism identified in chapter two - *political equality*, *majority rule* and *the principle of contestability* – cannot, by themselves, guarantee the management of disagreement. That is to say, without sufficient organisation, the legislature will not be able to overcome the circumstances of politics. The second objective is to ensure the legislature is organised in a way which ensures it is not only capable of performing its core functions - law-making, linkage, enabling and constraining the executive, legitimation and training - but also that it carries out these functions in a way which ensures the legislature performs its prescribed role within the constitutional order.

The risks associated with the legislature failing to organise political life to a sufficient degree are captured in Gary W. Cox’s theory about the *legislative state of nature*. Cox reasons that if the legislature fails to sufficiently organise the behaviour of legislative actors, chaos will ensue. The legislative state of nature describes “an assembly whereby all business is conducted in the plenary sessions (no committees) and members’ ability to talk and make motions is largely unrestricted.”[[812]](#footnote-812) There are two core problems with the legislative state of nature, which will prevent the legislature overcoming the circumstances of politics. First, the legislature can waste the limited resource of plenary time. Second, legislative decision-making can become super-majoritarian in its operation.

The first problem is that the legislature will consume plenary time at a highly inefficient rate. In the context of legislative institutions, plenary time is arguably the most important resource for legislative actors. Plenary time simply refers to any time used by the legislature, in relation to the performance of its core functions. Every action taken within the legislature will consume some amount of plenary time.[[813]](#footnote-813) Plenary time is an extremely limited resource for obvious reasons. There are only 24 hours in a day and only 365 days in a year. Furthermore, legislators are human, they will need to eat, and sleep and they will want to live a life beyond the legislature. Yet, in the legislative state of nature, debate is unregulated; there is no cut-off point in which a decision must be taken. Therefore, in theory, the debate can go on forever with each and every legislator voicing their opinions. Alternatively, legislators can filibuster debates, speaking indefinitely and refusing to give way to others (this of course would be a super-human endeavour).[[814]](#footnote-814) Moreover, plenary time is also used by individual legislators to communicate with their electorate. Elections incentivise legislators to cultivate their vote. [[815]](#footnote-815) Legislators achieve this through either acts of *legislative particularism* or *extra-legislative parochialism*.[[816]](#footnote-816) Particularism refers to when legislators attempt to cultivate their vote through securing benefits for their constituency, through amending legislation.[[817]](#footnote-817) Parochialism, in contrast, refers to when legislators provide local services within their constituency, such as casework and surgery sessions.[[818]](#footnote-818) Importantly, both consume plenary time, albeit in different ways. Particularism increases the consumption rate of plenary time during debates, as different legislators vie to maximise the legislative benefits or to mitigate the consequences for their constituency. Parochialism reduces the amount of plenary time available for debates, as legislators have to spend time away from the legislature carrying out constituency services.[[819]](#footnote-819) Furthermore, as Cox highlights, legislators may attempt to cultivate their vote by raising issues that are unrelated to the debate at hand. For example, during a debate on a bill to build more schools it is plausible to imagine some legislators being for the bill and others against. However, we should also expect a third category of legislators who are indifferent towards the bill. There is the risk that without procedural rules, these legislators may derail the debate by raising irrelevant issues that are designed to appeal to their constituency. Thus, this local publicity will consume more plenary time.[[820]](#footnote-820)

The second problem is that in the legislative state of nature, an ordinary majority decision-making process can become transmogrified into a super-majoritarian process. The problem here is that the organisation of the legislature becomes so dysfunctional that in practice, each legislator’s negative power to block legislation greatly outweighs their positive power to pass it. To prevent a bill being voted on, legislators can filibuster the debate. However, in doing so, those who deploy the filibuster to prevent their rivals succeeding, cannot guarantee their own bills will not also be filibustered. Therefore, in practice it is easier to block legislation than to pass it. As Cox points out, in such circumstances, bills will need a supermajority or even unanimous support to succeed.[[821]](#footnote-821) This is because, in order for a bill to be passed, the supporters of the bill will have to engage in a strategic bargaining with those threatening to oppose the bill via filibustering. Consequently, in the legislative state of nature there is a real possibility that a bill cannot succeed until the demands of a minority group or individual legislator are met. This creates problems when a decision needs to be taken quickly, such as emergency legislation, as opponents can simply run down the clock. Moreover, the legislative state of nature is biased towards the status quo, as to bring about a change, a unanimous or supermajority level of support may be required for a bill that changes the status quo. Those wishing the defend the status quo can in effect veto bills that threaten to change the status quo in ways they do not approve of. It worth remembering that chapter two observed that political constitutionalism is particularly sceptical of supermajority forms of decision-making.

It might reasonably be objected that the legislative state of nature is in practice very rare because legislative institutions organise political life to avoid this problem.[[822]](#footnote-822) However, there are several historical examples of this occurring. The first and perhaps best example is the Polish Sejm during 1652 to 1791. In order for a bill to be passed, each member of the nobility had to agree to it. In practice, what this meant was that each and every member could veto the bill to prevent any measure being adopted. This led to organisational paralysis, which in turn led to civil war.[[823]](#footnote-823) The Austrian parliament between the late 19th and early 20th century is another good example. The Austrian Parliament lacked any institutional rules or practices that could prevent the majority’s legislation being frustrated by obstructionist tactics. Instead, it’s one rule empowered any 50 MPs to request very time-consuming recorded voting procedure, which could delay any vote, including petitions to be read before the day’s agenda.[[824]](#footnote-824) In the hands of the opposition, this was a powerful tool for effectively preventing the majority from legislating, grinding the legislative process to a halt. The disruptive state of legislative politics within Austrian Parliament eventually lead to it collapse in 1933.[[825]](#footnote-825) Similarly, Josephine Andrews’ account of failures of the post-Soviet Russian parliament in early 1990 also suggest that dysfunctional institutional rules and practice contributed to the Parliament’s fall in the Russian constitutional crisis of 1993.[[826]](#footnote-826) In summary, limited plenary time and the near super-majoritarian processes of the legislative state of nature can create significant risks of an impassable bottleneck developing, preventing any decisions being reached and facilitating a wider constitutional crisis.

The combined effect of these problems is that the legislature risks becoming paralyzed by the legislative state of nature, unable to perform its core functions and role within the constitution. A lack of or dysfunctional form of organisation presents significant problems for those seeking to overcome the circumstances of politics. Without sufficient organisation, it is not possible for a legislature to produce collective decisions on legislation, which is necessary for the management of the wider political community. Consequently, to be an institution, a legislature must provide the necessary rules of the game that organise political life and link specific actors with specific rules in specific situations.[[827]](#footnote-827) Nevertheless, as was observed in chapter three, the arena and transformative legislatures are the product of different institutional prescriptions, which organise the legislature to perform its role within the constitutional order.[[828]](#footnote-828) These different institutional prescriptions reflect not only different understandings about what the legislature’s role should be, but also differences in how institutional rules, practices and narratives distribute the resource of plenary time between competing groups within the legislature.

## *Legislative Design in the context of limited resources and trade-offs*

Institutional design involves confronting inescapable design choices regarding the organisation of political life. These design choices force designers to weigh up and balance the trade-offs between often incommensurable values; such as the majority’s desire for strong and effective governance vs the need to respect the concerns and interests of minorities, and the benefits of visible, accessible and partisan-spirited debates within the main chamber vs the less visible, more cerebral and prudential technical debates within the committee system. Therefore, in designing a legislature to perform an arena or transformative role, the designer will need to identify the design choices and respond to them, by reflecting on and choosing between the competing choices before them. This requires determining, which of the competing choices, will most likely incentivise the organisation of political life towards the legislature’s prescribed role as advocated by each of the strands of political constitutionalism. Specific aspects of the legislature’s design might accentuate certain values, functions and practices, at the expense of others. Nevertheless, it may also be the case that on a systemic level, the overall design of the legislature may still broadly promote these values, functions and practices. Finally, one should also recognise that design is always a process of trial and error. In practice, the design choices taken by the designer may fail to live up to expectations or operate as intended.[[829]](#footnote-829) Accordingly, any claims made here, however evidence based they may be, may still have unforeseen consequences when applied in practice. For in the realities of politics, well-intentioned or evidenced-based design plans may still have to confront “the procrustean rocks of day-to-day partisan politics with its relatively short time-cycles and irrational incentives.”[[830]](#footnote-830)

As noted in chapter three, both transformative and arena legislatures are organised differently, as a result of the intentional or unintentional choices taken by real-world political actors and constitutional designers. In the context of a legislative institution, arguably the most difficult design trade-off one must confront is how to distribute the limited resource of plenary time, between competing groups with competing objectives. As the legislative state of nature highlights, organising a legislature involves balancing the limited resources of plenary time with the need to respect political equality among legislators. The legislative state of nature represents an extreme case, in which the legislature is organised in a way which promotes absolute political equality, but at the expense of the efficient consumption of plenary time. It serves to illuminate how the well-intentioned idea of absolute legislative egalitarianism will ultimately be in practice undesirable. On the one hand, by opting against placing procedural constraints on each legislator’s right to debate, the legislature is organised in a way which respects the circumstances of politics, as it provides an environment where opinions do not need “to be played down or hushed up.” [[831]](#footnote-831) Yet on the other hand, when organised this way, the legislature provides a poor environment for reaching the kind of collective decisions necessary for managing the disagreement within the political community, as it will most likely operate in a highly dysfunctional manner, wasting plenary time and is prone to being disabled via filibustering. As a result, if one expects the legislature to produce collective decisions, necessary for the management of disagreement, they will need to accept a more relative form of legislative egalitarianism. Here, the legislature is organised to ensure legislators have equal voting rights, but in all other circumstances - essentially everything leading up to the vote - certain legislators are privileged with important rights and resources by the institution.[[832]](#footnote-832)

A legislative institution must organise political life through distributing resources - the use of plenary time - between competing groups and sites within the legislature. These include the majority, the minority/minorities and the main chamber and the committees. Each of these will need to use plenary time to pursue their own goals and perceived functions within ordinary political process. For example, whereas the majority’s goal is to use plenary time to implement its policies, the minority (or minorities) will want to use plenary time to oppose and frustrate the majority’s goals. Yet, both will also wish to use plenary time to communicate with the electorate. Similarly, whereas some legislators will want to use plenary time for plenary debate and questions within the main chamber, others will want to use plenary time for committee work. Accordingly, a legislative institution will distribute plenary time between these groups through its rules, practices and narratives, privileging certain groups with specific rights to the resource of plenary time. A legislative institution organises political life through distribution of agenda-setting rights between the majority and minority groups. These are procedural rights which determine whether majority and minority groups are able to get their preferred bills, amendments, motions, issues and opinions on to the political agenda.[[833]](#footnote-833) The distribution of these rights is critical, because determining what will be debated and voted upon, each day and over the course of the legislative session, matters when plenary time is so scarce.[[834]](#footnote-834)

Agenda-setting rights allow the privileged groups a degree of control over what makes it on to the political agenda, through providing them positive and negative powers. Positive powers enable the privileged group to get their bills, amendments, motions and questions on the legislative agenda. In contrast, negative powers allow the privileged group to keep bills, amendments and motions off the agenda, thus defending the status quo and avoiding unwanted attention being given to certain political issues.[[835]](#footnote-835) In practice, agenda-setting rights take many forms. First, institutional rules can enable the privileged actor or group to place time constraints on debates and committee work. [[836]](#footnote-836) Importantly, these constraints can be used to ensure that favoured bills progress through the legislature at a more efficient rate. Second, institutional rules may enable the privilege group to restrict or wholesale prevent certain bills being amended by anyone other than themselves.[[837]](#footnote-837) Third and perhaps most importantly, institutional rules may allow a privileged group to act as a gatekeeper, determining which policy issues do and do not make it on to the legislative agenda.[[838]](#footnote-838) In doing so, the privileged group acts as the first veto-player within the legislature, providing them with a sufficient degree of control over when the status quo can be changed. Finally, in some countries, institutional rules vest a privilege group with discretion on the type of voting procedures used for certain bills.[[839]](#footnote-839)

Importantly, although legislative institutions organise political life through the distribution of agenda-setting rights, these rights are rarely distributed equally between the majority and minority. In real world legislative institutions, how these rights are distributed varies considerably from state to state and over time. Consequently, the designer must confront the design trade-off regarding how these rights are balanced between the majority and minority. The majority’s rights are relatively straightforward, in that the majority will need a certain degree of agenda-setting power to ensure it is able to pursue its goals. In essence, majority rights condition the majority’s ability to provide strong and effective governance. Accordingly, the majority may be afforded rights that allow them to act as a gatekeeper, exercising control over legislative timetable, and restricting the legislature’s ability to amend their bills. These agenda-setting rights do not guarantee the majority absolute control over the outcomes of the legislative process. In many circumstances, outcomes will also be conditional on the majority leader’s ability to maintain a cohesive majority on a given issue and their policy preference in relation to others within the legislature.[[840]](#footnote-840) In this regard, institutions merely provide a pre-existing set of rights and resources, which exist prior to the majority’s goals. In practice, the agenda-setting rights afforded to the majority vary from state to state and across time.[[841]](#footnote-841) In some states, agenda-setting rights are concentrated with the governing majority, but in others, the agenda-setting rights are more evenly distributed between the majority and minority. For example, in Britain, the agenda-setting rights are formally vested with the Government (though are subject to informal practices).[[842]](#footnote-842) In contrast, agenda-setting within the Danish Parliament rest with the speaker, who consults with party leaders to determine the agenda. Importantly, the government cannot challenge the speaker’s decision, and urgent matters must receive the backing of a supermajority to be placed upon the agenda.[[843]](#footnote-843)

In contrast, minority rights are more complicated but equally crucial in respecting the circumstances of politics. Because the minority (or minorities) within the legislature will disagree with the goals of the majorities, in order to respect their disagreement, the legislature will need to afford them some degree of agenda-setting rights and resources to allow them to oppose the majority. Furthermore, these rights will matter for protecting the minority from the majority abusing its power to silence dissent. As Thomas Jefferson insightfully highlighted, “it is always in the power of the majority, by their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts from those in power are the forms and rules of proceedings.”[[844]](#footnote-844) Minority rights should be understood as an important form of constitutional opposition.[[845]](#footnote-845) This is because through the organisation of the legislature, the constitution can guarantee the rights of those minority groups who recognise the legitimacy of the state and its constitutional arrangements, but oppose the policy preferences of the governing majority. Therefore, they are a specific set of rights *for* those who are willing to obey and operate within the constitutional rules of the state.[[846]](#footnote-846) Minority rights can be defined as a set of “procedural advantages protected from arbitrary change that enable members of the minority to amend, debate and obstruct the majority agenda.”[[847]](#footnote-847) Therefore, minority rights are a form of institutional organisation, and are purposively designed to make it harder for the majority to pursue their goals, by increasing the amount of plenary time that must be consumed to do so. Importantly, the type of rights afforded to minority groups will however be dependent on our normative preferences about the role the opposition ought to play within a legislature.[[848]](#footnote-848)

Beyond the design trade-offs presented by the need to distribute agenda-setting rights between the majority and minority, another trade-off that must be confronted is the division of labour between the main chamber and the committee system. Committees are generally recognised as a useful means of dividing labour within legislative institutions.[[849]](#footnote-849) This is because the smaller scale of committees allows them to perform more specialised functions of policy-making, scrutiny and oversight. Indeed, in some states, most notably within the United States Congress, committees are afforded important institutional agenda-setting rights to propose bills, amendments and to control their own agendas. However, in other states, committees may lack the power to propose legislation or control their own agenda. Yet, regardless of the committee’s power, their work also consumes plenary time, and this is time that could be spent in the main chamber for large scale plenary debates and questioning. Accordingly, the designer must also confront trade-offs over where within the legislature plenary time is spent.

Finally, legislative designers must confront trade-offs presented by competing attitudes towards questions of institutional organisation. This is the trade-off between legislative efficiency and legislative effectiveness. Whereas legislative efficiency is concerned with ensuring the consumption of plenary time is kept to a minimum, legislative effectiveness accepts a high consumption of plenary time is necessary for ensuring the legislature is able to perform its core functions effectively, in particular holding the government to account through legislative scrutiny and oversight.[[850]](#footnote-850) Accordingly, legislative effectiveness considers consuming more plenary time in promoting the effective functioning of the legislature to be a worthy trade-off. Importantly, neither attitude is morally wrong, nor are they always in conflict with one another.[[851]](#footnote-851) Nevertheless, the motivations and perceptions of the legislature’s role that underpins these attitudes are capable coming into conflict. Moreover, as Alexandra Kelso observes, in practice, efficiency can mean different things. It can mean stream lining the legislative process to improve the overall efficiency of the legislature.[[852]](#footnote-852) Alternatively, it can mean institutional rules and practices which enable the governing majority to pass through “unencumbered by procedural complexities” from the rest of the legislature.[[853]](#footnote-853) Therefore, it is also possible for the legislative designer to confront competing attitudes towards legislative efficiency.

To conclude, institutional design involves confronting inescapable design choices regarding how plenary time is distributed between the majority, minority, the main chamber, committee, and between competing organisational attitudes. Consequently, designing a legislature to perform its ideal role within a political constitution, requires the designer to confront these trade-offs by making choices which seek to organise political life within legislature to conform with its expected role.

## *Legislative Designing and Distributing Resources.*

Having illustrated some of the trade-offs that must be confronted when organising a legislative institution, we can now address the question of *how should a legislature organise political life according to political constitutionalism*? This section analyses how these trade-offs can be balanced in ways that incentivise the legislature to perform a transformative or arena role within the constitutional order. Chapter three demonstrated that the strands of political constitutionalism presented different understandings about what the legislature’s role should be within the ordinary political process. The democratic socialist and republican strands believed the legislature should perform an arena role; representing and formally authorising electoral inputs into law while providing a site for shaping future public debates. In contrast, the liberal strand believed the legislature should perform a transformative role, converting electoral inputs through intra-legislativedeliberation into more consensual legislative outputs. To analyse how a designer could organise a legislature to perform these prescribed roles, this thesis adopts Giovanni Sartori’s constitutional engineering methodology: we must analyse which of the available competing design choices will incentivise the legislature to perform its prescribed role.[[854]](#footnote-854) Consequently, the way that a legislature should organise political life will vary between the different strands of political constitutionalist thought.

### *Institutionalising the Arena Role*

Chapter three concluded that both the democratic socialist and republican strands of political constitutionalism implicitly favoured an arena role. The democratic socialist strand’s conception of the legislature was closely grounded in a Fabian understanding and defence of the Westminster Parliament, an apex arena legislature. This was reflected in the strand’s commitment to strong governance and the considerable emphasis it placed upon the importance of political parties and democratic mandate. Similarly, the republican strand’s understanding of the legislature also implied an arena role. This was evidenced in Richard Bellamy’s republican account, through his emphasis on partisan competition as a means of avoiding domination, and his claim that “the agenda has been set at the general election and parliament’s role is to reflect voting in that popular arena.”[[855]](#footnote-855) Chapters two and three also noted that Tomkins’ republican account presents a more complicated understanding of the legislature due to his inconsistent views towards the Westminster Parliament. Nevertheless, chapter three concluded that despite Tomkins’ objections towards political parties, he general supported the Westminster Parliament. Therefore, it concluded Tomkins’ account advocated what could be considered a modified arena role.

To organise a legislature to perform an arena role, three principal design choices must be taken. First, the institutional rules, practices and narratives must reflect that the goals of the governing majority –composed of a single party or a coalition of two or more parties – are legitimate and should be enacted into law. This is because the majority’s policy programme will have received the consent of the electorate at the previous election. Accordingly, the governing majority should be privileged with strong positive and negative agenda-setting rights to control the legislature’s policy agenda and prevent minority groups frustrating the majority’s goals. Second, institutional rules, practices and narratives must nevertheless still reflect the circumstances of politics. Arena legislatures achieve this by operating as a formal environment for “the interplay of significant political forces.”[[856]](#footnote-856) This can be incentivised through minority rights, which provide minorities with the opportunity to influence public discourse, rather than the policy agenda. Third, and as a consequence of the first two requirements, the legislature should be organised to ensure plenary time is primarily spent in the public debates and question time sessions of the main chamber, rather than the less visible specialist discussions held within the committee system. Consequently, because of their advocacy for an arena role, the democratic socialist and republicans adopt an efficiency-based attitude towards questions of institutional organisation.

#### I) Institutionalising Majority Agenda Control

To incentivise the performance of an arena role, the legislature must provide the governing majority with a high degree of control over the legislative agenda. In practice, this can be achieved through centralising agenda-setting rights with a specialist office within the legislature; either a special-legislative committee or an elected speaker/leader of the chamber. Regardless of the form this takes, the office should be institutionally privileged with dominant control over the legislative agenda through three principle means. First, the office-holder will need to have dominant or the sole gatekeeping rights within the legislature. In doing so, the office holder is afforded a high or near complete degree of control over the legislature’s policy-agenda during the session. This will allow the office holder to control which bills the legislature will have the opportunity to debate and vote upon. In essence, the governing majority determines which policy issues plenary time is spent on. In practice, the office-holder can use its gatekeeping rights as means of ensuring bills that conform to its policy goals make it onto the legislature’s policy agenda. Second, the office should also be afforded rights that allow it to control the legislative timetable. Here, the institutional rules, practices or narratives should privilege the office holder with a high degree of control over how much plenary time is spent at the various stages within the legislative process. This will include how much plenary time is spent in the main chamber’s debates and in the committee system. Importantly however, through programming the timetable, the office-holder can also restrict the legislature’s opportunity to scrutinise and amend bills. Finally, the office-holder may also have some degree of control over the amendment process. This can take the form of having control over which amendments are called (in essence, gatekeeping control over amendments), control over the terms and conditions for certain groups and actors to propose amendments and control over the sequencing by which called amendments are voted upon.[[857]](#footnote-857) Significantly, the institutional rules, practices and narratives can control not only which legislative office or offices are institutionally privileged, but also who can hold these offices. Through simply prescribing that the office holders must retain the support of the legislative majority, agenda-setting rights will remain within the hands of the governing majority. This is traditionally achieved through a combination of formal rules establishing the need for an investiture vote and a corresponding rule allowing for a motion of no-confidence, as a means of removing the office holder.

Consequently, when the governing majority controls the pivotal agenda-controlling office or offices within the legislature, the majority can pursue its programme for government without being substantially hindered by the rest of the legislature. This helps ensure the legislature performs an arena role in three ways. First, the governing majority will have gatekeeping rights over which policies make it onto the legislative agenda. In practice, this ensures the manifesto or proposed policy agenda of the elected governing majority is the legislature’s policy agenda.[[858]](#footnote-858) At the same time, this places a constraint upon others within the legislature, by providing an institutional deterrent against other legislative actors trying to place their policies on the agenda. In doing so, this prevents minority groups wasting plenary time by proposing bills which will be inevitably voted down because they contradict the majority’s policy preferences or are simply incoherent. Taken together, this incentivises political rivals to engage in their own coalition building, to ensure they have a majority necessary for controlling the legislature’s policy agenda. Second, the governing majority will have a sufficient degree of control over the legislative timetable to ensure their policies are enacted. The governing majority should be able to manage the amount of time spent debating and scrutinising its legislative proposals. This reduces the likelihood of the opposition obstructing the majority’s policies and ensures the majority’s bill pass through legislative process as efficiently as possible. [[859]](#footnote-859) Thus, the threat of plenary time being wasted by obstructionist tactics of the opposition groups is reduced when agenda-setting rights are centralised within the majority’s hands.[[860]](#footnote-860) Of course, in practice, the governing majority will not be able to completely plan the entire timetable ahead of time. For example, unforeseen emergencies may arise, which require urgent debates, questions and even legislation. Third, if the agenda-setting rights are concentrated within a single office, which is under the majority’s control, there will be no rival veto player to challenge the governing majority’s policy preferences. This is particularly important because it ensures that the governing majority’s policy preferences cannot be frustrated. Nevertheless, they could still be frustrated by *partisan* and *positional* methods of agenda control.[[861]](#footnote-861) In the former, if the majority’s leaders are unable to retain party unity over a specific policy or amendment, their policies can be frustrated by a coalition of legislators who oppose their legislative programme. In the latter, a specific policy preference of a group of rebellious legislators and opposition groups on a given bill or amendment, may converge into a position that gives rise to the possibility that certain aspect of the majority’s policy agenda can be defeated by an ad-hoc coalition. Regardless of whatever institutional advantages are afforded to the institutionally privileged majority leaders, their ability to succeed is conditioned by politics, in that to change the status quo, bills must still acquire the support of a legislative majority. If the internal political dynamics of the governing majority’s coalition fragments, even as the agenda setter, the governing majority’s leaders cannot guarantee their policies will succeed. In such circumstances, the agenda setter’s policy preferences are threatened by own their inability to prevent a breakdown of intra-party relations.[[862]](#footnote-862) If the party leaders lose control of their partisan and positional methods of agenda control, the rebellious legislators and opposition groups can have the potential to act as a veto player.

Nevertheless, concentrating agenda-setting rights with the majority creates the risk that this power could be abused.[[863]](#footnote-863) For example, through controlling the legislative timetable, the governing majority may attempt to frustrate the rest of the legislature’s ability to scrutinise legislation, or substantially reduce the minority’s rights to register their opposition. Since the agenda-setting office can only be occupied by the governing majority, the governing majority should be accountable for how they deploy their agenda-setting rights. Voters should be able to punish the governing majority based upon the use of its agenda-setting rights.[[864]](#footnote-864) Yet in practice, voters are unlikely to know how the governing majority is using its agenda-setting rights, and even if it does, it may not fully understand the significance of the governing majority’s actions. Therefore, in response, we must also institutionalise a means of ensuring that the behaviour of legislative actors is communicated to the electorate. In the context of the arena legislature, the actions of legislative actors can be communicated through institutionalised plenary debates.

#### II) Institutionalising Debate

Arena legislatures are distinctive because they organise political life around plenary debates. As Nelson Polsby observed, the arena legislature uses legislative debate as a means of allowing competing legislative groups to communicate their policy preferences and loyalties to the wider political community, for the purposes of educating and mobilising voters.[[865]](#footnote-865) Importantly, legislative debate is the pivotal means by which both the legislative majority and minority groups can communicate with the political community. Consequently, arena legislatures must establish institutional rules, practices and narratives that promote plenary debate. If the governing majority uses the agenda powers to substantially reduce or supress debate, the legislature will cease to perform an arena role. Instead, it will become more a of rubber-stamp legislature, whose sole role is simply to approve the governing majority’s policy preferences.[[866]](#footnote-866) In response, an arena legislature must, first, incentivise the governing majority to spend plenary time (despite its scarcity) in plenary debate. Second, if the arena legislature’s role is to represent the views of the political community, it must represent both the majority and minority. Therefore, it will need to empower and incentivise minority groups to engage in and communicate their policy preferences and opposition through plenary debate. This can be achieved through providing opposition groups with institutional opportunity structures. As we shall see, the majority and minority’s needs to communicate with the political community are closely linked through legislative design.

In chapter three, communication was identified as a core legislative function. Communication is best understood as a means of transmitting information both upwards from voters to legislators, and downwards from legislators to voters. Although Walter Bagehot claimed the legislature “ought to teach the nation what it does not know,” what the nation ought to know is always a matter of perspective.[[867]](#footnote-867) Indeed, competing legislators have always used the high visibility of plenary debate to communicate with and gain the support of voters. From the governing majority’s perspective, a lack of debate would hinder its ability to communicate with voters. First, they will want to show voters that they are implementing their electoral promises. Second, they will want to justify to voters their decisions regarding how they have chosen to implement these policies. This will include their method of implementation, the costs and any changes that occurred in the period between the election and the policy being brought into law. Third, the governing majority will want to demonstrate their competency in government, as well as explain to voters why they should continue to support their party and policy preferences over other rival parties. From this perspective, reducing or completely shutting down the legislature’s opportunity to debate will have the negative consequence of reducing the governing majority’s ability to communicate with voters.[[868]](#footnote-868) As Katrin Auel and Tapio Raunio argue, debates within the legislature (regardless of the outcome) are a pivotal mechanism for enabling voters to monitor and judge the governing majority’s performance.[[869]](#footnote-869) This is not to deny that modern governments have access to other resources for communicating with voters, such as close ties with media, social platforms, lobbying groups, local constituency staff, and campaigns. Nevertheless, despite the prevalence of these other resources, the governing party still rely heavily upon plenary debates to communicate with voters, as well as training members in the art of debate and persuasion.[[870]](#footnote-870) In this regard, it is in the interest of the governing majority to allow for debates, as an institutional means of demonstrating their performance in office and to communicate their policy positions.

Nevertheless, communication does not equate to transparency. Naturally, the governing majority will always seek to present itself in the most positive light possible. Thus, their communications may not always provide voters with an accurate image. For example, the governing majority may cover up their mistakes or actively lie about their actions. Although the need to continuously communicate with voters ought to deter the majority from abusing its agenda-setting powers, it does not necessarily incentivise transparency and accountability within the arena legislature. Transparency and accountability will be distorted if the channels of communication are concentrated solely with the governing majority. Furthermore, communication will most likely be dull and lifeless if it consists purely of the members of the majority patting themselves on back. Since we cannot trust the governing majority to be truthful, the legislature must incentivise different voices to challenge the majority’s claims. Plenary debates should provide a more lively and entertaining form of communication, through allowing differing and often competing opinions to be heard. Therefore, the legislature must institutionalise opposition.

Robert Dahl described the concept of opposition as ‘nearly the most distinctive characteristic of democracy itself.’[[871]](#footnote-871) Indeed, the concept is widely seen as one of the fundamental hallmarks of a liberal democracy, due to its close association with the belief that minority views should be respected, tolerated and protected.[[872]](#footnote-872) Within the legislature, minority groups matter, because they act as an organic form of opposition. They communicate dissenting opinions which would not be heard otherwise, regardless of their effect on actual political outcomes.[[873]](#footnote-873) In relation to political constitutionalism, the need for the legislative protection and incentivisation of minority rights is central to respecting the circumstances of politics. This is because in the circumstances of politics, electoral and legislative decisions will not produce a consensus, and inevitably sections of the polity will continue to disagree with the majority and may even go on to become a future majority at a later date. Accordingly, the circumstances of politics require that the legislature tolerates dissent. As Bellamy contends, respecting the disagreement requires incentivising the need to hear the other side.[[874]](#footnote-874) Thus, the governing majority ought to be “obliged to confront the prospect of continuous opposition.”[[875]](#footnote-875)

More recently, the importance of minority rights has been recognised by Jeremy Waldron and Grégoire Webber’s contributions to political constitutionalism.[[876]](#footnote-876) Waldron posits that the legislature should be organised to afford the losers of electoral and legislative decisions certain rights.[[877]](#footnote-877) First, he contends that the principle of contestability means that minority groups should have the right to wait around within the legislature and try again at the next election.[[878]](#footnote-878) Second, respecting disagreement and political equality requires these minority groups to have the right to dissent.[[879]](#footnote-879) Third, they should also have the right to openly voice their dissenting opinions within the legislature.[[880]](#footnote-880) Finally, they should have the right to organise themselves.[[881]](#footnote-881) Accordingly, the legislature ought to institutionalise rules, practices and narratives which recognise and tolerate their views, to protect the minority from accusations of treason.[[882]](#footnote-882) Webber similarly advances that the institutional rules and practices ought to place a duty upon the governing majority to recognise and respect the concept of opposition.[[883]](#footnote-883)

On the question of how a legislative institution should protect and promote minority rights, Waldron and Webber advocate emulating the institutional rules and practices of the Westminster Parliament. [[884]](#footnote-884) This is because at Westminster, the opposition is given special status by the institution’s rules and practices. For example, the minority party which has the greatest numerical strength among the other minority parties, is institutionally recognised as holding the office of *Her Majesty’s Loyal Opposition,* which provides it with specific minority rights.[[885]](#footnote-885) These include being recognised and treated as an official part of the state, receiving a salary from the state for holding the office, financial assistance for their party, access to confidential state information, and invitations to attend important state events alongside the members of the government. [[886]](#footnote-886) Furthermore, since the criteria for holding the office of Loyal Opposition requires the party to be the largest minority party within the legislature, the office holders are assumed to be an alternative government in waiting. It has been suggested that the more plausible the possibility of alternation between the party of government and party of opposition, the more that responsible governance is institutionalised. [[887]](#footnote-887) This is because if the opposition parties are perceived as an alternative government in waiting, then they might have strong electoral incentives to behave responsibly, as they may in the future find themselves in a similar situation as the current government. This suggests that through institutionalising the office of the Loyal Opposition and the continuous possibility of alternation, the governing majority and opposing minorities ought to see each other as “constitutional actors—not enemies in a civil war.”[[888]](#footnote-888)

Unfortunately, on closer inspection, both Waldron and Webber’s suggestions are open to criticism. First, they fail to recognise how the *loyal opposition* idea is extremely context specific. The problem is that the loyal opposition, as used at Westminster, is premised and dependent on the state having a stable two-party system.[[889]](#footnote-889) As Ludger Helms theorises, the legitimacy of institutionally privileging the largest minority party will likely be undermined if the other minority parties achieve a substantial number of seats within the legislature. [[890]](#footnote-890) For example, if *Party X* won 91 seats, *Party Y* won 90 seats and *Party Z* won 190 seats. On the one hand, institutionally privileging *Party X* as the loyal opposition may incentivise more effective scrutiny of the governing majority, as *Party X* technically appears as the more electorally viable alternative to *Party Z*. Yet, on the other hand, the perceived legitimacy of institutional rules privileging *Party X* with minority rights may become destabilised. *Party Y* may see little reason to behave appropriately and may consequently engage in disruptive or irresponsible behaviour. Similarly, as the rule becomes destabilised, an opportunist *Party Z* may refuse to respect the rights of *Party X*. One possible counterargument is that the rights associated with being the loyal opposition ought to incentivise coalition making among minority groups. However, there are reasons to doubt this will work in practice. As Andre Kaiser has argued, the loyal opposition idea operates on the binary logic of *those* *for* and *those* *against,* but in doing so, it fails to recognise how the policy preferences of *those against* may be so fragmented that it is impossible for them to form a cohesive opposition.[[891]](#footnote-891) For example, suppose *Party Z* was a centrist party, *Party X* was a right-wing party, and *Party Y* was a left-wing party. In these circumstances, because of their radically different ideological and policy preferences, it is unlikely that Party X and Party Y could work together as a single united opposition force within the legislature.[[892]](#footnote-892) Indeed within the UK, numerous small parties have sought to remain distinct, despite the potential institutional advantages of uniting. However, this could also be considered a product of the UK electoral system re-enforcing the two-party system.

Second, there is a risk that a Westminster style *loyal opposition* allows the constantly rotating large parties to engage in cartel behaviour, so as to freeze out certain minority voices challenging their institutional dominance and provide themselves with the resources and policies necessary to ensure their established parties continue to thrive.[[893]](#footnote-893) Third, Waldron and Webber seem to somewhat misunderstand how the Westminster Parliament’s institutional rules, practices and narratives enable the loyal opposition to work effectively. They emphasise how institutional rules create the formal office of HM Loyal Opposition, but they fail to explain how institutional rules privileging the office holders organise political life to ensure effective opposition. In doing so, they provide us with little insight into how the opposition actually opposes the government, or how effective it is at communicating its dissent.[[894]](#footnote-894) Unfortunately, they narrowly focus on the symbolic importance of recognising the opposition, rather than how a legislative institution enables opposition to operate on a day to day basis.

A richer understanding of how legislative institutions organise political life through the promotion of minority rights can be found in Kaiser’s comparative study of institutional opportunity structures available to opposition groups.[[895]](#footnote-895) At the most basic level, these are institutional rules and practices that provide opposition parties with opportunities to criticise the governing majority’s actions. Importantly, Kaiser distinguishes between opportunity structures which allow the opposition to directly influence the policy agenda through veto players, and those that allow the opposition to indirectly influence the future policy agenda through presenting themselves as an alternative.[[896]](#footnote-896) This is significant for our purposes because in the context of designing an arena legislature, the institutional rules, practices and narratives must prevent minority groups from substantively transmogrifying the electorate’s preference with their own, but must still allow the opposition to influence future public debates. Accordingly, an arena legislature must provide minority groups with opportunity structures that allow them to present themselves and their policies to the electorate as an alternative to those offered by the governing majority. Therefore, this would include opportunities for plenary time to be spent on plenary questions, spontaneous oral questioning and interpellations, as well as minor control over the agenda and committee seats.[[897]](#footnote-897)

Parliamentary question time (PQT) is a regular specially designated time in the legislative calendar whereby the leaders of the governing majority are challenged by their minority counterparts. In this specialised debate, the governing majority is forced to respond to several unseen questions by the opposition leaders. Importantly, Kaiser observed that PQT is often the most publicly visible part of the legislative process within those states that allow it.[[898]](#footnote-898) Consequently, PQT provides minority groups with opportunities to hold the majority to account and present themselves as an alternative.[[899]](#footnote-899) Furthermore, it also provides minority groups with an opportunity to indirectly influence the policy agenda. This can occur in several ways. First, opposition groups can raise issues which the governing majority want to keep off their policy agenda. If the issues raised by the minority become politically salient, the governing majority might be forced to incorporate that issue into their own policy agenda. Second, a skilful opposition group can catch the governing majority off guard by highlighting flaws in their policy plans, which again forces the governing majority to respond. Finally, the opposition can use PQT to propose alternative policies that may become so politically popular that the governing majority may be forced to steal the minority’s policies. PQT may also simultaneously serve the interests of the governing majority. This is because the leaders of the governing majority can also use PQT to communicate to voters their policy positions and justify why their policies are superior to the opposition’s. To work effectively, PQT will need to be a regular occurrence within the legislative calendar and the opposition question must remain unseen.

Plenary questions and interpellations are a less specialised form of plenary questions, though they ultimately provide minority groups with similar opportunities to present themselves as an alternative. The major difference from PQT, is that questions and interpellations are not formally given plenary time within the legislative calendar. Rather they tend to informally consume plenary time, by occurring through regular debates within the chamber. However, they might be formally recognised, if the institutional rules require that the governing majority must see these questions in advance. Nevertheless, even if the government is allowed to see the questions in advance, the opposition is still able to present themselves as an alternative, but the answers they will receive from the majority will be more prepared, which may make debates feel less dynamic. However, if spontaneous questioning is allowed, the opposition is in a slightly stronger position to catch the government off guard, making debates feel more politically vibrant and exciting. Furthermore, if follow up questions are allowed, the majority and minority groups within the legislature can engage in a more detailed debate, albeit at the cost of plenary time.

Another opportunity structure is to allow minorities a degree of control over the legislative calendar for limited periods. ‘Opposition days’ allow minority groups to set the policy agenda for a day. However, because they lack a majority, their policies are unlikely to be enacted. Consequently, opposition days function more as an opportunity to raise issues and highlight the opposition’s policies, rather than as a means for bringing forth legislation. The final opportunity structure to consider is the committee system. As we shall see below, while committees are an important tool for addressing imbalances of information within the legislature, they can also provide minorities with opportunities to scrutinise the majority and raise important policy issues. Accordingly, institutional rules and practice ought to reserve some committee seats, or committee chairs, to members from the minority parties.

Now we can see how the communication function is performed by the legislature as a whole. It is a shared endeavour between majority and minority groups. Spending plenary time on debate is valuable for both sides. Consequently, this helps institutionalise a shared understanding among the majority and minority that spending plenary time on debate is necessary for shaping public discourse. In this sense, plenary debate acts like a mechanism for determining the messages that are broadcast out of the legislature. Plenary debate “is not a stop switch, it is the tuning the tone and the amplifier of a system of communication.”[[900]](#footnote-900) Institutionalised correctly, it can provide both sides with relatively “equal access to the electorate.”[[901]](#footnote-901)

#### III) Institutionalising a Division of Labour

To ensure the more efficient use of plenary time, legislative institutions commonly divide their labour between the main chamber and the committee system. The institutional rules will normally allow the main chamber to delegate some aspects of its work to a committee system.[[902]](#footnote-902) Consequently, committees are a near universal aspect of modern legislative design.[[903]](#footnote-903) However, some legislative institutions grant their committees a more active role, allowing them to develop their own policies and agenda, control the main chamber’s timetable, or even act as gatekeepers.[[904]](#footnote-904) Such powers would be inappropriate in the context of the arena legislature. While committees are a part of arena legislatures, they not the focal point of political life within the legislature.[[905]](#footnote-905) Their inclusion can be justified on the grounds that they can function as information providers.

Institutional rules can provide minority groups the opportunity to scrutinise and oppose the governing majority, but they will be unable to scrutinise the governing majority’s policies and behaviour, if the levers of power remain secretive. The central problem is that the leaders of the governing majority have direct access to the machinery of the state, and as a result, when their leaders get up to speak within the main chamber, they will be extremely well prepared and briefed. [[906]](#footnote-906) In contrast, minority groups will only have a partial knowledge about the potential consequences of the governing majority’s policy choices. Although there will inevitably be an information imbalance between the majority and minority, committees can reduce the gap.[[907]](#footnote-907) Within legislative studies, research into committees is dominated by studies into the US Congress’s transformative committee system. Although the cross-state applicability of these theories beyond the US varies in mileage,[[908]](#footnote-908) the dominant theory is that committees exist to facilitate and incentivise legislative particularism,[[909]](#footnote-909) information distribution,[[910]](#footnote-910) or party coordination.[[911]](#footnote-911) Importantly, the theory on information distribution is particularly relevant for arena legislatures.

The informational theory contends that within legislatures, “information is unevenly distributed” between different actors.[[912]](#footnote-912) In response, committees function as “efficient vehicles for information acquisition.”[[913]](#footnote-913) Accordingly, a committee system enables the legislature as a whole to acquire information. [[914]](#footnote-914) By reducing the information gap between different groups, committees help provide closer scrutiny of the governing majority’s policies and behaviour, and equip legislators with the knowledge that they would lack otherwise.[[915]](#footnote-915) In practice, the detailed scrutiny of complex matters is a task best suited to small, more focused and potentially more skilled committees.[[916]](#footnote-916) For minorities, committees are particularly useful in helping them challenge the governing majority and present themselves as an alternative, because the information they acquire through committees helps them identify areas of weakness and begin to develop their own policy responses. Simultaneously, committees allow the ordinary members of the majority to monitor their leaders to ensure they are delivering their electoral promises in an effective manner. More broadly, committees allow coalition partners to track each other’s behaviour and maintain their deal.[[917]](#footnote-917)

To organise the legislature to perform an arena role, the committee system will need to be organised in several ways, so as to ensure that committees only function as a means of information distribution.First, institutional rules, practices and narratives must provide the committee system with a specific set of rights. Committees should only be afforded investigatory rights. This might include the right to hold investigations, call witnesses, publish reports and complete or partial control over their own agendas. Committees should not be given rights that allow them to control legislative policy agenda. Instead, the institutional rules, practices and narratives must constrain them to performing legislative scrutiny and oversight. Therefore, they should not be given powers to draft and propose bills or powers that allow them to control the policy agenda of the main chamber. Second, committees should not operate under closed rules, whereby the committee’s recommendations and amendments are binding in effect and thus cannot be challenged by the main chamber. The risk with affording committees closed rule powers is that they may transmogrify the majority’s policy agenda with their own. Accordingly, committees’ recommendations and amendments should always be conditional on the main chamber’s approval. This will ensure that it is up to the political parties within the main chamber to make use of their findings as they see fit. Political parties can use committee findings as information for communicating their values to the wider political community. Therefore, committees can indirectly enable voters to better judge for themselves the policies and behaviour of the governing majority. Third, institutional rules should incentivise legislators to invest their time in committee work. The more time a legislator spends on a matter, the more likely they are to specialise, gaining knowledge and skills on specific matters.[[918]](#footnote-918) On one level, this is practical because it will attract legislators with specific policy interests and skills to engage with committee work. Yet on another level, specialised committees can promote greater levels of scrutiny and oversight. The reason for this is that specialised committees can be designed to mirror the departments of state. Another important way to incentivise legislators to perform committee work is to ensure committees offer well paid and secure positions. This will ensure legislators see committee work as a viable alternative career route to standing for positions within the government. If sufficiently well implemented and maintained, committees can provide a more specialised forum within the legislature, allowing for the detailed scrutiny of policy to be taken off the main floor of the legislature, freeing up plenary time for both the governing majority and minority groups to engage in public debates.[[919]](#footnote-919)

### *Institutionalising the Transformative Role*

Chapter three concluded that the liberal strand of political constitutionalism believes the legislature should perform a transformative role within the political constitution. Whereas the other strands of political constitutionalism contended it was inappropriate for a legislative institution to substantively alter the outcomes of deliberation made by the public, expressed through the electoral system, the liberal strand conceived the legislature as the final decision-making site within a deliberative system. For Jeremy Waldron, deliberation was viewed as a continuous process which flowed through the polity and the election system and is finally concluded by the legislature. As a result, the legislature’s role was to transform political inputs into deliberative compromises. Consequently, the legislature needs to organise political life in ways that incentivise deliberation and compromise rather than just display.[[920]](#footnote-920) Therefore, the legislature needs to be organised to promote deliberation throughout the legislative process.

This requires the legislative designer to ensure their legislature is organised around the norms of deliberative democracy. However, incentivising deliberative democracy within the legislature is more complex than a desire for strong government as discussed above. As was argued in chapter three, a deliberative process embodies and maximises six core norms.[[921]](#footnote-921) First, a process is deliberative if *participation* is open to all. Second, participants engage in this process in a *truthful way*. Third, participants must present their views in a *logically justifiable* manner. Fourth, participants must justify their views with reference to the common good, as opposed to self-interest. Fifth, participants must show *respect* for one another. Sixth, participants must also be *willing to yield to better arguments*.[[922]](#footnote-922) The goal is to ensure political life produces more legitimate and well-reasoned outcomes. Nevertheless, consensus among legislative actors, though desirable, is not a necessary outcome.[[923]](#footnote-923)

#### I) Identifying Deliberation Sites within Legislature

To promote deliberative democracy within the legislature, the designer must identify where within legislatures deliberation is most likely to flourish. This requires reliance on empirical research into deliberative democracy. Unfortunately, one caveat to this approach is that the proposals made here are based on a limited amount of empirical research. There is currently only a small (although growing) number of empirical studies focused on deliberative qualities with legislative institutions. This lack of research can be explained by three factors. First, this is partly a consequence of the self-induced reluctance among some deliberative theorists to engage with institutional analysis. Deliberative theorists have been hesitant about analysing issues of institutional design because they have traditionally viewed the idea of institutional incentivisation as being associated with a rational choice or aggregative understanding of democracy.[[924]](#footnote-924) Second, this is also a consequence of the dispersed nature of deliberative democracy. Since norms of deliberation can occur or be applied in a range of different decision-making sites, such as between a group of friends, within a football club or within a university, empirical research has been equally dispersed, in an attempt to cover these sites. Thus, deliberation within legislative institution is one possible area for empirical research. Regrettably, researchers have often ignored analysing legislative institutions in favour of new decision-making sites such as citizens’ assemblies and juries, which could be used to supplement or replace the traditional decision-making sites like the legislature.[[925]](#footnote-925) Finally, empirical analysis of deliberation within legislative institutions has proven to be a highly demanding and time-consuming exercise.[[926]](#footnote-926) As a result of these factors, this thesis was only able to identify a limited amount of research focused on deliberation within legislative institutions, although research is growing.[[927]](#footnote-927)

The claims made here are based on the leading empirical research on deliberation in legislatures; Jürg Steiner, André Bächtiger, Markus Spörndli, Marco R. Steenbergen’s *Discourse Quality Index* (DQI).[[928]](#footnote-928) The DQI was developed with the specific intention of providing a bridge between normative and empirical understandings of deliberative democracy.[[929]](#footnote-929) The DQI analyses the speech acts of individuals and places them on a continuum which ranges from no deliberation at one end to ideal deliberation at the other.[[930]](#footnote-930) Speech acts are measured and analysed through coding based on the prominent deliberative scholar Jürgen Habermas’ conception of deliberative democracy.[[931]](#footnote-931) These categories are:

1. *Participation –* How freely are participants able to participate in the debate? - As Steiner *et al.* note, since legislators have established rights of participation, this is not a demanding criterion within the legislative context. Nevertheless, they do account for whether legislator speech acts can be interrupted.
2. *Level of Justification –* Do actors justify their demands or not?
3. *Content of Justification –* Are demands justified with appeals to the common good or narrow self/group-interests?
4. *Respect –* Are speakers respectful to others, to the demands of others, and do they engage in counterarguments that are respectful?
5. *Constructive Politics –* This final category distinguishes between:
6. *Positional Politics* – whereby speakers’ preferences remain fixed.
7. *Alternative Proposals* – whereby speakers offer mediating proposals, but their alternative proposals do not fit the current debate agenda
8. *Mediating Proposals* – whereby speakers offer mediating proposals that fit the current debate agenda.[[932]](#footnote-932)

The DQI has received the approval of several leading deliberative theorists, including Jürgen Habermas and David Thompson. Habermas stated he admired “Discourse Quality Index for capturing essential features of proper deliberation” with an empirical testable framework.[[933]](#footnote-933) Similarly, David Thompson praised the DQI as “a serious and well-informed effort to capture the core elements of deliberation” and Steiner’s *et al.* decision to apply it to legislative debates.[[934]](#footnote-934) Steiner *et al.* applied their DQI to measure deliberation within four distinct legislative institutions:

* *The United Kingdom* - a competitive parliamentary system that lacks veto players.
* *Switzerland* - a consensual legislature in a presidential system with veto players.
* *Germany* - a competitive parliamentary system with veto players.
* *The United States* - a competitive legislature in a presidential system with veto players.

At the time of writing, this research currently offers the most systematic and comprehensive research in deliberation with legislative institutions. Steiner *et al.* found that deliberation is more likely to flourish within consensual legislatures that have veto players present and observed that deliberation was more likely to occur within a second chamber and within non-public arenas, such as closed-door committees. In contrast, competitive institutions, and a lack of veto players and public debate tend to reduce the likelihood of deliberation occurring.[[935]](#footnote-935) Polarization also effected deliberation; the more polarized an issue was, the fewer deliberative qualities were recorded.[[936]](#footnote-936)

#### II) Organising Deliberation:

Steiner *et al.* findings can help legislative designers ensure that their legislation promotes deliberation through incentivising a transformative role. This requires that legislature must organise political life in ways that incentivise consensual over competitive behaviour, and makes use of veto players and a second chamber.[[937]](#footnote-937) However, the idea that non-public arenas facilitate deliberation might appear to conflict with political constitutionalism’s commitment to contestability, as political actors and citizens logically must be able to see what is being done in their names before they can contest said actions. Furthermore, polarization is not a matter of legislative design; polarization is conditioned by the nature of the issue before the legislature. Polarization depends on the extent to which people disagree about a matter, and as political constitutionalism posits, this disagreement is not something to be eradicated (nor could it ever be) but rather managed through the process of deliberation. Incentivising consensual behaviour is clearly the most difficult challenge as it is likely to be the sum of various institutional rules, practices and narratives. The transformative legislature will need the same common structural features as the arena; agenda-setting rights, opportunities for the opposition and committees. However, these features will be deployed in a different way to incentivise the transformative role.

##### *Distributed Agenda-setting*

To incentivise deliberation, agenda-setting rights cannot be centralised with one legislative office or group. Rather they should be distributed across multiple sites or with a specialist committee or bureau that allows allow both majority and minority groups’ opportunities to directly influence the context of legislative agenda. This is because if one legislative group has a complete monopoly over the agenda, they have little institutional incentive to engage in deliberation with others. When one group has a monopoly over agenda-setting, there is an increased risk of polarisation, which reduces the deliberative potential. Steiner *et al.* defined a non-polarised matter as when there is a shared consensus among legislative actors on key value or goal of a bill. In contrast, there is sharp disagreement about those key values or goals in the context of a polarising bill.[[938]](#footnote-938) They hypothesised that non-polarised bills would facilitate more deliberation than polarised bills.[[939]](#footnote-939) Using the DQI, they were able to collect empirical evidence to support their hypothesis.[[940]](#footnote-940) In the context of non-polarised bills, legislative debates featured more examples of sophisticated justifications, as well as higher levels of respect between different legislative actors.[[941]](#footnote-941) Further research by Andre Bächtiger and Dominik Hangartner also supported this hypothesis.[[942]](#footnote-942) Low polarization facilitates higher quality deliberation because different legislative actors are in agreement about the core principles underpinning a bill, which reduces the scope for disagreement between legislators.[[943]](#footnote-943) Nevertheless, in their later study, Bächtiger and Hangartner also theorised that low polarisation was often a product of the legislation considered less electorally salient by the legislative actors. [[944]](#footnote-944)

These findings must be considered in relation to research into agenda-setting rights by Christian Henning and Herbert Döring. Henning hypothesised that governing majorities would need to spend more political resources (including plenary time and rallying the support of ordinary legislators) to get highly-polarising bills enacted, in comparison to less polarising bills[[945]](#footnote-945) Henning also theorised that these costs could be reduced if the governing majority held a relative monopoly over legislative agenda-rights.[[946]](#footnote-946) In response, Döring hypothesised that centralised agenda-setting rights function as a cost-saving mechanism and might, in turn, incentivise governments to pursue more polarising bills.[[947]](#footnote-947) Using data collected from 650 parliamentary debates taken from 18 western European states, Döring was able to demonstrate that this hypothesis was empirically correct. Governments which were institutionally vested with a complete or a near-complete monopoly over agenda-setting rights introduced more polarising bills.[[948]](#footnote-948) Logically, this suggests that the promotion of transformation through deliberation, institutional rules, practices and narratives must prevent one political group or actor holding a monopoly over the agenda-setting rights. It should be noted that this does mean that the governing majority should not have the largest stake within the legislative agenda. Rather, the governing majority must be constrained into deliberating with other legislative actors in determining the content of legislative agenda. When the governing majority is constrained by the need to respect the views of the minority, the increased political cost required for pursuing polarising bills ought to discourage governments from bringing forth unnecessary controversial legislation before the legislature, which should in turn help increase potential for deliberation. Therefore, this requires the designer to introduce institutional rules, practices and narratives which provide opportunity for the other legislative actors, such as minority parties and committees, to directly influence the agenda.

##### *Committees as Agenda Controllers and Opposition Opportunity Structures*

Allowing other legislative actors, a more direct form of influence over the legislative agenda requires institutionalising a committee system and opportunity structures for minorities that by design should operate radically differently from those found within an arena legislature. The end goal is to organise political life in ways that promote consensual behaviour among legislative actors. This is because as, Steiner *et al.* showed, deliberation is more likely to occur when political actors operate within a consensual institutional environment.[[949]](#footnote-949) Steiner *et al.* hypothesised deliberative discourse would be lower within competitive legislatures, and their data supported this theory.[[950]](#footnote-950) When compared to Switzerland’s consensual legislature, the UK’s competitive legislature performed poorly in terms of examples of respectful speech acts and attempts at constructive politics via mediation or appeals to a consensus. However, the difference between the two in terms of justification was lower.[[951]](#footnote-951) Data from Germany and the US was also compared to the data from Switzerland and reinforced their hypothesis.[[952]](#footnote-952) Significantly, Steiner *et al.* also demonstrated that their finding was not the product of differences in legislative design, but rather cultural differences. They did this by comparing two different legislative votes within the Westminster Parliament: a vote on disabled rights in which large cross-party coalition formed to challenge the government policy preferences, and an open vote on Sunday trading laws. In both votes, institutional variables changed to discourage competition, and in both votes quality of deliberation was higher.[[953]](#footnote-953)

Where the governing majority has near to complete control over the legislative agenda, a competitive environment will be encouraged. As was argued above, if the governing majority has a monopoly over the legislative agenda, the opposition groups will not be able to directly influence the agenda. As a result, they will be aware that the only opportunity they will have to directly influence the legislative agenda will be to replace the current government at the next election, thus incentivising the opposition parties to seek to present themselves as a desirable alternative. This is problematic for the liberal strand because it frustrates the potential for the transformation of political inputs through legislative deliberation. In a competitive institutional environment, both sides will have strong institutional incentives to undermine and mock their opponent’s arguments.[[954]](#footnote-954) Both sides will be encouraged to demonstrate that they are more competent, and their views are better than those of their rivals. This fosters low levels of respect (in particular by the opposition towards the government).[[955]](#footnote-955) A competitive institutional environment organises political life in ways that provide little incentive or room for political actors to behave in a respectful manner to one another or yield to the better arguments. The governing majority will feel no need to accept the opposition’s arguments, and the opposition will have little incentive to yield to the government’s arguments when said arguments are superior. In most circumstances, the opposition parties will view acts of constructive politics as assisting the government for no political pay-off. This will especially be the case when they think the policy will succeed, as they will fear the governing majority will take sole credit for policy success.[[956]](#footnote-956) Nevertheless, Bächtiger and Hangartner’s research showed governments tend to be more respectful towards opposition arguments, even when they do not accept them.[[957]](#footnote-957) This is most likely a consequence of the established logics of appropriateness within a competitive legislature, as the governing majority will be aware they might quickly find their roles reversed. It might also be a strategic consideration by the governing majority leaders, as intra-party rebellion within the own ranks could force them to rely upon the votes of opposition legislators.[[958]](#footnote-958)

Institutionalising a consensual style of politics requires the legislative committee system to function as the focal point of political life within the legislature. In many respects, the nature of committees makes them uniquely well-suited to function as both agenda setters within specific policy areas and opportunity structures for members of minority groups to directly influence policy outcomes. For as we shall see, committees operate under institutional rules, practices and narratives that actively discourage their members from engaging in competitive behaviours, instead encouraging them to engage in collaborative work and deliberation. One of most obvious and important features of legislative committees is their composition, which includes members from both the legislative majority and minority. Unless specified otherwise by the institutional rules, committee membership traditionally aims to mirror the composition of the main (parental) chamber. This is an important difference, because even if the legislative majority has a majority within a committee, the majority’s committee members will still need to routinely work with members from the minority to ensure the committee functions effectively.

The legislative committee system always divides committee work across relatively defined policy areas. The committee focus is therefore determined by its assigned policy area. Nevertheless, their focus may expand if their members, and or members within the main chamber, put enough pressure upon the committee to broaden their focus to cover certain issues that were previously considered beyond their remit.[[959]](#footnote-959) For this reason, the committee system is an obvious mechanism for distributing agenda-setting rights. Committees can function as agenda-setter for the main chamber, functioning as gate-keepers over whether bills within their specific policy areas reach the main floor of the chamber. When agenda-setting rights are vested with the committees, the legislative agenda and legislation is the product of a cumulative effort by different political groups. The majority no longer is able to solely determine the legislative agenda but is incentivised to work with members of the minority through the medium of committees. By allowing opposition actors to have some influence over the agenda, the winner takes all mindset is likely to be reduced. As former US President Barrack Obama argued, “when you’re not worrying about who’s getting credit, or who’s getting blamed, then things tend to move forward a little more constructively.”[[960]](#footnote-960) The additional benefit of this approach is that committees may also function as an opportunity structure for the opposition; one which allows them to direct influence over legislative outcomes, rather than one that forces them to present themselves as an alternative government.[[961]](#footnote-961)

It also important to recognise how committees are well suited towards promoting deliberation among their membership. In one of the earliest examples of applying deliberative theory to real legislative politics, deliberative scholar Joseph Bessette identified committees as an important form of legislative organisation for incentivising deliberation. As Bessette described, a committees’ system is the “institutional device intended to solve the fundamental deliberative problems of that face a finite legislative body entrusted with hundreds of complex…issues.”[[962]](#footnote-962) There is a good reason to suspect committees are well suited to deliberation. First, by design committees focus on the detailed examination of specific types of legislation.[[963]](#footnote-963) It is therefore likely that committee members will become well versed in these policy areas. When the level of expertise is higher, we should expect that committee deliberation will require a higher level of justification from the membership, leading to a higher level of discourse. Second, due to their small size of the committees, the relationships between the members is noticeably different from that of main chamber. In committees, legislators of rival parties have to work with one another on a daily basis and as a consequence, as Steiner *et al.* highlight, there is greater potential for friendships, respect and trust to develop between members from different parties.[[964]](#footnote-964) One can assume this promotes a more consensual working environment. Third, committee work tends not to receive the same levels of public attention as plenary debates within the main chamber. Therefore, committees are under less pressure to engage in partisan rhetoric towards other members. Deliberative theorist Jon Elster has suggested that the level of public attention might affect deliberation.[[965]](#footnote-965) In particular, Elster took the view that secrecy would enhance deliberation, arguing that “the greater the difficulty of backing down from a position one has started in public has several undesirable effects. It makes it less likely that speakers will change their mind as a result of a reasoned objection and encourages use of publicity as pre-commitment device.”[[966]](#footnote-966) Nevertheless, Elster’s arguments should not be confused with a demand for absolute secrecy. As Elster acknowledges, secrecy can encourage bargaining and self-interest which harms the quality of deliberation.[[967]](#footnote-967)

Steiner *et al.*’s research demonstrated that committees are an important site for deliberation within legislative institutions. The reasoning for this largely supports Elster’s claims about public and private forms of deliberation. Steiner et al observed that when committees deliberated in public, examples of sophisticated justifications were higher, and there were more frequent appeals to the common good, than when the committees engaged in private deliberation.[[968]](#footnote-968) However, private committee deliberation led to greater levels of respect, in particular towards counter arguments and demands.[[969]](#footnote-969) Steiner et al. theorised that difference in audience was important for explaining these differences. They suggested that the reason private committee deliberation featured fewer appeals towards the common good was because the committee members were aware that they were only debating with their fellow policy experts, who could easily see through their appeals.[[970]](#footnote-970) Bessette found similar evidence within his observation of the US Congress, noting that the lack of an audience puts more pressure on legislators to engage in serious deliberation about the details of the bill.[[971]](#footnote-971) Committees can of course be both public and non-public. For example, Bessette highlights how the committees in the US Congress engage in both types of deliberation; using public deliberation for evidence collection and using a non-public deliberation at the end for the marking-up process before introducing the bill the main chamber (i.e. placing it upon the main chamber’s agenda).[[972]](#footnote-972)

If a private committee is desirable for deliberation, one might argue that this presents a problem for political constitutionalism, as lack of transparency undermines the political accountability of a committee’s membership. However, it is important to recognise that incorporating an element of non-public deliberation should not undermine the accountability of the legislature as a whole. This can be justified on two grounds. First, if this argument holds true, then it presents a problem for those political constitutionalists favouring an arena conception. The process of translating electoral promises into legislation inevitably features non-public parts. However, here private deliberation occurs within the governing party’s own internal structures, through the cabinet committee, discussions with legislative draftsmen and the consultation with important stakeholders. Nevertheless, the outcomes of these deliberations are made public. When the governing majority places their bills before the legislature, the onus is on the governing majority to account for their decision and justify the content of the bill. This includes accounting for how they have chosen to translate their campaign promises into legislation. As we argued above, the government will allow plenary time for debate partly because they will seek to justify this outcome. In essence, a similar process occurs when committees engage in private deliberation to produce or amend legislation. Ultimately, the committee’s membership must account for its decisions to the main chamber. It is up to the main chamber to scrutinise and oversee the committee’s work and decide whether to accept the committee’s bills or amendments.[[973]](#footnote-973)

Second, it is worth remembering the systemic nature of legislative institutions. Under a systemic understanding, the designer recognises that the weakness of some parts of the legislature may be compensated by the strengths of others. Under this systemic understanding, deliberative values do not need to occur at all stages of the legislative process. Since committees are the subordinate to the main chamber, they must convince the parent chamber to defer to their judgment. It is at this stage in the process, that norms of deliberation which were absent in private committee discourse, can materialise. Accordingly, the deliberative values of regarding justification and the common good might appear through public debate within the main chamber. This means that a lack of pubic transparency within the committees is compensated by the increased public transparency within main chamber debate. As Bessette identifies, when committees report back to the chamber, they are under a duty to justify their choices.[[974]](#footnote-974) Committees will defend their decision both through their written reports and oral communication. These justifications might not necessarily always encourage legislators within the main chamber to change their opinions, but it might help them reflect on their own reasoning and the opponent’s.[[975]](#footnote-975) This might in turn help them justify their choices to the wider political community, enhancing public reasoning more broadly.

## *Conclusion*

This chapter has sought to demonstrate the importance of legislative design in relation to distribution of resources. Organising political life is an unavoidable and inherent aspect of being a legislature. As institutions, they organise political life by prescribing to political actors appropriate behavioural logics and a higher degree of certainty about their peers likely behaviour in a given circumstance. This is both necessary and ultimately desirable because it enables legislative institutions to perform their core functions and prescribed role within the political process, by circumventing the threats posed by the disorderly legislative state of nature and the circumstances of politics. The most significant and critical way that legislative institutions organise political life is through distributing the limited resource of plenary time between majority and minority groups and institutionalising a division of labour between the main chamber and the committee system. By distributing resources, legislative institutions empower and constrain the capacity of these groups and parts to exert influence within the ordinary political process. In this sense, although legislative institutions provide structure to politics, they cannot do so in a truly neutral way. This means legislative design matters because the organisation of political life is not only necessary but also inevitably must involve making choices about how important resources are distributed.

How a legislature should organise political life is conditioned by political constitutionalism’s understandings about what the legislature’s role should be within the ordinary political process. Yet, since there is no unity of thought among political constitutionalists, this in turn resulted in competing views on how legislative resources should be distributed through legislative design. Republican and democratic socialist political constitutionalists contend that legislative design should seek to ensure the legislature performs an arena role. Designing a legislature to perform an arena role requires the institutional rules, practices and narratives that organise political life in three distinct ways. First, agenda-setting rights should be concentrated with leaders of the governing majority. This ensures the governing majority controls the plenary agenda, securing the time necessary for efficient passage of electoral promises into law. Second, to balance the concentration of agenda rights with the majority, minority or opposition groups must be provided opportunities to present themselves and their policy preferences to the political community. Third, the main chamber should be the focal point of political life, with plenary time being spent more with the main chamber than within the committee system. In doing so, the legislature operates as an arena for partisan debate, aimed at influencing debate within the wider political community. The committee system ought to function as a means for taking issues of technical scrutiny off the floor of the main chamber, thus allowing more time for partisan debate between majority and minority.

In contrast, since the liberal strand contended that legislative design must ensure the legislature performs a transformative role, a different approach to legislative design is necessary. Designing a legislature to perform a transformative role requires the institutional rules, practices and narratives that organise political life in ways that institutionalise a more deliberative form of decision-making. This results in a different form of distribution. This can be achieved in two ways. First, agenda-setting rights should be distributed through the committee system. This allows both majority and minority parties to directly influence the plenary agenda. In essence, the policy agenda must itself be the product of deliberation. Second, committee deliberation must be the focal point of political life within the legislature, by being equipped to function as both agenda-setters and opposition opportunity structures. In this sense, committee deliberation must precede deliberation within the main chamber. Committees should empower minority or opposition groups with opportunities to directly influence policy. Taken together, these should promote a more deliberative and consensual style of legislative politics. This demonstrates how one can adopt different approaches toward legislative design which can determine the distribution of important legislative resources and affect the organisation of political life. Nevertheless, all of this has be premised upon the idea of political life operating within a single legislative chamber. Yet, as the next chapter will demonstrate, some legislatures are bicameral in their design and differences in bicameral design can also determine how legislative institutions organise ordinary political life.

# V

# *Bicameralism and Political Constitutionalism*

The political model is valuable because of its distinctive focus on legislative institutions. Nevertheless, proponents of political constitutionalism have insufficiently reflected on how the design of legislative institutions affects the management of politics. This is a problem because institutional design shapes and channels political action through the establishment of institutional opportunities and constraints upon political actors.[[976]](#footnote-976) The previous chapters analysed how the distribution of important institutional resources could incentivise the legislature to perform a specific role within the ordinary democratic process. This analysis focused on how institutional design distributed resources within a single legislative chamber. However, legislative institutions can also be bicameral in their design. Bicameralism is a design feature that divides legislative power and functions (though not always equally) between two chambers, as opposed to one.[[977]](#footnote-977) Intercameral relations will shape how the legislature organises political life and manages disagreement. This means bicameral design affects how intercameral relations are institutionalised within the legislature. Bicameralism is also an aspect of legislative design that pre-dates the rise of our modern understandings about democracy. Accordingly, there are longstanding debates about how bicameralism should be designed to accommodate modern democratic decision-making. Peculiarly, despite its attempts to explain and illuminate the value of legislative institutions within the democratic process, political constitutionalism has only minimally engaged with the issue of bicameralism. In response, this chapter asks *can bicameralism be institutionalised in a way that is compatible with political constitutionalism?*

This chapter argues bicameralism can be compatible with political constitutionalism, if two conditions are satisfied. First, the second chamber’s institutional power must be derived from a contestable source. Second, the second chamber must be composed of a directly elected membership. The second chamber’s powers are conditioned by our considerations about what the legislature’s role should be. As this chapter will argue, the liberal strand favours vesting the second chamber with strong powers to further reinforce the legislature’s ability to perform a transformative role within the constitutional order. In contrast, the republican and democratic socialist strands favour the legislature performing an arena role. As a result, both strands favour vesting the second chamber with weak powers.

The structure of this chapter is as follows. Section one introduces the concept of bicameralism, through briefly examining debates about the value of bicameralism and exploring how bicameralism organises political life. Section two draws upon comparative research to identify the three key determinants of bicameral power. This section will demonstrate how *formal institutional power, composition* and *political legitimacy* are key determinants of bicameral power, subsequently affecting how intercameral relations are institutionalised. Section three analyses how these determinants could be designed to ensure the second chamber is compatible with political constitutionalism. Finally, section four analyses how bicameralism can be compatible with the different strands’ understandings about the legislature’s role.

## *Bicameralism and Organisation of Politics*

The value of bicameralism has long been debated within political theory. [[978]](#footnote-978) Early theorists, such as Aristotle and Montesquieu, argued bicameralism was desirable as a means of institutionalising a form of *mixed government*.[[979]](#footnote-979) As proponents of mixed government, they advanced that good governance required allowing different sections of society to be represented within the political process but in ways that enabled these different groups to counteract one another.[[980]](#footnote-980) Later theorists, such as John Stuart Mill and John Marriott, argued bicameralism was desirable because it provided citizens with a safeguard against the arbitrary action of the first chamber and the executive.[[981]](#footnote-981) In contrast, Jeremy Bentham remarked bicameralism was 'needless, useless, worse than useless.’[[982]](#footnote-982) Bentham doubted bicameralism could help the political process promote utilitarian goods because the claimed benefits of bicameralism had yet to be proven.[[983]](#footnote-983) Socialist writers have also traditionally argued that bicameralism threatens the promotion of socialism. Harold Laski described bicameralism as “the protective armament of vested interests.”[[984]](#footnote-984) Similarly, Lewis Rockow described it as a vital part in “the defensive armor of the present property system” and a ‘bulwark’ against socialist parties.[[985]](#footnote-985)

Arguments for bicameralism can be summarised as follows; first a second chamber enables additional forms of political representation with the legislative process, and second, a second chamber institutionalises a redundancy break mechanism for preventing hasty decisions.[[986]](#footnote-986) The first argument maintains that bicameralism enables a legislative institution to further represent political interests. These political interests could be very similar or radically different from those represented within the first chamber.[[987]](#footnote-987) This is because a second chamber can implement different institutional rules regarding which interests can and should be represented. Nevertheless, this is only valuable if one believes a single chamber and a single electoral system cannot completely represent all of the numerous and diverse interests that exist within a political community.[[988]](#footnote-988) A second chamber could enhance the legislature’s representative qualities by mitigating some of the irregularities in political representation produced by the electoral system and by constituency boundaries.[[989]](#footnote-989) Indeed, the prominent liberal political constitutionalist Jeremy Waldron takes this view.[[990]](#footnote-990) In practice, bicameralism has traditionally performed this function in two ways. Historically, second chambers functioned as a means of representing certain class interests within a system of mixed governance.[[991]](#footnote-991) Since the end of the 18th century, as faith in mixed-governance waned, second chambers were repurposed to represent geographic interests.[[992]](#footnote-992) The federal conception of bicameralism originates from the *Connecticut Compromise* during the drafting of the US Constitution. The Connecticut Compromise was a response to concerns by the smaller states, that the larger states would dominate how the new republic would be governed moving forward. In response, a second chamber was proposed as a means of representing the people manifested through their federal states.[[993]](#footnote-993) Following the establishment of the American Republic, many European states repurposed their second chambers to represent federal interests.[[994]](#footnote-994) Bicameralism has become a common feature of federal states, with John Coakley observing that 76% of federal states have a federal second chamber.[[995]](#footnote-995) Nevertheless, a federal second chamber is not an essential feature of federalism.[[996]](#footnote-996) For example, both Canada and India are federal states, but do not use their second chambers to represent federal interests.[[997]](#footnote-997)

The second argument maintains that a second chamber can serve as a redundancy mechanism or emergency break within the ordinary democratic process. John Uhr describes this redundancy function as “a reinforcement mechanism, or safeguard, in the event that systems fail to operate as planned.”[[998]](#footnote-998) As a redundancy mechanism, a second chamber institutionalises the idea that ‘two pairs of eyes are better than one.’ For example, a second chamber may identify problems and solutions that the first chamber missed or failed to consider.[[999]](#footnote-999) Alternatively, as a redundancy mechanism, a second chamber can institutionalise the idea that cooler heads ought to prevail. A second chamber can provide political actors with opportunities to reflect upon the merits of the choices before them. For example, the first US President George Washington compared a second chamber to the act of pouring coffee into a saucer before drinking it; “we pour legislation into the senatorial saucer to cool it.”[[1000]](#footnote-1000) Finally, in a similar vein, as a redundancy mechanism, a second chamber may function as a means of blocking or delaying tyrannical actions by the first chamber.[[1001]](#footnote-1001)

There is a third argument for bicameralism, which is often overlooked within political theory. A second chamber can enhance the efficiency of the legislative process. This is because a second chamber can increase the legislature’s load-carrying capacity. If institutional rules and practices enable bills to be initiated in either chamber, before proceeding to the other chamber, the risk of legislative overload can be reduced. Consider a situation in which all bills must start in the first chamber. At the beginning of the legislative process, the first chamber will be extremely busy initiating bills, but at the end of the legislative process, it will be waiting for the second chamber. In contrast, at the beginning of the legislative process, the second chamber will have to wait around for bills to reach them. As a result, it risks being overburdened at the end of the legislative process. However, if some bills can begin in the second chamber before being considered by the first chamber, then the legislative workload is more evenly distributed between two chambers, avoiding the risk of either chamber being overwhelmed. In this sense, bicameralism can assist the legislature to manage its limited plenary time more efficiently.[[1002]](#footnote-1002)

The adoption of a second chamber, for whatever reason, will nevertheless affect how the legislature shapes and channels political action. Chapter three observed how legislative institutions perform multiple functions including law making, linkage, executive relations, legitimation and training. Bicameralism has particular implications for how the linkage, training and law-making functions are performed.[[1003]](#footnote-1003) To recap, the *linkage function* refers to how legislative institutions connect the people and the state together, through providing the means for political representation, accountability and communication. This function will be performed differently because the second chamber enables additional methods for representing interests, holding political actors to account, and means for communicating. The training function refers to how legislative institutions provide an environment for political actors to learn and develop numerous political skills. The introduction of two chambers can provide political actors the opportunity to socialise and train within different political environments. For example, a second chamber may institutionalise a more collegiate and consensual environment, incentivising political actors to develop their technical, rather than oratory, skills.

Most importantly, bicameralism will affect how a legislative institution performs its law-making function, and in turn its ability to manage disagreement. This is because bicameralism introduces an additional layer of decision-making within the legislative process. The obvious consequence of this is that to change the status quo, a bill must be considered and potentially approved by two chambers, as opposed to one.[[1004]](#footnote-1004) This extra layer of decision-making creates the risk of inter-chamber disagreements occurring, as a second chamber may have its own preferences that conflict with the first chamber’s. The possibility of intercameral disagreement will affect the internal calculus of political actors, influencing their behaviour and strategies and consequently the legislation they produce.[[1005]](#footnote-1005) Of course, disagreements will not always arise, particularly if the policy preferences of both chambers are sufficiently aligned. Unfortunately, in the circumstances of politics, we cannot assume this will always occur. Accordingly, the potential for intercameral disagreements requires legislative designers to identify ways of incentivising and maintaining a healthy working relationship between the two chambers, as well as identifying suitable mechanisms for overcoming intercameral disputes. For example, legislative designers may institutionalise formal rules and informal practices aimed at preventing and overcoming intercameral disagreements. This requires reflection on what powers should be afforded to each chamber, and which chamber’s preferences should prevail over the other during the legislative process.

## *2. Bicameral Power, Composition and Legitimacy*

Bicameralism presents a significant design issue for political constitutionalism because it alters how political action will be shaped and channelled through the legislature. There are multiple ways of designing bicameralism, with different designs institutionalising different intercameral relationships. Differences in intercameral design therefore affect how the legislature manages the circumstances of politics. Analysing how bicameralism can be designed to be compatible with political constitutionalism requires identifying which aspects of bicameral design affect the kind of intercameral relations that are institutionalised. A review of leading comparative studies on bicameralism identifies formal power, composition and legitimacy as the key determinants of intercameral relations.

Arend Lijphart’s seminal study of how democracy is institutionalised in thirty-six countries provides the leading typology on bicameralism.[[1006]](#footnote-1006) Lijphart’s study measured how different intercameral relations were determined by the second chamber’s formal powers and the democratic legitimacy of its composition.[[1007]](#footnote-1007) On this basis, Lijphart distinguished between *symmetrical* and *asymmetrical* forms of bicameralism. *Symmetrical bicameralism* describes when a second chamber is institutionalised to be relatively equal to the first chamber in terms of its power and the democratic legitimacy of its composition. [[1008]](#footnote-1008) In contrast, *asymmetrical bicameralism* describeswhen a second chamberis institutionalised to be highly unequal to the first chamber in terms of its powers and or the democratic legitimacy of its composition.[[1009]](#footnote-1009) Under Lijphart’s typology, when a first chamber has stronger formal constitutional powers, it should be able to overrule the second chamber in the event of disagreement. Yet in practice, this might not always play out this way, as the first chamber may not make full use of its formal powers. Similarly, when a second chamber enjoys equal powers, it should be able to challenge the first chamber’s policy preference. Yet once again, this is not always the case, as a second chamber may choose not to challenge the first chamber, even when it disagrees with the first chamber’s policy preferences. This is because there is always a subtle interplay between bicameral powers, composition, and political legitimacy. It is important to note that Lijphart’s study treated bicameral composition and legitimacy as one determinant. Lijphart reasoned that symmetrical bicameralism required a democratically elected second chamber to match the first chamber’s democratic credentials. Although there is certainly logic in this thinking, Meg Russell has argued that because the concept of legitimacy is more complicated than Lijphart assumed, it would be wiser to treat composition and legitimacy as separate determinants.[[1010]](#footnote-1010) Accordingly, legislative designers will need to account for three determinants of intercameral relation; power, composition and legitimacy.

### *Formal Power*

The first determinant is the formal power afforded to the second chamber under the constitution. This refers to how the constitution establishes formal rules that enable or constrain the second chamber’s ability to advance its policy referencing during the legislative process.[[1011]](#footnote-1011) Accordingly, the constitution formally establishes the working relationship between the two legislative chambers; the appropriate rules of behaviour for the political actors in both chambers, and the formal processes used to resolve intercameral disputes. This will usually include whether the second chamber enjoys formal powers that enable it to amend, delay or reject legislation. It will also determine whether disagreements should be resolved by a joint session, a joint committee, a shuttle system, or a legislative override.[[1012]](#footnote-1012) The ‘navette’ or ‘ping-pong’ system is the most commonly used method of resolving intercameral disputes.[[1013]](#footnote-1013) Under the navette system, bills cannot become law until both chambers reach a mutually acceptable agreement. As a result, a bill will ping-pong between the two chambers until both agree to the amended bill. Alternatively, the constitution may empower one chamber with the right of final say.[[1014]](#footnote-1014) When the constitution requires a joint session, this tends to act as a constraint upon the second chamber’s ability to advance its policy preferences. This is simply because most second chambers have a smaller membership than the first chamber.[[1015]](#footnote-1015) As a result, in a joint session, members of the first chamber can usually outnumber members from the second chamber.[[1016]](#footnote-1016) Similarly, a joint committee might constrain the second chamber by enabling members from the first chamber to hold more committee seats. The purpose of a joint committee is to iron out disagreements, before presenting a refined bill to both chambers on a take it or leave it basis.

In most states, there will be a single-codified constitutional document regulating the power of the second chamber. For example, *Article 77 of the Belgian Constitution* empowers theSenate with equal legislative competency in relation to bills about federal matters, constitutional revisions, international treaties and the courts.[[1017]](#footnote-1017) In contrast, *Article 78* constrains the second chamber by granting the House of Representatives with greater legislative competency on all other legislative issues. The Senate may propose amendments, but these must be accepted by the first chamber if they are to become law. [[1018]](#footnote-1018) It is also possible that the text of the constitution only partially defines, or is silent on the second chamber’s powers. For even under a written constitution, “some matters of constitutional relevance will always be unaddressed or significantly underdetermined by a master-text constitution.”[[1019]](#footnote-1019) Constitutional silence is an inevitable and necessary aspect of a written constitution.[[1020]](#footnote-1020) Furthermore, in a handful of states that lack a codified constitution, the second chamber’s power will be determined by other constitutional sources, such as ordinary legislation and constitutional conventions. As will be argued in the second section, these other constitutional sources are particularly important for ensuring the second chamber is compatible with political constitutionalism.

The United Kingdom’s *Parliament Acts 1911* and *1949* are prime examples of how ‘ordinary’ legislation can be used to institutionalise a second chamber’s formal powers. [[1021]](#footnote-1021) Prior to 1911, within the UK’s Westminster Parliament the House of Commons and House of Lords both held relatively equal legislative powers. The only exception was that from the latter half of the 17th century, the Commons had secured legislative privilege on financial matters.[[1022]](#footnote-1022) In all other matters, the House of Lords had in effect the power to veto any bill passed by the Commons that it opposed. By 1909, this resulted in a constitutional crisis, as the elected Liberal Government with the Commons attempted to implement its ‘people’s budget’ in response to the deteriorating economy. However, the hereditary and predominantly Conservative-controlled House of Lords opposed this budget and provoked a constitutional crisis.[[1023]](#footnote-1023) In response, the Liberal Government introduced the *Parliament Act 1911*, for the explicit purpose of altering “the powers of the House of Lords in relation to those of the House of Commons” by “limiting and defining the powers” of the second chamber.[[1024]](#footnote-1024) Under Section 2 (1) of the 1911 Act, any Public Bill (other than a money bill or a bill to extend the duration of Parliament beyond five years), passed by the Commons in three successive sessions, but opposed by the Lords in each of those sessions, may on its rejection for the third time and when two years have elapsed since the date of the bill’s second reading in its first session, the bill can become an Act of Parliament.[[1025]](#footnote-1025) In effect, this reduced the Lords’ power from an absolute veto to a two-year delay and enabled bills to be passed without its consent. The *Parliament Act 1949* amended the 1911 Act, by reducing the Lords’ power of delay to just one year.[[1026]](#footnote-1026) This second Parliament Act was introduced by the Labour Government, which in keeping with their general approach to constitutional design, was designed to enhance strong democratic governance. [[1027]](#footnote-1027)

Constitutional conventions may serve as an additional means of defining bicameral power. Inevitably, every functioning constitutional order is dependent upon the existence of constitutional convention.[[1028]](#footnote-1028) From an institutionalist perspective, constitutional conventions are formal rules and informal practices that organise political life, by determining how much political discretion is available to political actors in a given situation.[[1029]](#footnote-1029) They provide a system of constitutional morality for those political actors occupying constitutionally important institutions.[[1030]](#footnote-1030) Failure to follow a convention may result in undesirable consequences for political actors, [[1031]](#footnote-1031) or, as will be discussed in chapter seven, bring about changes to an institution’s rules and practices. Conventions can be considered an example of James March and Johan Olsen’s institutional ‘logics of appropriateness.’ Conventions provide logics of appropriateness for political actors, enabling actors to determine what should be their most appropriate course of action, given the socially accepted logics within their given institution or situation.[[1032]](#footnote-1032) Once again, the UK provides a prime example of how conventions can determine the powers of the second chamber. Within UK Parliament, there are two important conventions of intercameral relationship between the Commons and Lords. The first is the convention that establishes the Commons’ financial privilege. The second is the *Salisbury-Addison Convention*. The original *Salisbury Convention* enabled the Lords to block legislation and require the Government in the Commons to demonstrate electoral support for the bill via an election.[[1033]](#footnote-1033) Following the Second World War, discussions between partisan leaders in the Lords resulted in the convention changing. The updated *Salisbury-Addison Convention* makes clear that although the Lords may amend, it would be politically unacceptable for it to obstruct bills that seek to implement clear manifesto policies.[[1034]](#footnote-1034) In contrast to its original form, the convention substantially constrains the Lords’ powers and increases the flexibility afforded to parties within the Commons. Party manifestos merely need to be drafted in sufficiently broad terms to anticipate and counteract the Lords’ response.

### *Bicameral composition*

As was noted above, historically, one of the primary justifications for bicameralism has been that a second chamber can enhance the legislature’s ability to represent the polity. Accordingly, Lijphart’s second criteria focuses on the composition of the second chamber.[[1035]](#footnote-1035) The second determinant of intercameral relations refers to the institutional rules regarding the second chamber’s composition. As Lijphart observed, although the first chamber will always be elected within a contemporary democracy, a second chamber may not be, because the concept of bicameralism pre dates modern conceptions of democratic representation.[[1036]](#footnote-1036) During the medieval period, bicameralism served to represent different estates within the realm.[[1037]](#footnote-1037) However, as George Tsebelis and Jeannette Money observe, from the late 18th century onwards the bicameral phenomenon began to diverge between those that sought to present different estates and those that sought to represent federal interests. [[1038]](#footnote-1038) Moreover, bicameral chambers can also institutionalise rules to ensure a range of different methods are used for selecting their members. These include selection via direct election, indirect elections, appointments, and based upon birth right.[[1039]](#footnote-1039) Each of these systems could *theoretically* lead to a second chamber representing a different set of interests and views.[[1040]](#footnote-1040) Furthermore, some bicameral chambers can be characterised by mixed representation, in which two or more of these methods are applied to select its membership. These methods of selection and their compatibility with political constitutionalism will be considered in detail in section three.

### *c) Political Legitimacy*

The legitimacy of a second chamber is the third determinant of its power.[[1041]](#footnote-1041) Legitimacy refers to the right to govern, in sense that one’s legitimacy justifies the exercise of power and demands for obedience from others.[[1042]](#footnote-1042) Russell posits that, “a lack of legitimacy may render a second chamber unable in practice to make full use of its [formal] powers.”[[1043]](#footnote-1043) Legitimacy is implicit in Lijphart’s approach to determining bicameral power. When discussing the second dimension, he acknowledges a perceived lack of legitimacy might weaken the second chamber. However, Lijphart’s study focuses only on democratic states; therefore, his conception of legitimacy is identical to the concept of democratic legitimacy. [[1044]](#footnote-1044) This is uncontroversial if democratic legitimacy is a part of the state’s shared belief system. However, the state’s shared belief system may view legitimacy in different ways.[[1045]](#footnote-1045) For example, legitimacy may be conditioned by dominant religious values with a state. In Iran, legislation must be approved by the elected Islamic Consultative Assembly and by the Islamic clerics within the Guardian Council.[[1046]](#footnote-1046) For this reason, legitimacy is its own determinant, rather than a part of the composition. Legitimacy must also be considered independently from formal power, as it affects how formal power will be used in practice.[[1047]](#footnote-1047) This has important implications for the logic of appropriateness. The constitution establishes formal powers, but political actors will internalise how and when they can use these powers, based upon the perceived legitimacy of themselves and their formal powers in their current situation. As a result, formal powers may diminished or enhanced by the second chamber’s legitimacy within the state.

Accordingly, the second chamber’s legitimacy will condition how intercameral relation organise political life in various ways. Questions of legitimacy may encourage political actors within both chambers to engage pre-emptive behavioural logics to reduce the risk of intercameral disagreements. For example, the second chamber may defer to the first chamber’s judgment, even if the constitution enables it to pursue its preferences, because the first chamber believes on this current issue, that they lack the legitimacy necessary to deploy their formal powers against the second chamber. Similarly, if a second chamber is perceived to be more legitimate in relation to certain issues, such as federal related matters, the first chamber might pre-emptively draft their bills to conform to the known preferences of the second chamber. Alternatively, the first chamber may choose not to initiate bills on specific matters because it believes responsibility for initiating such legislation rests with the second chamber. The second chamber’s legitimacy may determine which chamber’s preferences prevail, regardless of their constitutional powers. For example, the constitution may allow the first chamber to overrule the second chamber, but public, media, and academic criticism may deter the first chamber from exercising its formal powers against the second chamber. Perhaps most importantly, the legitimacy of the second chamber is central to institutionalising a healthy intercameral relationship. When a second chamber is recognised as legitimate, the first chamber should behave in a respectful manner towards it. A legitimate second chamber should be treated like the loyal opposition, in that it should not be seen as treasonous when it disagrees with the first chamber.[[1048]](#footnote-1048) Respecting the circumstances of politics requires recognising intercameral disagreements as a healthy part of ordinary political process. Respecting the second chamber merely requires that the first chamber reflects upon its own arguments and the second chamber’s arguments when deciding whether to deploy its constitutional powers to overrule the second chamber. According to political constitutionalism, the legitimacy of political institutions within the constitutional orders should be conditioned by the extent to which they respect the circumstances of politics. In order for a second chamber to be considered legitimate within a political constitution, its institutional design must respect the procedural and equalitarian norms of political equality, majority rule and contestability. The more a second chamber conforms to these norms, the more legitimacy it will have within a political constitution.

## *3. Can Bicameralism be Compatible with Political Constitutionalism?*

This chapter is concerned with analysing how bicameralism can be institutionalised to be compatible with political constitutionalism. In response, this section argues bicameralism can be compatible, if it is designed in two ways. First, a second chamber’s formal powers must originate from a contestable source such as ordinary legislation or political conventions. This is necessary to ensure that the rules regulating the legislature’s intercameral relationship can remain within the ordinary political process and in turn be contested and reformed through ordinary politics. Second, the second chamber’s membership must be selected and contested through the ordinary political process. Nevertheless, there are multiple ways of selecting a second chamber membership. This section will argue that, to be compatible with political constitutionalism’s central case, the second chamber should be directly elected. Accordingly, when a second chamber is elected, it will have legitimacy within constitutional order. This section does not consider what powers a second chamber should be vested with. This is because the question is closely linked to how intercameral relations help institutionalise the legislature’s role within the ordinary political process. As we have seen in the previous chapters, the different strands of political constitutionalism disagree over what the legislature’s role should be, and therefore will disagree about the kind of powers that should be vested in the second chamber. Moreover, the complex interplay between bicameral power, composition and legitimacy will affect the role that legislature as a whole performs within the constitutional order. This presents a challenge when designing the legislature to perform an arena or transformative role, based upon the expectations of the peripheral strands of political constitutionalism.This question shall be addressed in section four.

### *The Source of Formal Power*

First, the second chamber’s formal powers, regardless of the powers afforded, must originate and be regulated by a contestable constitutional source. This requires analysing whether any of the constitutional sources discussed above are compatible with political constitutionalism. This also requires reflecting on whether there are any particular advantages in using one source over another or relying on multiple constitutional sources to regulate bicameral power. Section two identified three potential constitutional sources; a codified and entrenched constitution, constitutionally important statutes, and constitutional conventions. Only statutes and conventions can be compatible with political constitutionalism, because they provide a sufficiently contestable means of regulating bicameral power.

In many states, bicameral power is regulated by provisions within an entrenched constitution. However, this constitutional source is traditionally seen as incompatible with political constitutionalism. With the notable exception of Marco Goldoni, most political constitutionalists are profoundly sceptical about constitutional entrenchment.[[1049]](#footnote-1049) Political constitutionalists would undoubtedly argue that to regulate intercameral relations via entrenched constitutional provisions is disrespectful in the circumstances of politics. For political constitutionalism, constitutional entrenchment reduces citizens’ opportunities to contest and reform the rules regulating intercameral relations. Entrenchment would freeze in time the relationship between the two chambers, preventing their relationship evolving alongside the polity. Over time the way that the legislature institutionalises intercameral relations and how the citizens believe the legislature should institutionalises intercameral relations, may become dis-aligned. This is problematic in one sense because it risks privileging the wisdom of the original drafters over the current views of the political community.[[1050]](#footnote-1050) In another sense, it is also problematic because it is highly impractical. For example, what if the provisions established by the original drafters began to result in unforeseen or undesirable consequences, such as legislative gridlock? The constitution would need to be amended. Unfortunately, amendment processes tend to function as a constraint upon change, by establishing cumbersome rules that require a high level of political support. It may even require the approval of the second chamber, which may be abusing its constitutional powers to intentionally bring about a gridlock within the legislative process. In these circumstances, the second chamber may attempt to veto any amendments designed to weaken its formal powers. More broadly, because entrenchment is seen by political constitutionalism as undesirable for organising the constitution as a whole, a political constitution will eschew using an entrenched constitution altogether. Therefore, the formal powers of a second chamber will need to originate from another source.

Before proceeding, it is worth briefly reflecting on Goldoni’s criticisms about political constitutionalism’s rejection of constitutional entrenchment. He has sought to justify how the process of constitutional drafting and amending could be compatible with political constitutionalism. [[1051]](#footnote-1051) Echoing the philosophy of Hannah Arendt, Goldoni argues that constitution making can be a progressive act that creates a new beginning for the polity.[[1052]](#footnote-1052) Traditionally, political constitutionalists have viewed entrenchment as a conservative act.[[1053]](#footnote-1053) Goldoni, in contrast, highlights how constitution making might enable a political community to recover following a period of war or an economic crisis. Drafting an entrenched constitution is an act of drawing a line under the past and an attempt to avoid repeating past mistakes.[[1054]](#footnote-1054) On this basis, Goldoni reasons that as long as the new constitution leaves open sufficient space for political disagreements and avoids entrenching the trajectory of the state, it should be compatible with political constitutionalism.[[1055]](#footnote-1055) Although Goldoni’s refined attitude towards entrenchment is compelling, unfortunately it does not provide a sufficient justification for using provisions within an entrenched constitution to regulate bicameral power. It could be argued that, if the previous intercameral relations resulted in a constitutional crisis that provoked citizens to enact a new constitution, then perhaps the new constitution could be an attempt to avoid repeating the mistakes of the past. However, if the new constitution establishes equally dysfunctional intercameral relations and is difficult to amend, then political constitutionalism’s concerns about entrenchment will remain valid. Furthermore, if bicameralism caused the crisis in the first place, it would seem plausible that the new constitution would ensure the legislature is unicameral in design. Finally, as we shall see below, in comparison to the other potential sources, Goldoni’s re-evaluation does not reveal any particular advantages in using constitutional provisions to regulate bicameral power over statutes or conventions.

Political constitutionalism maintains that the ordinary political process can and should serve as the constitution, organising and regulating the powers and relationships between the various institutions of the state.[[1056]](#footnote-1056) Within the ordinary political process, both statutes and conventions can organise and regulate bicameral power. Importantly, they also allow the political community to contest and reform bicameral power through the ordinary political process. For example, statutes can regulate bicameral power and remain easy to contest, as the political community only needs to enact a new statute to replace or amend the rules that regulate the second chamber’s power. At most, the first chamber would only need to demonstrate that a sufficient degree of support for the change exists within the polity, by either winning an election or holding a referendum. [[1057]](#footnote-1057) Similarly, constitutional conventions also provide sufficient opportunities for the political community to contest and reform their second chamber’s power. Constitutional conventions evolve over time as “a series of precedents that are agreed to give rise to a binding rule.”[[1058]](#footnote-1058) Nevertheless, conventions can be established in other ways. For example, Geoffrey Marshal and Aileen McHarg highlight how political actors can consciously attempt to influence future constitutional behaviour through declaring certain practices as conventions.[[1059]](#footnote-1059) The difference between these declared conventions and evolved conventions, is that evolved conventions gain support based upon past precedents, while in contrast, declared conventions are dependent on the future behaviour of political actors, as they will not take hold if political actors refuse to conform to them.[[1060]](#footnote-1060)

Both legislation and conventions are compatible with political constitutionalism, as both provide a means of regulating bicameral power, which is sufficiently contestable. A political constitution could use both to define the working relationship between the chambers. For example, a convention may be used to clarify ambiguities or gaps within a statute. Alternatively, conventions may refine how statutory provisions should be exercised. A statute may legally empower the first chamber to ignore the second when it wishes, but a convention may develop establishing behavioural logics that discourage the first chamber from exercising its powers in relation to certain matters or establishing additional criteria that must be taken into consideration before the power can be exercised.[[1061]](#footnote-1061) Although there is no reason why intercameral relations cannot be regulated by both statutes and conventions, we may nevertheless ask whether there are any particular advantages of using one over the other.

Robert Brett Taylor has made the case that conventions are more desirable then statutes for political constitutionalism.[[1062]](#footnote-1062) This argument is premised on Albert Venn Dicey’s distinction between laws and conventions. Dicey posited that unlike laws, conventions could not be recognised or enforced by the courts.[[1063]](#footnote-1063) On this basis, conventions should be more appealing to political constitutionalists, because they provide rules to political actors, without the risk of judicial interference.[[1064]](#footnote-1064) This is a simplification of the argument, because as Taylor acknowledges, Dicey’s sharp distinction has been widely criticised.[[1065]](#footnote-1065) First, the courts can and do recognise conventions. As Nick Barber points out, in theory the courts are free to recognise anything they wish.[[1066]](#footnote-1066) In practice, conventions are formally recognised by the courts in various ways, including in the interpretation of statutes.[[1067]](#footnote-1067) Taylor concedes this point but highlights the precedent from the Canadian Supreme Court case *Re Resolution to Amend the Constitution,* that while the courts can recognise the existence of a convention, they cannot enforce it.[[1068]](#footnote-1068) This was echoed by the UK Supreme Court in the recent *Miller* case, as the majority asserted that judges are “neither the parents nor the guardians of political conventions; they are merely observers.”[[1069]](#footnote-1069) Second, courts may indirectly enforce a convention, as their recognition may increase the political costs on political actors who do not adhere to the convention. Interestingly, Taylor argues this should not however be problematic for political constitutionalists, as judicial power is limited to potentially influencing the political discourse, rather than determining it. [[1070]](#footnote-1070) One potential caveat is the suggestion that it may remain possible for direct judicial enforcement to occur in the future.[[1071]](#footnote-1071) This change would no doubt by welcomed by those who favour legal constitutionalism.[[1072]](#footnote-1072) The direct enforcement of political conventions by the courts would mark a significant change in the relationship between the political and legal elements of a constitution. Despite this potential caveat, the appeal of conventions to political constitutionalists seems plausible. For example, Adam Tomkins’ account of political constitutionalism supports Taylor’s argument, as Tomkins’ account relies heavily on the convention of ministerial responsibility as the primary mechanism for ensuring political accountability.[[1073]](#footnote-1073) On these grounds, conventions appear to be the more suitable option for political constitutionalism. Nevertheless, both statute and convention provide contestable sources for regulating bicameral power. There is no reason bicameral power cannot be regulated through both statutes and conventions, or that a convention cannot be reflected within the text of a statute.[[1074]](#footnote-1074)

### *Composition*

The second issue is to determine how the second chamber’s membership can be compatible with political constitutionalism. This requires the second chamber’s membership to conform to the norms of political equality, majority rule and contestability. Importantly, the second chamber’s membership can be determined and regulated in multiple ways. As highlighted in section one, bicameralism has traditionally been used as a means of representing a diverse range of political interests, which are not sufficiently represented within the first chamber. As a result, legislators within a second chamber may be selected through direct and indirect elections, an appointment processes, or based upon birth right. For example, if a legislative designer operating federal states wanted the second chamber to represent the interests of constituent territorial units over partisan interests. The second chamber’s representative function is enhanced through incentivising the representation of distinct interests, rather than duplicating those found within the first chamber. Importantly, evidence suggests direct elections enable partisan interests to overshadow territorial interests.[[1075]](#footnote-1075) Therefore, the designer might reason that the second chamber’s membership should be indirectly elected, by members of the sub-national government, rather than directly by citizens of the territorial unit.[[1076]](#footnote-1076) It is also important to recognise how a second chamber can institutionalise mixed forms of representations, by allowing 50% of its members to be directly elected and 50% to be appointed. Section two revealed how questions about composition and legitimacy are often closely intertwined, thus the composition of the second chamber will also have important implications for its legitimacy within the eyes of the political community. If the second chamber’s function is to ensure additional forms of political representation, its membership and the interests they represent will need to be considered legitimate if their opinions are to be heard and reflected upon within the legislative process. Similarly, if the second chamber’s function is to serve as a redundancy mechanism within the legislative process, its membership will need to be seen as legitimate when exercising its formal powers to challenge or delay the first chamber’s policy preferences. Consequently, the legitimacy of the second chamber’s membership will have practical implications for the working relationship between the two chambers.

Identifying what a compatible (and consequently legitimate) membership is according to political constitutionalism might appear to be relatively straightforward. As chapter one and two argued, political constitutionalism has traditionally been developed and subsequently valued as a means of challenging judicial supremacy. Political constitutionalism has argued that judicial actors should not engage in political decision-making because they lack the legitimacy required to make such decisions in the circumstances of politics. For political constitutionalism contends the design of judicial institutions cannot respect the circumstances of politics. This argument includes specific focus on ways that the members of judicial institutions are selected, in comparison to legislative institutions. Political constitutionalism argues the members of judicial institutions are neither elected by, nor sufficiently accountable to, the citizens.[[1077]](#footnote-1077) This is problematic, as allowing judges to engage in political decision-making infringes upon political equality by privileging the preferences of the judiciary over the preferences of the community.[[1078]](#footnote-1078) Furthermore, the political community cannot contest judicial decisions, as judges are not accountable to people (at least in the sense understood by political constitutionalists).[[1079]](#footnote-1079) In contrast, political constitutionalism tends to assume legislators will be elected by and will be directly accountable to the people. As a result, unlike legislatures, unelected judges do not sufficiently conform to the norms of political equality and contestability. On these grounds, it would seem clear that only a fully elected second chamber could be considered compatible with political constitutionalism.

Yet as was noted in chapter two, political constitutionalism’s comparative analysis of legislative and judicial institutions hinges upon a sharp distinction between *elected* and *unelected* institutions. This distinction is less clear-cut in the context of bicameralism, because second chambers can be comprised of the directly and indirectly elected; they may be comprised of appointed or even hereditary members. Consequently, the binary logic between an elected and non-elected membership cannot fully address how these methods of selection and mixed methods of representation affect the compatibility and legitimacy of the second chamber within a political constitution. Instead, the compatibility and legitimacy of the second chamber’s membership is always a question of degree. Some methods of regulating the second chamber’s membership will be more compatible (and consequently more legitimate) than others.

#### A Directly Elected Membership

Based upon the existing political constitutionalist literature, it is clear that a directly elected second chamber provides the most compatible and legitimate membership. Assuming there is near universal-suffrage, the use of an election system for selecting and removing members should provide a sufficient form of political equality.[[1080]](#footnote-1080) Each and every citizen within the political community will have equal influence over the selection and removal of the second chamber’s membership, just as they would when selecting and removing members of the first chamber. However, what if the second chamber was directly elected but in a different way to the first chamber? For example, different electoral systems or constituency boundaries may be used to ensure the second chamber represents set of interests distinct from those represented within the first chamber. Differences in the electoral systems used by both chambers should not be particularly problematic, if both provide a base level of legitimacy. Although the strengths and weaknesses of first-past-the-post in comparison to proportional representation or the alternative vote system can be debated, we should still accept that each of these different electoral systems provides a base level of democratic legitimacy. Furthermore, as long as the political community can contest and reform their electoral systems, this should be not problematic.

Representing federal interests usually requires the second chamber’s membership to be selected under a different set of constituency boundaries to those used by the first chamber. At this point, it is worth briefly reflecting on the issue of federalism in relation to political constitutionalism. This is not because federalism is incompatible with political constitutionalism *per se*, but rather because questions about its compatibility have largely been overlooked within the existing literature. Unfortunately, the question of whether federalism can be compatible with political constitutionalism falls beyond the scope of this thesis.[[1081]](#footnote-1081) Nevertheless, since federalism and bicameralism can often be closely related, some brief comments will be provided. William Riker defined federalism as when the land and people of the state are ruled by two levels of government, each of which is guaranteed a sphere of autonomy under the constitution.[[1082]](#footnote-1082) For Riker, federalism needed to be embodied in some form within the constitution. In practice, this can be achieved in various ways including through provisions within the entrenched text of the constitution, judicial review, intergovernmental institutions, the use of constitutional referendums, and bicameralism.[[1083]](#footnote-1083)

It is important to recognise that a political community may choose to express itself through federal arrangements for a variety of reasons. First, Riker argued that federal unity should be adopted to provide smaller individual states security from an external enemy.[[1084]](#footnote-1084) A slight variation of this argument can be seen within the context of the European Union, as a supra-national federal organisation. The European Union deploys federalism to manage conflict among its members-states.[[1085]](#footnote-1085) Second, federalism may allow individual states come together in order to gain the integrative benefits of unity. Individual autonomous states may use federalism to promote a more effective of governance through pooling their sovereignty together in a way that does not compromise their identity.[[1086]](#footnote-1086) Third, federalism can also be used as a method of holding together the political community. For example, a state may attempt to devolve certain governing responsibilities to its component units, in the hopes of pacifying the threat of separatist movements developing, which might weaken the state as a whole.[[1087]](#footnote-1087) Federalism enables political communities to group together to reap the associated benefits of managing disagreement through a network of institutions at a local and national level. Fourth, it may simply be considered the most practical option for managing disagreement in the context of those large, geographically and culturally diverse states.

Although bicameralism it is not an essential requirement for establishing a federal constitution, federalism can be embodied within the second chamber, through elections designed to promote territorial forms of representation. Significantly, the representation of federal interests will condition when a second chamber is seen as legitimate and when it is not. This is because its legitimacy will be tied to interests it represents; the legitimacy of a federal second chamber is contextual. The federal second chamber is at its most legitimate in the context of federal matters, but its legitimacy carries less weight in the context of non-federal matters.[[1088]](#footnote-1088)A federal second chamber is designed to represent the federal interests within the political community when federal concerns arise. In contrast, the first chamber is designed to represent the interests of the political community in relation to all other matters. This does not rule out the possibility of a directly elected federal chamber using its powers in relation to non-federal matters, but it suggests in the event it does, it will need to find support for its actions within non-federal dimensions of the political community. Here the development of a political convention, which empowers the second chamber on just federal matters, would be a particularly suitable option.

In the context of federal bicameralism and political constitutionalism, it should be recognised that there is a potential trade-off between on the one hand, the potential benefits of federalism for the effective management of disagreement, and on the other hand, respecting the circumstances of politics through ensuring political equality. The problem lies with the amount of political representation given to each territorial unit when weighed against the size of their population. A federal second chamber could grant each state equal representation and decision-making influence, even though some units may have a significantly smaller or larger population than the others. This is problematic because some sections of the political community may be over or under-represented within the second chamber. An obvious example of this problem can be seen in the US Senate. Under the US Constitution, each state is represented two senators, regardless of the size of the state’s population. As a result, the population of the smaller states has, in a technical sense, greater decision-making influence than the population within the larger states. Political constitutionalists acknowledge that absolute political equality is in practice unachievable.[[1089]](#footnote-1089) Whether a federal form of political representation would be considered too great an infringement of political equality remains to be seen. This question might turn on whether one is willing to embrace a systemic understanding of how political constitutionalism can be applied in practice. Under a systemic understanding, some degree of political inequality might be tolerable, if it is compensated by greater political equality elsewhere. On a systemic understanding, federalism may be possible, but this claim is subject to the caveat that further research on federalism and political constitutionalism is required.

#### An Indirectly Elected Membership

A second chamber can be comprised of indirectly elected members. This method of selection and removal is used in several states, including Germany and France. Under this method, the second chamber’s members are not elected by ordinary voters; instead, they are elected by the elected representatives within sub-national governments or the first chamber.[[1090]](#footnote-1090) For example, the membership of the French *Sénat* is elected by a complex Electoral College made up from the members of local government.[[1091]](#footnote-1091) The *Bundesrat* of Germany is elected by the members of *Länder* governments.[[1092]](#footnote-1092) An indirectly elected second chamber conforms to the norms of political equality and contestability, albeit to a lesser degree than a directly elected second chamber. This is because indirect elections privilege the preferences of elected political actors over the preferences of ordinary citizens. Nevertheless, indirect elections are still a means of linking voters with the second chamber. Direct elections establish a direct link between the voters and their legislative agents. Voters have a more direct form of control over their legislative agents, because they can directly select and remove them.[[1093]](#footnote-1093) In contrast, indirect elections produce a more complex chain of control between the voters and legislators within the second chamber. This is because the chain now involves three groups of actors instead of two; voters, directly elected representatives (within sub-national governments or the first chamber), and indirectly elected representatives within the second chamber. The directly elected representatives are simultaneously agents of the voters, and principals who select members of the second chamber. The preferences of voters need to be channelled through the medium of their directly elected representatives. When voters elect a centre-right party for their local government, they should expect the centre-right party to elect a centre-right candidate to represent their territorial unit within the second chamber. Logically, a centre-right local government is unlikely to vote for a centre-left candidate to represent their territorial unit within the second chamber. After all, a centre-left candidate would not mirror their preferences and would actively frustrate the policy preferences of the centre-right local-government and the majority of voters within the territorial unit. Accordingly, the preferences of voters may still be represented, and voters have indirect power to select and remove. Therefore, an indirectly elected second chamber would still conform with the norms of political equality and contestability, but to a lesser degree, in comparison to a directly elected second chamber. As a result, an indirectly elected second chamber should have some degree of legitimacy within a political constitution, albeit not as much as a directly elected second chamber.

When a second chamber is designed to institutionalise a vocational-based membership, an interesting variant of indirect elections is used. In the early 20th century, several European states began using bicameralism to represent certain social groups or vocations within the legislative process.[[1094]](#footnote-1094) Two contemporary examples are the Republic of Ireland’s *Seanad Éireann* (Senate of Ireland) and Slovenia’s *Državni svet* (National Council).[[1095]](#footnote-1095) The idea is taken from the catholic social teachings of Pope Pius XI, who stressed that “true and genuine social order demands that various members of society be joined together by some firm bond.”[[1096]](#footnote-1096) The goal of the vocational system is to avoid class-based conflicts by institutionalising the need for collaboration and harmony between different social and economic groups.[[1097]](#footnote-1097) Under this system, members of the second chamber are elected to represent vocational rather than geographic constituencies. For example, in Ireland, there are five different vocations panels, representing: *National Language and Culture, Literature, Art and Education*; *Agriculture and Allied Interests and Fisheries; Labour; Industry and Commerce;* and *Public Administration and Social Services*.[[1098]](#footnote-1098) An additional constituency includes graduates from Ireland’s two oldest university groups.[[1099]](#footnote-1099) Candidates are nominated to represent each category by two sub-panels, one made up of parliamentarians and the other by nominating bodies, who are made up of different organisations, trade unions and employment groups.[[1100]](#footnote-1100) Candidates should have “knowledge and practical experience” in their given vocation. In theory, this should ensure the second chamber represents a different set of interests from the first chamber. Yet in practice, this has not been the case in Ireland for two reasons.[[1101]](#footnote-1101) First, the requirements that candidates should be experienced within their vocation has been liberally interpreted.[[1102]](#footnote-1102) Second, the Electoral College used to elect the second chamber’s members is made up from the ranks of parliamentarians and local councillors.[[1103]](#footnote-1103) As a result, the second chamber's membership tends to represent partisan interests, rather than vocational skills. [[1104]](#footnote-1104)

Unfortunately, the vocational system is not very compatible with political constitutionalism. This is because the vocational system might hinder the constitution’s ability to promote political equality. There is a serious risk that a vocational system might result in certain groups having greater decision-making influence than others. Similar to concerns about federalism, there is the risk that a vocational system over-represents certain sectors. For example, under the Irish system, the labour sector is afforded 11 members and the commerce sector is afforded nine members, which might lead to accusation of a slight constitutional bias towards the left.[[1105]](#footnote-1105) In theory, this might be overcome through simply distributing the number of seats equally between the sectors. Conversely, political constitutionalists might argue instead that direct elections provide the fairest method of determining the balance of power between sectoral interests within the political community.

Ultimately, an indirectly elected second chamber is compatible with political constitutionalism, to a certain extent. Therefore, indirect elections would provide the second chamber with some degree of legitimacy within the legislative process. For political constitutionalism, an indirectly elected second chamber is the less desirable option, when compared to the potential for a directly elected second chamber. Nevertheless, as we shall see, for political constitutionalism an indirectly elected second chamber is more desirable than a second chamber with an appointed or hereditary-based membership.

#### An Appointed and or Hereditary Membership

From the perspective of political constitutionalism, an appointed or hereditary based second chamber would provide the least compatible and legitimate option. Both systems were originally designed to ensure the representation of aristocratic interests within a system of fixed government but have since the 18th century been on the decline. Today, second chambers comprised predominantly or completely of appointed members are rare.[[1106]](#footnote-1106) The appointment system is still used for the UK and several British colonies in the Caribbean.[[1107]](#footnote-1107) Under an appointment system, certain officials are constitutionally empowered to appoint the members of the second chamber. They may have a free hand over whom they appoint. Alternatively, conventions or statutes may require them to consult with an appointment panel or advisor. In theory, the appointment system could allow the second chamber to represent a distinct range of interests, including territorial units, vocations and or expertise, but it could also be used to reward party loyalty and patronage.[[1108]](#footnote-1108) An appointment system is problematic for political constitutionalism because it heavily infringes upon the norms of political equality and contestability. The official in charge of the appointments is empowered to promote their preferences, at the expense of the ordinary voter. Whether the official takes into consideration the interests of the voters is largely optional. Moreover, appointed legislators cannot be directly or indirectly contested by the voters, as appointed legislators cannot be dismissed through elections because membership is constitutionally guaranteed for several legislative terms or for life. As a result, even if the second chamber’s membership were solely appointed to represent federal interest or vocational interest, rather than partisan interests, the legitimacy of the second chamber would still be lacking.

The hereditary system is a worse variant of the appointment system. Under the hereditary system, the second chamber’s membership is determined by birth right. This inevitably infringes upon political equality, by privileging some citizens over others because of their family. Furthermore, the chain of accountability between the ordinary voters and hereditary members is non-existent, which completely infringes the contestability principles. Accordingly, a second chamber comprised of appointed or hereditary members is the least compatible option for political constitutionalism. It is also the least legitimate option within a political constitution, as neither appointed nor hereditary members will have the legitimacy necessary to make political decisions within the circumstances of politics.

#### Mixed Representation

The second chamber’s membership can also be determined through multiple methods of selection. For example, a second chamber’s membership could be determined through both direct and indirect elections, or could be mostly elected, with a small proportion being appointed. The introduction of mixed forms of political representation will affect the extent to which the second chamber is compatible with political constitutionalism. Once again, compatibility and legitimacy will always be a matter of degree, with some arrangements being more compatible and legitimate then others. The above analysis identified that according to political constitutionalism, direct elections should be recognised as the most compatible and legitimate method for selecting the second chamber’s membership. Indirect elections were seen as a somewhat compatible and legitimate method. On this basis, indirect elections are a second best-option. Finally, the appointment or hereditary methods were considered the least compatible and legitimate options. On this basis, if 70% of the second chamber was directly elected, and 30% was indirectly elected, then from the perspective of political constitutionalism, this should be sufficiently compatible and legitimate. Similarly, if 70% of the second chamber was indirectly elected and 30% was directly elected, this would be compatible and legitimate, but to a lesser extent than the above option. In essence, the more a second chamber is elected, the more compatible and legitimate it will be. Conversely, the less a second chamber is elected, the less compatible and legitimate it will be.

## *Political Constitutionalism and the Role of the Second Chamber*

Section three demonstrated that in principle bicameralism can be compatible with political constitutionalism if two conditions are met. First, the second chamber’s formal powers must be derived from and regulated by a contestable constitutional source, such as through statutes and/or conventions. Second, the second chamber’s membership should be selected, and contested through direct elections. This does not address what powers should be afforded to the second chamber within a political constitution for two reasons. First, how the second chamber contributes to the role of the legislature as a whole within ordinary democratic process is reflected within the nature of its formal constitutional powers. This means that one must determine what the role of the second chamber should be within the legislative process according to political constitutionalism, before subscribing what powers should be vested to the second chamber. Second, the complex interplay between bicameral power, composition and legitimacy will affect the second chamber’s role within the legislative process, and in turn the legislature’s role within the constitutional order. As a result, when designing a second chamber to perform a given role, the legislative designer must reflect on how the legitimacy of the second chamber’s membership can enhance or erode its formal constitutional powers, which subsequently affects the kind of intercameral relations that will institutionalised. This presents a challenge when designing the legislature as a whole to perform either an arena or transformative role. In response, this final section analyses how the second chamber should be designed according to the different strands of political constitutionalism. It will be argued that because the different strands advance competing conceptions about the legislature’s role, this will result in the strands making different choices about what the formal powers and composition of the second chamber should be.

Chapter three demonstrated that the liberal, republican and democratic socialist strands of political constitutionalist thought advanced different understandings about what the legislature’s role should be within a political constitution. The liberal strand believed the legislature should perform a transformative role; the legislature should organise political action in ways that transform electoral inputs through deliberation and compromise.[[1109]](#footnote-1109) In contrast, both the republican and democratic socialist strands maintained the legislature should perform an arena role. The legislature should organise political life in a way that prevents legislators from substantially modifying or transforming electoral demands. Instead, the legislature must be designed to enact into law what has already been decided by the electorate.[[1110]](#footnote-1110) At the same time, the legislature should be designed to ensure majority and minority groups can communicate their views to polity.

The idea that legislatures can perform a predominately transformative or arena role was developed by the legislative scholar Nelson Polsby. Curiously, Polsby choose not to reflect within his analysis how intercameral relations affected the legislature’s role.[[1111]](#footnote-1111) This is particularly peculiar because all of the legislatures used with Polsby’s case were bicameral in their design.[[1112]](#footnote-1112) This omission has been indirectly criticised by some bicameral scholars.[[1113]](#footnote-1113) However, one can logically deduce from Polsby’s reasoning, how different intercameral relations might contribute to a legislature performing a transformative or arena role. If a relatively symmetrical form of bicameralism is institutionalised, the first chamber will not be able to ignore the preferences of the second chamber. Instead, the second chamber will be able to function as a redundancy mechanism within the legislative process. As a result, in order for bills to become law, compromise will be needed. This creates the potential for electoral inputs to be transformed through intercameral deliberation and compromise. However, there is a risk that a symmetrical form of bicameralism could result in legislative gridlock. In contrast, enabling the second chamber to function as a redundancy mechanism conflicts with the idea of the arena legislature. Institutionalising a legitimate second chamber with weak formal powers could be beneficial for enhancing the legislature’s ability to represent and communicate the preferences of majority and minority groups. Nevertheless, there is a risk that the second chamber’s legitimacy may enhance its formal powers, creating the potential for the second chamber to engage in transformative logics.

Within the existing political constitutionalist literature, some proponents have articulated what the second chamber’s role should be, but other’s proponents have yet to express a view on it. Both liberal and democratic socialists have argued articulated the clearest positions. The liberal strand provides the most comprehensive attempt to analyse the value of bicameralism from a political constitutionalist perspective. In chapter two, it was observed that the liberal political constitutionalist Jeremy Waldron has argued that legislative design should be guided by his principles of legislations and the need for articulated governance. Waldron’s principles of legislation are *legislative transparency, the duty of care in the law-making process, the diversity of opinions, loyal opposition, responsive deliberation* and *procedural rules*.[[1114]](#footnote-1114) Articulated governance refers to the idea that the exercise of state power should be channelled through “an orderly succession of phases” to ensure individual autonomy is not unnecessarily harmed.[[1115]](#footnote-1115) Waldron argues that bicameralism is necessary to promote principles of legislation and articulated governance. As a redundancy mechanism within the legislative process, bicameralism institutionalises the ‘*Tristram Shandy Principle’,* which argues any course of action should be debated twice; first drunk then sober.[[1116]](#footnote-1116) On this logic, bicameralism is desirable because it functions as “an additional layer of representation [that] affords a qualitatively distinct basis for legislative scrutiny and accountability.”[[1117]](#footnote-1117) In addition, Waldron argues that as a redundancy mechanism, the second chamber institutionalises articulated governance through reducing the executive’s control over the legislative process.

Waldron’s claim that a second chamber can induce sober and reflective flavours of deliberation is supported by the *Discourse Quality Index* (DQI).[[1118]](#footnote-1118) As was discussed in chapter four, Jürg Steiner, André Bächtiger, Markus Spörndli and Marco R. Steenbergen deployed the DQI to measure deliberation in four legislative institutions: *the UK’s Westminster Parliament*, *Switzerland’s Federal Assembly*, *the German Bundestag* and *the United States Congress*. Each of these legislatures is bicameral design, which enabled Steiner *et al*. to measure whether Bicameralism affected deliberation within these legislative institutions. According to their findings, discourse was of a higher quality in the second chambers than in the first chambers.[[1119]](#footnote-1119) Discourse within the second chamber tended to show higher levels of overall respect, and respect towards demand and counterarguments, and examples of constructive politics including appeals for consensus and mediating proposals.[[1120]](#footnote-1120) Steiner *at el.* suggest three causes for this. First, second chambers tend to institutionalise a different working environment from first chambers, which enables different institutional logics to develop. Debate can be organised around different norms of civility, which increases the likelihood of deliberation.[[1121]](#footnote-1121) Second, party discipline tends to be weaker, in particular with federal chambers. Lower levels of party discipline help foster a more consensual atmosphere.[[1122]](#footnote-1122) Third, most second chambers are smaller than the first chamber.[[1123]](#footnote-1123) Second chambers appear to be better suited to ensuring deliberation.[[1124]](#footnote-1124) However, if the legislative process is to substantively benefit from a second chamber, the legislative designer will need to ensure the first chamber cannot easily ignore the second chamber’s reasoning.

The democratic socialist strand has also reflected on bicameralism to a lesser extent. British social democrats have traditionally seen bicameralism as a blemish upon the UK’s predominantly political constitution.[[1125]](#footnote-1125) As Peter Dorey comments, the Labour party [as the parliamentary vehicle of democratic socialism] “has been more critical of the House of Lords than of any other political institution or constitutional feature of British politics.”[[1126]](#footnote-1126) Democratic socialist’s objections to bicameralism have focused on the second chamber’s capacity to frustrate strong socialist governance and preserve capitalist interests. This is because, as we noted above, bicameralism has historically been used to secure mixed government, functioning as a means of representing the interests of aristocracy within the legislative process. Democratic socialists viewed the second chamber as a redundancy mechanism for defending capitalism through the frustration of socialist legislation.[[1127]](#footnote-1127)Their concerns were undoubtedly re-enforced by political events within Britain in the early half of the 20th century. For example, Ivor Jennings lamented how the second chamber had amended the Education Bill 1906 “out of existence because the Conservative party never hoped for support for the Nonconformists.”[[1128]](#footnote-1128) More infamously, in 1910 the mostly Conservative second chamber voted down the Liberal Government’s ‘People’s Budget’, which proposed funding new social provisions through increased taxation upon the wealthy.[[1129]](#footnote-1129) This was, in hindsight, a self-destructive act, in that it spurred the creation of the Parliament Act 1911 weakening the second chamber’s powers. For democratic socialists, the incident reinforced their suspicions about bicameralism. In 1923, the Labour Party became the official opposition, and consequently a potential future government. Yet within the second chamber, there was little to no political representation given to democratic socialist interests.[[1130]](#footnote-1130) Consequently by 1933, Stafford Cripps considered the second chamber to be “the stronghold of capitalism” within the constitution, identifying it as the one flaw that could prevent the constitution adapting itself to the democratically expressed “desires and wishes of the people.”[[1131]](#footnote-1131) Similarly, Jennings concluded the second chamber unbalanced the democratic constitution in favour of the interests of the Conservative party:

So long as a Conservative Government is in office, there is no problem with the House of Lords. The Conservative Government has a permanent majority in the house, which never seriously embarrasses a Conservative Government… The position is quite different when any other Government has a majority in the House of Commons. The Conservative majority in the House of Lords then acts in collaboration with the Conservative Opposition in the House of Commons...[[1132]](#footnote-1132)

“[Their] power to delay is… immense… Nor it is just that a Conservative Opposition should be able to delay legislation when other parties must accept any change made by a Conservative Government.[[1133]](#footnote-1133)

During the first half of the 20th century, democratic socialists were committed to abolishing the second chamber.[[1134]](#footnote-1134) However, as Jennings rightly argued, since the abolition of the second chamber would be far from straightforward, alternative design strategies were needed to ensure the second chamber better suited the democratic constitution.[[1135]](#footnote-1135) Jennings proposed modifying the Parliament Act to reduce the second chamber’s delay powers from two years to just one to three months.[[1136]](#footnote-1136) Cripps also reflected upon bicameral reform. His solution was to re-balance the constitutional order, through the emergency appointment of socialist peers.[[1137]](#footnote-1137) However, if this could not be achieved, Cripps suggested radical unconstitutional actions would, regrettably, be necessary. Cripps suggested a socialist government should disregard the second chamber’s lack of consent and declare the bill to be law; the government could then dare the courts to publicly reveal their support for capitalism by refusing to enforce the law.[[1138]](#footnote-1138)

When Labour returned to power in 1945, the Attlee Government sought to pre-empt the second chamber’s attempts to frustrate its proposals to nationalise the iron and steel industries, through implementing reforms in line with Jennings’ earlier proposals.[[1139]](#footnote-1139) The Parliament Act 1949 reduced the second chamber’s powers to delay down to a single year.[[1140]](#footnote-1140) Although this initiated debate democratic socialists about also reforming the composition of the second chamber, once the Act was passed, little further consideration was given to the issue.[[1141]](#footnote-1141) In his account of the Labour Party’s approach to constitutional reform, Peter Dorey concludes that following the passage of the 1949 Act, democratic socialists thinkers within Britain became too indecisive or uninterested to develop a more coherent strategy for reforming bicameralism to work within a socialist understanding of the democratic constitution.[[1142]](#footnote-1142) Dorey’s claim is supported by the fact that modern proponents of the democratic socialist strand of political constitutionalism have not focused on addressing the compatibility of bicameralism within their accounts of the legislature (despite operating during a period of significant bicameral reform within the UK). Perhaps at most, we can infer that democratic socialists appear to be content with a form of bicameralism that does not seriously obstruct the policy preferences of the first chamber.

Of all of the strands of political constitutionalism considered within this thesis, the republican strand has given the least amount of consideration towards the question of bicameralism. For example, Adam Tomkins briefly suggests a legitimate elected second chamber would enhance republican values within the legislative process.[[1143]](#footnote-1143) Unfortunately, he does not provide any further justification for this claim. Similarly, bicameralism is only briefly addressed within Richard Bellamy’s account. Bicameralism is briefly criticised as part of Bellamy’s overall critique of using mixed governance to enhance public reasoning. Bellamy maintains that “most forms of bicameralism… erode yet further the equality of votes and the incentives towards responsibility and accountability of politicians.”[[1144]](#footnote-1144) While Bellamy presents a strong critique of why mixed government is undesirable, he does not actually interrogate how other non-mixed government forms of bicameralism enhance or hinder a political constitution. Nevertheless, as we can infer from our findings in the previous chapters that the republican strand advances that the legislature should perform an arena role within the political constitutional. Accordingly, this would suggest it would oppose allowing the second chamber to transform the preferences of the first chamber and the electorate. Instead, a weak form of bicameralism would be compatible.

The strands of political constitutionalism articulate different understandings about how intercameral relations should be institutionalised within a political constitution. The liberal strand favours a strong second chamber that functions as a redundancy mechanism to promote intercameral deliberation and compromise. In contrast, both the democratic socialist and republican strands are sceptical of bicameralism, and as a result, they favour institutionalising a weak second chamber, which can neither present a serious threat to the first chamber, nor have a transformative effect upon legislation. Accordingly, the challenge for the legislative designer is to identify how these competing understandings can be institutionalised through the design of the second chamber’s formal powers, composition and legitimacy.

### *Liberal Political Constitutionalism*

Designing a strong form of bicameralism involves vesting the second chamber with a robust set of constitutional powers, and a sufficiently legitimate membership to ensure that, in practice, these powers will be exercised. Section three has already established that political constitutionalism considers a directly elected membership to be the most legitimate option. Therefore, this means we only need to identify the powers that should be afforded to the second chamber, via statute or convention. This requires reflecting on Lijphart’s claims about symmetrical or asymmetrical intercameral relations. Symmetrical bicameralism occurred when both chambers were relatively equal in terms of their power and political legitimacy. Thus, institutionalising symmetrical bicameralism involves vesting the second chamber with the powers and legitimacy to rival the first chamber. In contrast, asymmetrical bicameralism occurred when second chamber was weaker in terms of its powers or legitimacy, or both. Although the liberal strand favours a strong second chamber, symmetrical bicameralism should not be institutionalised for practical reasons.

While symmetrical bicameralism ensures the first chamber cannot ignore the second chamber and incentivises the need for compromise, it also creates the risk of what Bruce Ackerman calls a *legitimacy tie*.[[1145]](#footnote-1145) Ackerman theorised that “if there were two houses with equal powers, the symmetric constitution could readily generate a legitimacy tie with rival parties in competing houses claiming an equal right to form a government.”[[1146]](#footnote-1146) Consequently, the second chamber could disable the first chamber’s ability to govern, as the consent of both houses would be needed for a bill to become law. The second chamber could refuse to consent, as a means of intentionally preserving the status quo. Symmetrical bicameralism is problematic because it can institutionalise an intercameral stalemate. If neither chamber is willing to compromise, the legislature will become gridlocked. From the perspective of political constitutionalism, legislative gridlocks are highly problematic, as they symbolise the constitution’s inability to manage the circumstances of politics. In response, Ackerman has argued to prevent bicameralism paralysing the ordinary political process; the constitutional designer has three options.

First, the designer could empower another constitutional actor to decide which chamber’s preferences should prevail in the event of legislative gridlocking.[[1147]](#footnote-1147) Ackerman contends that symmetrical intercameral relations will require the creation of a powerful and independent presidency.[[1148]](#footnote-1148) Empirical analysis by Russell largely supports Ackerman’s conclusion. Russell observed that in 16 out of the 22 examples of symmetrical bicameralism were found in presidential systems.[[1149]](#footnote-1149) However, one can also imagine another constitutional actor, such as the courts, the governor general, monarch, or a plebiscite performing this role. Second, Ackerman suggests institutionalising virtue symmetry through the electoral system.[[1150]](#footnote-1150) Instead of using a different electoral system or set of constituency boundaries to ensure the second chamber represents a distinct set of interests, Ackerman suggests both chambers should be elected at the same time and through the same method, to ensure the electoral majority in the first chamber is replicated within the second chamber.[[1151]](#footnote-1151) The problem with this approach is that in practice it is rarely used, with Italy being the only example. Ackerman’s third suggestion is what he calls the ‘*one-and-a-half house*” solution.[[1152]](#footnote-1152) This requires the designer to accept that the second chamber must be intentionally weakened to avoid gridlock. Ackerman contends the easiest way to achieve this is to ensure the second chamber’s membership is indirectly elected.[[1153]](#footnote-1153) Alternatively, he theorises this could also be achieved without sacrificing the second chamber’s legitimacy, through vesting the second chamber with “modest powers to delay measures passed by the dominant house, or it may be vested with greater power of suspensive veto.”[[1154]](#footnote-1154) Russell’s analysis of bicameral powers reveals that this is a common method for preventing intercameral gridlocks paralysing the legislative process.[[1155]](#footnote-1155)

A second chamber can be vested with absolute or conditional rights to veto and amend bills. The former establishes that in order for a bill or amendment to reach the statute books, it will need to be consented to by both chambers.[[1156]](#footnote-1156) Accordingly, a directly elected second chamber with an absolute right to veto and amend bills institutionalises symmetrical intercameral relations. While this would certainly prevent the first chamber ignoring the second’s concerns, and incentivise transformation via intercameral compromises, it could also create the potential for intercameral gridlocks. In contrast, under the latter, the first chamber cannot ignore the second chamber’s concerns, but it can overrule it if need be. The conditional right to veto and amend means the second chamber can delay bills. The first chamber may overrule the second, but only once a certain period of time has elapsed. This approach is necessary to institutionalise a “*one-and-a-half house*” solution without sacrificing the second chamber’s democratic legitimacy. Importantly, this approach can still secure the benefits of bicameralism carved by the liberal strand.

First, the second chamber can still function as a redundancy mechanism within the political process. Through temporarily delaying bills, the second chamber’s conditional powers can provide political actors (and the wider political community) with an opportunity to reflect upon the consequences of the bill and interests it might affect.[[1157]](#footnote-1157) Consequently, this can incentivise a higher duty of care within the legislative process. Second, this can incentivise intercameral deliberation and compromise, as both chambers reflect and refine their arguments for and against a bill or amendment. Therefore, this can enhance their capacity for public reasoning. Third, both chambers can use the delay to communicate their preferences and test the political communities’ opinion on the issue. In these circumstances, either chamber could prevail, or both chambers may be encouraged to compromise in response to public pressure. In practice, this power may be enhanced or weakened by the perceived legitimacy of either chamber’s behaviour. For example, if the second chamber uses its formal powers irresponsibly, and the political community sides with the first chamber, the first chamber is empowered to overturn the second.[[1158]](#footnote-1158) In contrast, if the political community sides with second chamber, the first chamber may find it politically difficult to publicly justify the exercise of its constitutional right to overrule the second chamber.   
  
Nevertheless, the legislative designer will need to consider how the length of the delay will affect the second chamber’s power. For example, if the first chamber can quickly overturn the second chamber’s conditional veto or amendments, the benefits discussed above will be weakened. Thus, the length of delay matters. In some nations, the second chamber’s powers to delay are relatively short. For example, in France, the first chamber has immediate right to overrule the second chamber, but in contrast, within the Indian parliament, the first chamber must wait up to 6 months before it can overrule the second chamber.[[1159]](#footnote-1159) This means the amount of time for reflection could be designed to be a long period in the hope of allowing tempers to cool and reflect. We should also remember that plenary time is a limited resource. A long delay might incentivise the first chamber to pre-emptively adapt its bills in the hope of avoiding intercameral disputes. Equally, we must also recognise that there will be times when the management of disagreement demands the rapid response of the legislature. In these circumstances, the misuse of a long delay could reduce the legislature’s ability to manage disagreement in a timely and efficient manner. Admittedly, there is no precise way of determining how long a delay should be. Nevertheless, in the context of designing a second chamber based upon the expectations of the liberal strand, a short delay is unlikely to provide the cooling off period and redundancy, because the threshold that the first chamber must overcome will be too low. Consequently, a longer delay is desirable from the perspective of the liberal stand. The length of the delay could be determined by assessing the extent to which the first chamber organises political life in ways that conform to claims made in the previous chapter.[[1160]](#footnote-1160)

### *Republican and Democratic Socialist Strands of Political Constitutionalism.*

Both the republican and democratic socialist strands favoured a weak form of bicameralism. This of course means symmetrical forms of bicameralism are immediately out of the running. Instead, it requires the legislative designer to once again institutionalise asymmetrical intercameral relations, albeit in a different way to the methods discussed above. Intentionally designing weak form bicameralism requires the designer to pay close attention to the relationship between power and legitimacy of the second chamber’s membership. There are three methods for institutionalising a weak form of bicameralism.

The first method requires vesting the second chamber with asymmetrical powers. Importantly, the second chamber’s powers will need to be substantially weaker than those afforded in the context of the liberal strand. The main difference is that the second chamber’s power to delay bills for long periods is problematic for the republican and democratic socialist strands. This is because long delays will be costly for the first chamber’s legislative programme, especially when plenary time is limited. Consequently, in order to avoid prolonged delays, the first chamber may find itself pressured into pre-emptively modifying its bills to meet the second chamber’s policy preferences. This problem can be avoided (or at least mitigated) through vesting the second chamber with the conditional right to delay and amend bills for a short period of time. Once again, there is no precise way of determining how long a delay should be, but anywhere between a week to a month would be at the shorter end of the spectrum. The short delay still enables the second chamber to provide a redundancy mechanism within the legislative process. For example, the second chamber could still represent the concerns of its interests through delaying or amending bills. At the same time, a short delay ensures that if the first chamber still disagrees, it can overturn the second chamber’s veto or amendments in a timely manner. It is important to remember that just because the first chamber has power to quickly overrule the second chamber, it will not always exercise this power. Rather, a short delay confers upon the first chamber the discretion to decide if and when it will overrule the second chamber.

Nevertheless, there is a risk that the democratic legitimacy of the second chamber’s membership might, in practice, transmogrify the effects of its powers to delay.[[1161]](#footnote-1161) The second chamber’s legitimacy may impose a political constraint upon the first chamber, preventing it from being able to easily overrule the second. Accordingly, the designer must also consider the legitimacy of the second chamber’s composition. As Ackerman argued, the only way to avoid this risk is to intentionally reduce the second chamber’s political legitimacy. For when the second chamber perceives its legitimacy to be weaker than the first chamber’s, it will feel reluctant or unable to use this power because of perceived lack of legitimacy.[[1162]](#footnote-1162) Section three identified that according to political constitutionalism, direct elections provide the most legitimacy, indirect elections provide a moderate form of legitimacy, and an appointed or hereditary membership would provide the least legitimacy. Therefore, ensuring that the second chamber’s membership is indirectly elected or appointed would intentionally reduce the second chamber’s legitimacy. Consequently, ensuring the second chambers powers will not be enhanced in a way incentivises a form of intercameral relation capable of transforming the content of a bill. Yet there is a problem with this approach from the perspective of political constitutionalism, as an indirectly elected or appointed second chamber would fail to provide the kind of political equality and contestability necessary for respecting the circumstances of politics. Alternatively, this infringement may be considered tolerable if one adopts a systemic conception of legislature. Under a systemic conception, the second chamber’s failure to conform to the norms of political constitutionalism is acceptable to ensure the legislature as a whole performs its role within the ordinary political process. Therefore, in order to guarantee that the legislature as whole performs an arena role, the republican and democratic socialist strands may tolerate an indirectly elected or appointed second chamber. Accordingly, when designing a second chamber based upon the expectations of the republican or democratic socialist strands, the legislative designer may be forced to choose between two less than perfect options for institutionalising a one-and-a-half-solution. The designer will have to choose between intentionally weakening the second chamber’s powers or its legitimacy.

Of course, there is a third option. The designer could institutionalise asymmetrical intercameral relations through intentionally depriving the second chamber of both the powers and legitimacy necessary to challenge the first. This would institutionalise, in effect, an insignificant form of bicameralism. The second chamber would have neither the power nor the legitimacy to challenge the first chamber. Nevertheless, this begs the question, if the first chamber is always able to overrule the second chamber, why not simply abandon the second chamber altogether? The answers depends on the context which the designer is operating within. When designing a constitution from scratch, adopting a unicameral design over a nominal second chamber is a plausible option. After all, why waste time and resources on institutionalising an insignificant second chamber? In contrast, Jennings argued abolishing a second chamber is not straightforward.[[1163]](#footnote-1163) From a sociological institutionalist perspective, a second chamber, regardless of its power, composition and legitimacy, will also embed and represents within its design the social, cultural and historical values of political community.[[1164]](#footnote-1164) Symbols, myths and ceremonial practices that do not serve any logical benefit, such as increased efficiency, are often embedded within our political institutions. The simply exist to transmit social, cultural and historical values from one generation of institutional actors to another.[[1165]](#footnote-1165) Consequently, political actors may fail to see the need for reform. Alternatively, as will be discussed in chapter seven, institutional reform may be supressed because the cost of reforming and associated risks are too high.[[1166]](#footnote-1166) Therefore, it is unsurprising that despite pre-dating the rise of modern democracy, political actors have been reluctant to simply abolish their second chambers.

## *Conclusion*

Bicameralism is an important design choice because it affects how a legislative institution organises political life. This chapter has demonstrated that bicameralism can be compatible with political constitutionalism, if two conditions are satisfied. First, the second chamber’s institutional power must be derived from a contestable source. Second, the second chamber must be composed of a directly elected membership. This chapter has also demonstrated that determining what powers should be vested in the second chamber is complexified by the subtle interplay between formal power, composition and legitimacy. For the liberal strand, it was argued that the second chamber should have a conditional, rather than absolute, right to veto and amend legislation. In particular, the second chamber’s conditional veto should enable the first chamber to overrule the second chamber, but only once a sufficient period of time for reflection has passed. This would ensure transformation could occur through intercameral deliberation and compromise without risking legislative gridlock. In contrast, the republican and social democrat strands favour vesting the second chamber with weaker powers to veto and amend bills. The major difference here is that first chamber can more quickly overrule the second chamber, which should prevent the second chamber from being able to substantially transform electoral input. Alternatively, the design could deprive the second chamber of its political legitimacy to help institutionalise the performance of the arena role. This chapter has argued that for political constitutionalism, the legitimacy of political decision-makers is conditioned by the extent to which they are selected and subsequently accountable to the political community. This implies electoral design, rather the legislative design, is the key to organising accountability within political life. However, as the next chapter will argue, the design of our legislative institutions can also shape and channel how political accountability can be secured within a political constitution.

# VI.

# *Institutionalising Political Accountability*

Political constitutionalism has tried to present a positive and accurate account of legislative institutions, but its ability to do so has been hindered because political constitutionalists have insufficiently reflected on issues of legislative design. This oversight is problematic, as legislative institutions organise political life through providing opportunities and constraints upon the exercise of political power.[[1167]](#footnote-1167) This thesis seeks to remedy this problem through analysing and applying political constitutionalism to questions of legislative design. Previous chapters have analysed how legislative design conditions how the political community manages the circumstances of politics. Legislative design also matters because it organises and conditions how the political community holds its political actors to account. As James Madison once argued, when designing a constitutional form of governance, “you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”[[1168]](#footnote-1168) Accordingly, this chapter is concerned with how legislative design can provide these ‘auxiliary precautions' through interrogating how accountability can be institutionalised through legislative design.

This is an important issue for political constitutionalism because the accountability of political actors is central to political constitutionalism’s case for organising the constitutional order around the legislature. This chapter challenges and refines political constitutionalism’s understanding of political accountability. Modern proponents of political constitutionalism tend to operate within the shadow of J.A.G. Griffith’s claim that “real” accountability requires that political actors must be removable.[[1169]](#footnote-1169) Consequently, political constitutionalists have traditionally focused more on explaining how political accountability is secured through the electoral system, rather than through legislative design. However, in the gaps between elections, the political community is dependent upon the legislature to hold political actors to account on its behalf and provide the community with the necessary information to make informed decisions at the ballot box. In response, this chapter articulates a more refined understanding of political accountability, one which recognises political accountability as a far broader and more complex power to remove a political actor.

This chapters posits that the design of legislative institutions plays an important part in ensuring the accountability of various political actors, including members of the executive, bureaucrats and even legislators themselves. If appropriately designed, legislative institutions can institutionalise a resilient, systemic and multi-layered form of political accountability. Moreover, legislative design can provide the oversight mechanisms necessary to link together the legislature and the political community into a dynamic collaborative partnership for holding political actors to account, in the periods between elections.There can be no accountability without accountability mechanisms, and legislative institutions can provide the rules, practices and resources necessary for holding political actors to account. The challenge for a legislative designer is to identify and understand how different mechanisms foster political accountability. Constituency services; legislative committees; legislative debate and questions; auditors; anti-corruption agencies; the legislative ombudsman and freedom of information legislation are all important mechanisms for institutionalising political accountability.

The structure of this chapter is as follows. Section one explores the concept of accountability and its application within the context of the legislature via the principal and agent. This section casts light on the issues that must be considered when attempting to institutionalise accountability through legislative institutions. Section two analyses how the different strands of political constitutionalism have understood accountability in the context of legislative institutions. This section will highlight how the existing literature has struggled to sufficiently capture, explain and analyse how legislative institutions provide accountability mechanisms that complement and feed into electoral forms of accountability. In response, section three presents a more accurate understanding of how of political accountability is secured by legislative institutions in between elections. Legislative design organises political life through creating opportunities for legislative oversight, which influences the behaviour of political actors.[[1170]](#footnote-1170) To do this, legislative institutions need to provide a range of different oversight mechanisms, some of which operate on a routine basis while others operate in a more *ad-hoc* way.

## *The Concept of Accountability in the Context of the Legislature*

Accountability often feels like a buzzword of modern governance, “a golden concept that no one can be against.”[[1171]](#footnote-1171) Yet, as with many of the concepts encountered in this thesis, accountability can be difficult to precisely define, as there are competing conceptions. Consequently, it is worthwhile to reflect on these different conceptions and their implications for legislative design, before analysing how accountability is understood within political constitutionalism. Accountability can be used in both a normative and descriptive sense. In the normative sense, accountability serves as an evaluative tool, but in the descriptive sense, accountability delineates what is known as an *accountability relationship*. This is a special relationship between two or more actors, in which one actor is under an obligation to explain and justify their conduct to the other.[[1172]](#footnote-1172) Accountability relationships are often unequal, with one party having authority over the other.[[1173]](#footnote-1173)

An accountability relationship is made up from six constituent parts; *who, to whom, for what, through what process, by what standards* and *to what effect.*[[1174]](#footnote-1174) *Who* refers to the duty holding party in the relationship. The duty holder can include an actor, group or institution. *To whom* refers to the right holding party in the relationship. Like the duty holder, the right holder can be an actor, group or institution to whom the duty is owed. *For what* refers to the behaviour that the duty holder must account for. *Through what process* refers to the formal or informal accountability mechanisms used by the right holder to ensure the duty holder is held to account. *By what standard* refers to the right holder’s expectations of the duty holder. The final part, ‘*to what effect,’* refers to the ends the accountability mechanism must secure. What these ends might entail in practice is subject to debate, due to competing understandings of accountability as a normative idea.[[1175]](#footnote-1175) For some, such as Mathew Flinders, accountability mechanisms need only require the duty holder to give an account of behaviour.[[1176]](#footnote-1176) For others, such as Robert Mulgan and Mark Bovens, accountability mechanisms must also empower the right holder to respond to the duty holder’s account with further questions, rewards or sanctions.[[1177]](#footnote-1177) Importantly, Mark Philps highlights how the possibility of sanction operates differently between these two normative conceptions. In the former, sanctions are only available for when the duty holder fails to account for their behaviour. They are not available in relation to the content of the duty holder’s account. In the latter, sanctions are available when the duty holder fails to account for their behaviour and when the content of their account falls below the right holder’s standards. [[1178]](#footnote-1178)

Organising an accountability relationship requires establishing *accountability mechanisms* for enforcing the obligation. Accountability mechanisms can be both formal and informal, as both provide the rules and resources necessary to foster and maintain an accountability relationship.[[1179]](#footnote-1179) The complexity and number of mechanisms is contingent upon the nature of the relationship. For example, good friends can usually rely on trust and honesty to hold each other to account. Conversely, complex political institutions, such as legislatures, will need to rely on a range of formal and informal rules, practices and narratives to ensure political actors are held to account.[[1180]](#footnote-1180) As Mark Bovens rightly points out, “there is no accountable governance without accountable arrangements. Accountable mechanisms keep public actors on the virtuous path and prevent them from going astray.”[[1181]](#footnote-1181) Therefore, accountability mechanisms are essential for organising an accountable form of political life, as they provide the rules and resources necessary for institutionalising a duty upon political actors to account for their behaviour.[[1182]](#footnote-1182)

Legislative institutions organise political life through providing the mechanisms necessary for maintaining the accountability relationship between the political community and the state. However, the legislature’s capacity to promote and secure political accountability is inevitably complicated by its unique position within the state. As explained in chapter three, legislative institutions perform the important *linkage* function between the citizens and the state, through linking together citizens, legislators and other political actors, such as members of the executive and bureaucrats, into two broad accountability relationships. The first is a vertical relationship between the people and the state. The second is a horizontal relationship between the legislature and other institutions and political actors within the state, including the executive, civil servants, legislative committees and individual legislators. Although it is possible to treat these in isolation, in practice these relationships are closely intertwined. The people’s ability to hold the state to account is contingent upon by their ability to hold the legislature to account, and their legislators’s ability to hold the rest of the state to account on their behalf. Legislative institutions connect and interweave these relationships by establishing accountability mechanisms. Accordingly, the design of legislative institutions creates opportunities for, or may impose constraints upon, the political community’s ability to hold their political actors to account.

Accountability relationships can be captured and simplified by the *principal-agent* model.[[1183]](#footnote-1183) This model describes a situation where one actor, *the principal,* delegates to another, *an agent,* the responsibility for performing a task necessary to reach a desired outcome. When the principal delegates to their agent, a corresponding accountability relationship is established, under which the agent is accountable to the principal for their behaviour. Underpinning this model is the assumption that the principal believes delegating the task to an agent will increase the likelihood of their desired outcome being delivered.[[1184]](#footnote-1184) This may be because the agent has the knowledge, skills, resources or time that the principal lacks. For example, the political community delegates the day to day management of the circumstances of politics to the state because it lacks the knowledge, skills, resources and time to be constantly engaged in democratic decision-making.

In the legislative context, the *principal-agent* model simplifies the vertical and horizontal relationships between the political community and the state into a streamlined chain of command. Voters - as principals - delegate responsibility for decision-making and the administration of said decisions to legislative and executive agents, to save time and to ensure that decisions are implemented effectively. Kaare Strøm highlights that in the context of the legislature, the *principal-agent* model results in four links being established between voters, legislators, the executive and civil servants.[[1185]](#footnote-1185) The first link connects voters to elected legislators, with the electoral system being the primary mechanism for delegation and accountability. This first link represents the vertical accountability element of the relationship. The second link connects elected legislators to the head of the executive branch. In a parliamentary context, this link is maintained through requiring members of the executive to gain and maintain the support of a parliamentary majority. This link would also exist (albeit more loosely) within a presidential system, in the sense that the presidency will need legislative support to enact their campaign policies into law to avoid impeachment, and the legislature will still require the executive to administrate its policy decisions. This link is a horizontal relationship between the legislative and the executive branches within the state. The third link is from the head of the executive to their ministers who manage the different departments within the executive branch. Finally, the fourth link is between the ministers and their civil servants.[[1186]](#footnote-1186) Importantly, this chain of command implies that if citizens were to demand the legislature take action by tugging at the chain at one end, their demands should reverberate down the chain, having direct consequences for legislators and indirect consequences for executive and bureaucratic actors further down.

The *principal-agent* model is also valuable because it identifies the challenges that come with the act of delegating. First, there is the possibility of *agency problems,* which occur when an agent acts – either intentionally or via omission - in a way that is not in the interest of the principal. A second and related problem is that there is *asymmetrical information* between the principal and agent.[[1187]](#footnote-1187) This creates both *ex-ante* and *ex-post* accountability issues. The *ex-ante* issues occurs when an agent intentionally withholds information from the principal, prior to their appointment.[[1188]](#footnote-1188) For example, an agent may conceal their ulterior motives to ensure that the principal chooses to delegate a task to them. Generally, principals should aim to select agents with preferences that mirror their own. This ensures that when the agent follows his or her own convictions, the principal’s will is carried out.[[1189]](#footnote-1189) The *ex-post* issues occur when principal lacks information about, or their agent actively conceal information about their behaviour, preventing the principal having the full information necessary to judge and hold their agent to account. A lack of information about the agent’s performance risks creates the space necessary for an agent to act in conflict with the principal’s desires, as the agent has less reason to fear being held to account.[[1190]](#footnote-1190) Accordingly, accountability mechanisms seek to reduce the risks associated with agency problems and asymmetrical information.

The *principal-agent* model provides a useful tool for conceptualising how legislative institutions are involved in and link together multiple accountability relationships. Nevertheless, it is important to remember that its simplicity can also mask how each these accountability relationships are conditioned by politics, which contains inherently anarchic and unpredictable elements.[[1191]](#footnote-1191) Political forms of accountability are always contingent upon internal and external factors. Internal factors include how institutional rules, practices and narratives create opportunities and constraints on the principal’s ability to hold their agents to account. Therefore, legislative institution shapes the willingness and behavioural logics of both principals and agents. In contrast, external factors will include scrutiny from international actors, media pressure and public opinion. Political forms of accountability are inherently unpredictable because there is always the potential for internal and external factors to conflict with one another. For example, legislative actors may hold the executive to account to a higher standard than members of the media or public. Alternatively, external actors may be more willing or able to identify issues than members of the legislatures. Ultimately, legislative design is concerned with determining how internal factors shape and influence political accountability. Legislative design aims to reduce the unpredictability of political accountability, by institutionalising the necessary resources and behavioural logics for holding political actors to account.

Reflecting on accountability in the context of legislative institutions has revealed several important issues that must be considered when attempting to institutionalise political accountability through legislative design. First, accountability relationships cannot exist without accountability mechanisms. Thus, the designer must focus on institutionalising mechanisms that enable the principle to hold their agents to account. Second, accountability mechanisms do not necessarily require the agent to be sanctioned for the content of their account. At their most basic level, accountability mechanisms enable the principal to enforce their rights against their agent, requiring the agent to account for their behaviour on demand. Therefore, it is possible to distinguish between accountability relationships where the principal is empowered to sanction their agent, and those relationships where the principal lacks this power. Third, legislative institutions can simultaneously be principals and agents. Thus, legislators can be under a duty to account for their behaviour, and have a duty owed to them by other political actors. Accordingly, the designer must address how the legislature connects two different accountability relationships: the relationship between votes and legislators, and the relationship between legislators and other actors. Consequently, the legislative designer cannot view these relationships in isolation. Instead, the designer must seek to institutionalise the accountability mechanisms, which connect these relationships together. Fourth, accountability mechanisms should also seek to reduce the risk of agency problems and asymmetrical information gaps developing. Accordingly, the design of legislative institutions matters because political accountability is dependent on accountability mechanisms being institutionalised.

## *Political Accountability through the lens of Political Constitutionalism.*

Chapter two observed that political constitutionalism’s case for using legislative supremacy as the central organising principle within a constitutional order was, in part, premised on the belief that legislative institutions are well suited to managing political disagreement, in a politically accountable manner. Proponents of political constitutionalism contend that those who exercise political power should be held to account through ordinary political and institutional means.[[1192]](#footnote-1192) Moreover, in the absence of an entrenched constitution norms enforced by the courts, a political constitution is arguably more reliant upon the legislature to institutionalise sufficient self-regulating practices for ensuring that political actors are held to account. On this basis, one might expect that a central question for proponents of political constitutionalism is *how can political accountability be achieved through the legislative institutions?* Unfortunately, the existing literature fails to sufficiently capture and explain how legislative design contributes to the promotion of political accountability within the constitutional order. Chapter Two distinguished that within the existing literature, there are three main strands of political constitutionalists thinking. These were the *Liberal, Republican and Democratic Socialist* strands of political constitutionalism. As was hypothesised and subsequently observed in previous chapters, each of these strands articulates different understandings about legislative institutions. Consequently, it is likely these strands may respond differently to the question of how political accountability is to be secured through the design of legislative institutions. As this section will demonstrate, there are different understandings between the strands about why accountability matters, who it is owed to, and how it should be secured. These fragmented and conflicting understandings prevent political constitutionalism from being able to capture and explain how legislative institutions promote political accountability.

### *The Liberal Strand*

The liberal strand of political constitutionalism is concerned with ensuring the constitutional order respects each and every individual’s capacity to act as a morally autonomous agent.[[1193]](#footnote-1193) The liberal strand contends that when political actors cannot be held to account for their decisions, individual autonomy is not respected.[[1194]](#footnote-1194) The power to sanction political decision-makers is considered a key part of respecting each and every individual’s right to self-govern their own affairs in two ways. First, by empowering the individual to remove and replace political actors, the individual is able to begin the process of correcting mistakes of the past. In essence, accountability ensures the individual’s capacity for self-governance is not restrained by past decisions. Second, accountability has an important cathartic effect for the individual. Removing and correcting wrong decisions enables the individual to acknowledge that when they (or a past generation) faced the circumstances of politics in the past, they made wrong decisions about how to proceed.[[1195]](#footnote-1195)

For the liberal strand, political accountability is viewed through the lens of the principal and agent model.[[1196]](#footnote-1196) A significant feature of the liberal strand’s conception of accountability comes from Jeremy Waldron’s focus on the question of *who accountability is owed to;* i.e. who is this principal and *the standards by which the agent should be judged.* Waldron distinguishes between agency, legal, trustee and consumer types of accountability. Of the four types, Waldron reasons that agency accountability is most desirable for respecting individual autonomy. First, under agency accountability, the agent is accountable to an individual, whereas under the other types, accountability is not actually owed to the affected individual.[[1197]](#footnote-1197) Second, as moral autonomous beings, the affected individual is capable of deciding on what basis their agent’s actions should be judged.[[1198]](#footnote-1198) To fully appreciate why this is desirable, one must compare agency accountability to the other types.

Legal accountability ensures the agent owes a duty to a pre-established legal text or norms and in turn, that the court enforces it.[[1199]](#footnote-1199) Here an agent’s behaviour may harm the principal’s interests, but the agent is not accountable to the principal, they are only accountable if there is a legal text and norms which protect the principal’s interest. Of course, a principal may secure their interests by placing them on a statutory footing. In these circumstances, legal and agency accountability converge to ensure the agent is accountable to the principal.[[1200]](#footnote-1200) However, in other circumstances, convergence may not occur. The principal has little to no control over the development of legal norms, as they developed over time through judicial decision-making. Consequently, to rely solely upon a form of accountability based upon legal norms developed through judicial reasoning, fails to respect the principal’s own capacity for reasoning. Trustee accountability operates in a similar way. The agent is accountable to the terms of the trust. It is important to recognise that Waldron’s definition of a “trustee” accountability differs from the traditional idea of a trustee within political theory. Under the more commonly understood definition, the agent is free to behave in whatever way they see fit as long their actions benefit their principal.[[1201]](#footnote-1201) In contrast, Waldron’s definition is more akin to a legal concept of a trustee. Waldron’s trustee accountability assumes an accountability relationship established by trust. Here the trustee is considered accountable to the terms of the trust, rather than the beneficiary *per se*. The beneficiary’s ability to hold the trustee to account is always delineated by what terms are set by the settlor when the trust was established, rather than the beneficiary’s desires.[[1202]](#footnote-1202) Finally, consumer accountability refers to where a business reflects on a customer’s preferences when deciding to act.[[1203]](#footnote-1203) Technically, the business considers itself accountable to its customers. However, the business’s primary concern with gathering feedback and improving its operations is to maximise profits, and concerns for the individual is always secondary.[[1204]](#footnote-1204) In practice, the business is accountable to its profit margins and interests of the market, rather than interests of the individual.

As Waldron perceptively highlights, when accountability is owed to an individual, rather than an object or a metaphysical concept, the individual as a moral agent is capable of responding to and determining their owns standards for judging their agent’s account. This means the standards by which an agent is held to account remain flexible because the principal has moral capacity to redefine their standards at their own pleasure.[[1205]](#footnote-1205) This is important because the agent is no longer held to account based upon their ability to follow the principal’s initial instructions. In a convoluted way, Waldron interprets accountability as akin to the standard trustee model of representation.[[1206]](#footnote-1206) In the context of a democratic legislature, this is logical given how the liberal strand downplays the idea of electoral mandate.

As was observed in chapter three, the liberal strand advances that the legislature’s role was to institutionalise deliberation and promote compromise. In doing so, legislators could not be beholden to their electoral mandates, as compromise requires that legislators yield to better arguments.[[1207]](#footnote-1207) Therefore, it is unsurprising that the liberal strands cautions against the idea of agents being held to account via by static electoral mandates. A reliance upon pre-determined instructions would erode the distinction between agency and legal accountability.[[1208]](#footnote-1208) Furthermore, Waldron advances that a narrow focus on mandate would reduce accountability, as political decision makers would only be accountable to the majority.[[1209]](#footnote-1209) He advocates that the principal needs to be viewed as a multi-layered concept.[[1210]](#footnote-1210) The electoral majority - and therefore any mandate based upon the standards that are construed from them - are only one layer. There are many different and competing layers in play, each layer representing “partial collectives, interest groups, factions; the inhabitants of provinces, states and regions and members of various corporate entities.”[[1211]](#footnote-1211) However, the most important layer is the broad notion of “the people,” because since government deploys state power for public business, it owes a duty to each and every member of the public for their actions.[[1212]](#footnote-1212) Legislative actors are accountable because they exercise state power, and are judged by the flexible standards determined by each and every individual and group within the polity.

In practice, this requires as a bare minimum that political actors have a duty to provide information at the principal’s request.[[1213]](#footnote-1213) This is necessary because of the multi-layered nature of the principal. If a normative conception of accountability required that an agent must face the potential of being removed by their principal, in a democracy, said power would only be available to the majority, thus accountability would only be formally owed to the majority. In contrast, a multi-layered conception requires accountability to be owed to all. Political actors owe a duty to all, not just the majority. Accordingly, as a base level requirement, accountability requires that political actors must respond to any individual or group’s request for information. As Waldron notes, “individuals and minorities don’t have the formal power to throw politicians out of office. But they have a right to embarrass them with questions, and that embarrassment is often politically (and electorally) consequential.”[[1214]](#footnote-1214) Therefore, mechanisms for sanctioning are not an absolute requirement for ensuring legislative actors are accountable to each and every individual. The right to sanction political actors rests with the majority, the right to demand political actors account for their behaviour belongs to all. A majority may hold their elected agents to account by sanctioning them, on behalf of the affected minority.[[1215]](#footnote-1215)

Since Waldron maintains that the failure of an agent to provide the principle with information is an act of disrespectful towards the principal’s moral autonomy, one might assume Waldron would attempt to explain how a legislative institution can enable each and every citizen to acquire information about the behaviour of political actors.[[1216]](#footnote-1216) Yet despite the liberal strand’s sophisticated understanding of accountability, the strand provides little insight into how legislative institutions can provide the accountability mechanisms necessary to secure this multi-layered form of political accountability. Waldron emphasises that elections are the primarily tool for holding legislators to account.[[1217]](#footnote-1217) While he does acknowledge that the legislature should provide for a horizontal form of accountability in-between elections, he only briefly suggests a legislative committee system might be necessary.[[1218]](#footnote-1218) Unfortunately, this claim is never developed or built upon further. Therefore, disappointingly, the liberal strand fails to explore and explain how legislative institutions through their design can promote political accountability.

### *The Republican Strand*

The republican strand of political constitutionalism is concerned with ensuring the constitutional order promotes freedom by non- domination. Accountability is critical to the republican strand, as avoiding domination requires the citizens to contest political actors and their decisions.[[1219]](#footnote-1219) However, Richard Bellamy and Adam Tomkins present different methods of institutionalising accountability through the legislature’s design. These differences are the product of their different attitudes towards political parties, which we have observed in previous chapters. Whereas Tomkins advocates in-house legislative accountability mechanisms, Bellamy supports out-sourcing accountability to the political parties, who serve as external accountability mechanisms. These differences also highlight how these writers tend to focus on the legislature in relation to one of its accountability relationships. Whereas Tomkins focuses on the legislature’s relationship with the executive, Bellamy focuses on the relationship between citizens and the legislature.

Tomkins’ account is concerned with ensuring the legislature is equipped for holding the executive to account.[[1220]](#footnote-1220) As Tomkins contends, “the purpose of all constitutions is to find ways of insisting government is held to account.”[[1221]](#footnote-1221) As a result, accountability mechanisms are necessary for incentivising responsible government.[[1222]](#footnote-1222) For ensuring the legislature is accountable to citizens, Tomkins recommends the electoral system. Nevertheless, as Tomkins acknowledges, elections only provide limited opportunities for holding political actors to account.[[1223]](#footnote-1223) This is a significant and distinctive feature of Tomkins’ political constitutionalism. As a result, Tomkins’ account is more concerned with how the legislature can prevent domination, through holding the executive to account on behalf of the citizenry in the period between elections. The benefit of this approach is that Tomkins has stronger focus on examining how the legislators can hold the executive to account on a day-to-day basis.[[1224]](#footnote-1224) Regrettably, one limitation of Tomkins’ account is that he deploys republicanism to present a normative reading of the UK’s constitution. This result in a narrow focus on the UK’s Westminster Parliament, rather than a broader analysis of how different legislatures have developed mechanisms for holding government to account. His approach exemplifies the weakness of the *execeptionalist* approach, discussed in chapter two, in that it fails to engage in any comparative analysis of how different legislative institutions hold the executive to account.

Tomkins contends that the legislature must be equipped to function as a “scrutineer” of all executive behaviour.[[1225]](#footnote-1225) The legislature should scrutinise the government in three senses.[[1226]](#footnote-1226) First, it should scrutinise the executive in an administrative sense, through evaluating policy performance, identifying future reforms and interrogating key policy actors and affected interests. Second, the legislature should scrutinise the executive in a legislative sense, through scrutinising, approving or rejecting government bills.[[1227]](#footnote-1227) Third, the legislature should scrutinise the executive in a financial sense, overseeing the budget and taxation. To ensure the legislature can scrutinise the executive, Tomkins suggests four accountability mechanisms will need to be institutionalised. First, legislatures should institutionalise an analogous rule or practice the convention of individual ministerial responsibility. This is the convention that the appointment and removal of executive personnel should be controlled by the legislature.[[1228]](#footnote-1228) Therefore, the legislature should have the right to sanction executive actors. Second, the legislature should institutionalise rules and practices, which requires open government. For example, these could include rules and practices which place the executive under a duty to report and justify its behaviour to the legislature. [[1229]](#footnote-1229) Third and similarly, institutionalising a strong independent committee system should further enable the legislature to scrutinise the executive’s behaviour. In particular, when select committees provide a less partisan institutional environment, they can serve the interests of the legislature, rather than government, opposition or partisan interests. Interestingly, Tomkins has gone out on a limb by suggesting effective scrutiny requires the legislature to become “a parliament of committees.”[[1230]](#footnote-1230) He thereby proposes a comprehensive committee system, which is designed to ensure every legislator, who is not member of the executive, should be a member of a committee.[[1231]](#footnote-1231) Tomkins’ final and perhaps most controversial proposal builds on the third idea by banning party whips.[[1232]](#footnote-1232) As discussed in previous chapters, Tomkins is sceptical of political parties - or perhaps more specifically the party whips – considering them to be the biggest hindrance to legislative scrutiny and oversight.[[1233]](#footnote-1233) This is because he is concerned party control should ensure legislators become more motivated about seeing their party succeed, rather than ensuring good governance through effective scrutiny.[[1234]](#footnote-1234) If whips cannot be removed, the committee system must be protected from their influence, for example by ensuring they have no say on who is allowed on to the committees.[[1235]](#footnote-1235) Tomkins directs the designer to ensure the legislature’s internal structures are sufficiently institutionalised, in that the legislature is able to provide effective accountability and resist pressure from external forces like the executive and parties.

In contrast, Bellamy contends domination is avoided through the empowerment of the citizenry to self-govern their society. For Bellamy, contestation takes the form of enabling the citizenry to rebuild their ship at sea, through empowering the current citizenry (and future generations) to always be able to repeal or amend past legislation and introduce new laws.[[1236]](#footnote-1236) For Bellamy, accountability is achieved through incentivising and institutionalising a balance of power between “rival aspirants.”[[1237]](#footnote-1237) However, Bellamy focuses only on vertical accountability; the relationship between citizens and the legislature. In contrast, to Tomkins, Bellamy posits that the electoral system and political parties are the key mechanisms for securing political accountability.[[1238]](#footnote-1238)

The electoral system and political parties promote accountability in three ways. First, competition between rival parties “promotes scrutiny of rival views and places the incumbents under a continuous obligation to address the criticism posed” by their rivals.[[1239]](#footnote-1239) The idea is that rivals not only present themselves as alternatives, but also actively monitor and critique their opponents’ behaviours. However, as chapter four contended, for this kind of rivalry to work in practice, opposition or minority groups need to be empowered by the legislature’s structure to communicate criticisms of their rivals to the citizens. The same is true if one expects rivals to monitor each other. Hence, not only does the legislature need to provide rivals with a voice, but it will also need to provide them with mechanisms for monitoring each other’s behaviour, especially the governing parties’ behaviour. Second, counter to Tomkins’ view party discipline is considered to enhance the accountability of the executive to voters, for Bellamy argues that legislators are delegates of citizenry, not trustees.[[1240]](#footnote-1240) This argument is further developed through Bellamy’s support of the parliamentary system, as party discipline links the voters’ wishes and government behaviour together. Thus, party discipline creates incentives for legislative and executive actors to behave in ways that maximise their voters’ wishes, rather than their own personal desires. Implicit in Bellamy’s account is a third way for parties to provide accountability. Bellamy’s defence of parties and majority rule is that the governing party will be made up of a coalition of smaller interest groups, and the internal balance of power within this coalition will always be shifting. This implies that within the same party structure, rival factions exist and will compete with each other to gain control of the party’s internal structure. It is therefore reasonable to assume that rival factions within each party will have incentives to monitor their internal rivals’ behaviour, in the hope that in doing so, they can become the dominant faction within the party’s internal structure.

To conclude, within the republican strand of political constitutionalism there is division over how accountability can be institutionalised. This is a somewhat unsurprising finding, as throughout this thesis the competing republican attitudes towards political parties have resulted in different understandings about the legislature. For Tomkins, parties undermine the legislature’s accountability mechanism, but for Bellamy, parties are the central mechanism for promoting accountability. There is also a difference in focus. Whereas Tomkins is concerned with prescribing mechanisms for maintaining the relationship between the legislature and executive, Bellamy is concerned with voters’ relationship with their legislative representatives. The problem is that neither writer is sufficiently able to reconcile how the legislature should connect these two accountability relationships together.

### *The Democratic Socialist Strand*

The democratic socialist strand is concerned with ensuring the constitutional order can provide the means of democratic transformation of economic and social conditions of the state. Interestingly however, this strand has given the least amount of thought towards the question of how accountability should be institutionalised. There are at least two reasons that explain this diminished focus.

First, as explained in chapter two, the strand is particularly influenced by early British socialist thinking. This is important because early British socialist thinking eschewed considering issues of accountability, in favour of focusing on how to harness the power of state towards socialist ends.[[1241]](#footnote-1241) Earlier social democrats were of the view that a socialist government would operate on a “far higher tempo” of legislation then a capitalist one. [[1242]](#footnote-1242) Therefore, their goal was to grease the legislative process and ensure surrounding constitutional architecture would accommodate this.[[1243]](#footnote-1243) From this perspective, Keith Ewing notes, accountability was largely treated by socialists as a distraction.[[1244]](#footnote-1244) Consequently, the democratic socialist strand has the strongest disposition towards a positive conception of constitutionalism; enabling the exercise of power. Ultimately, “the constitutional law of social democracy is about providing the means to enable the ends.”[[1245]](#footnote-1245) Danny Nicol’s claim that “in order to have genuine accountability, governments need first to have the opportunity to govern” perhaps offers the best explanation of how democratic socialists reconcile the tension between the need to govern and the need to be held to account.[[1246]](#footnote-1246)

Second, generally speaking, early democratic socialists generally held an optimistic attitude towards the exercise of state power.[[1247]](#footnote-1247) Once again, because of this attitude, accountability was not at the forefront of early democratic socialist thought. Furthermore, early socialist thinking was moulded by significantly different political circumstances to those we find today. Early socialist thinking pre-dates the modern focus on accountability.[[1248]](#footnote-1248) As Mulgan points out, the greater focus ensuring accountability is a modern trend, which emerged after the 1970s.[[1249]](#footnote-1249) Mulgan theorised that prior to and in the aftermath of the Second World War, the public had a generally optimistic attitude towards the state. As a result, they too were uninterested in demanding greater accountability. Therefore, in retrospect, the public were more trusting of Western Governments because government appeared to be effective at meeting the needs of the public.[[1250]](#footnote-1250) Demands for greater accountability would emerge later on, as the post-war consensus was eroded by increasing economic and political strife, governmental failures in both domestic and foreign policy,[[1251]](#footnote-1251) and increasing political scandals, most notably in the United States with Watergate. Consequently, later proponents of the democratic socialist strand were noticeably more alert to the need for greater accountability.[[1252]](#footnote-1252) In response to the Thatcher Government’s willingness to exploit the flexibility of the UK’s predominantly political constitution to threaten civil liberties during the 1980s, more modern democratic socialists such as Keith Ewing and Conor Gearty acknowledged there was the need for “major surgery to body politic to reduce the load on an overworked House of Commons and to introduce some real and effective political constraints on the power of the executive.”[[1253]](#footnote-1253) Unfortunately, in practice the way in which proponents of modern democratic socialism have used accountability tended to appear more as a means of critiquing the court’s engagement in political decisions, rather than the legislature.[[1254]](#footnote-1254) For example, for while J.A.G. Griffith’s ‘the political constitution’ is famed for emphasising the need for ‘real accountability,’ Griffith had very little to say about enhancing the accountability of political actors through legislative means.

It might be argued that by modern standards, this disregard for accountability implies an almost authoritarian tendency within early democratic socialist thought. However, it is important to remember the considerable emphasis that democratic socialism places upon the concept of democratic mandate. Consequently, their considerations about accountability have been closely bundled up with the need to ensure a democratic mandate is respected. Early democratic socialism emphasised the need for state actions to express, rather than frustrate, the will of people and the legislature.[[1255]](#footnote-1255) Therefore, this suggests early democratic socialism was concerned with the possibility of agency problems developing. Their primary concern was that state actors, whether they be legislators, members of the executive, civil servants or judges, might fail to sufficiently give effect to or may actively frustrate the voters’ democratic mandate. Hence, in the context of the legislature, they focused on ensuring legislature could translate the voters’ democratic mandate into law as efficiently as possible. Consequently, the strand emphasises party-based accountability mechanisms. On the one hand, party whips function to ensure the behaviour of individual legislatures conforms to the electorate’s mandate, thereby ensuring legislators remain accountable to their voters’ desires.[[1256]](#footnote-1256) Conversely, democratic socialists contend that in a parliamentary system, the executive is held to account by their party members, as the majority party has the right to replace members of the executive.[[1257]](#footnote-1257)

From our perspective, a more interesting feature of democratic socialist thought is its tendency to gravitate towards legislative committees as a means of promoting accountability. For example, both Ivor Jennings and Stanford Cripps advocated the development of a system of select committees to shadow the work of the government departments and interrogate ministers.[[1258]](#footnote-1258) Bernard Crick would later advance the same proposals and succeed, introducing a select committees system within the Westminster Parliament in 1979.[[1259]](#footnote-1259) More modern democratic socialists, Keith Ewing and Conor Gearty, also suggest enhancing the powers of legislative committee to hold the government to account on human rights matters.[[1260]](#footnote-1260) Nevertheless, it is important to recognise democratic socialists have tended to see committees as providing an administrative form of accountability. Their primary function is to promote efficient governance through providing constructive criticism of the executive’s administrative performance.[[1261]](#footnote-1261) As a result, their capacity to hold political actors to account is traditionally seen as useful by-product. This implies that committees were expected to hold that executive to account on behalf of the governing majority’s interests in the effective administration of the policy they voted for at the ballot box. Once again, other forums of accountability are expected to be achieved through electoral competition.

### *The limitations of Political Constitutionalism’s understanding of accountability*

The analysis above suggests there are limitations within the existing political constitutionalist literature that prevent the political model from being able to sufficiently capture and explain how legislative design contributes to the promotion of political accountability. First, each of the strands has focused more on how the electoral system, rather than the legislature, can promote political accountability. Second, even when legislative mechanisms are considered, political constitutionalists have struggled to articulate an accurate and attractive understanding of them. Instead, they have tended to focus on one or two mechanism and struggled to explain how these mechanisms can work alongside and with the electoral system. At worst, some political constitutionalists have presented these different legislative mechanisms as in conflict with each other, leading them to imply certain mechanisms are incompatible with each other, forcing the designer to prioritise one over the other.

First, political constitutionalism is prone to narrowly focusing on how political accountability can be secured through the electoral system, as opposed to the legislature. This suggests a stronger focus is given toward those accountability mechanisms that allow voters to sanction their political actors. This is most likely an effect of political constitutionalism being developed as a tool for critiquing judicial power. As chapter two observed, for political constitutionalism, it is undesirable for judicial actors to engage in political decision-making because judicial actors are not sufficiently accountable.[[1262]](#footnote-1262) This is because there are no appropriate mechanisms available to citizens to contest and remove judicial actors, and thus judicial actors cannot be sanctioned for their decisions. In contrast, voters can contest and remove their legislators. This is certainly reflected in Griffith’s claim that ‘real’ accountability requires the possibility of political actors being removed.[[1263]](#footnote-1263) Although this comparative approach is not in itself problematic, it does appear to have an unintentional distorting effect on how political constitutionalists understand political accountability. This approach skews their focus towards those mechanisms that allow the principal to sanction their agents, at the expense of considering those mechanisms that merely require the agent to provide the principal with an account of their behaviour. As a result, there is a broad consensus among the strands that the electoral system should be understood as the primary mechanism for holding political actors to account.

Yet as a result, this limits their capacity to explore and explain how the legislature can hold itself and other political actors to account. As Marco Goldoni rightly worries, a narrow focus on electoral accountability suggests a reductive understanding of how ordinary day-to-day politics operates. As Goldoni contends, the electoral system alone will not be able to sufficiently tether together citizens with political actors further down the chain.[[1264]](#footnote-1264) Rather, reliance upon elections might constrain voters’ ability to hold their political actors to account. This is because in practice, the periodic nature of elections reduces citizens’ power to sanction their political actors to limited intervals of time. Accordingly, Marco Goldoni cautions fellow political constitutionalists about the dangers of political actors becoming “isolated and independent from the citizenry.”[[1265]](#footnote-1265) Underpinning this critique is the assumption that the time gap between elections creates space for political actors to misbehave and reduces political actors’ incentives to police themselves.[[1266]](#footnote-1266) Political actors may feel free to act as they want in the period between elections, with the only limit being that they must bear in mind “that from time to time they have to be accountable” to the people.[[1267]](#footnote-1267) Logically however, the strands must be at least implicitly aware of these risks, as each of the strands accepts, to some degree, the need for an additional mechanism or mechanisms to supplement the electoral system. For example, the analysis above observed how several proponents suggested legislative committees might be necessary for holding political actors to account on a more day-to-day basis in between elections. Similarly, Bellamy and the democratic socialists have maintained that political parties are vital for promoting political accountability in between elections. However, these mechanisms are treated as secondary to the electoral system, primarily because they do not directly allow political actors to be sanctioned for their behaviour. Furthermore, this leads to a second problem.

Second political constitutionalists have struggled to explain how legislative mechanisms can work alongside each other. This is implicit in their disagreement about political parties. For Bellamy and the Democratic Socialists, the electoral system is both a means for sanctioning political actors and a means for incentivising certain behavioural logics for promoting political accountability between elections. Inter and intra party competition incentivises rivals to behave appropriately and to monitor each other’s behaviour. Political rivals are incentivised to hold each other to account through acquiring information on each other’s behaviour. In turn, this information is disseminated through the parties, allowing voters to make an informed judgement at the ballot box. That is to say, inter and intra party competition reduces the likelihood of asymmetrical informationbetween voters and their legislators. In contrast, for Tomkins, the electoral system’s ability to encourage partisan competition imposes a constraint upon the ability of the legislature as a whole to monitor political actors. For Tomkins, as electoral pressures incentivises party loyalty, rather than a commitment to political accountability, when legislative actors are loyal to their party, the legislature’s capacity to collect and disseminate information is constrained.[[1268]](#footnote-1268) Partisan actors are encouraged to turn a blind eye to their own party’s misbehaviours. On Tomkins’ logic implies we cannot have parties, if want political actors to be held to account. Danny Nicol in response has contended that without parties and their electoral mandate, voters cannot hold their political actors account.[[1269]](#footnote-1269)

This disagreement is somewhat misguided, and only serves to demonstrate how the existing literature has failed to capture and explain how political accountability can be promoted through legislative institutions. It falsely presents the question of political accountability as a binary choice between mechanisms. In reality, legislative designers do not place all their eggs in one basket; they deploy multiple accountability to function simultaneously and alongside one another. Legislative institutions can be designed to institutionalise multiple accountability mechanisms. Legislative design matters because legislative institutions can be designed to provide a democratic and pluralistic means for holding political actors to account on a day-to-day basis.

## *Institutionalising Legislative Oversight*

As section two has shown, the existing political constitutionalist literature has struggled to sufficiently capture and understand why legislative design is central to ensuring political accountability. In the periods between elections, the political community is heavily dependent upon the legislature to hold political actors to account and provide it with the information necessary to appropriately judge their political actors at the ballot box. The legislature’s capacity to hold political actors to account is conditioned by its design, as institutional rules and practices provide the accountability mechanisms necessary to facilitate effective political accountability. Accordingly, legislative design matters because it determines the kinds of institutional rules and practices that create or constrain the political community and their legislative representative’s ability to hold political actors to account on a day to day basis. To remedy the weaknesses within the existing literature, we need to first analyse and present a more accurate understanding about the distinctive way political accountability is secured through the legislature. Second, we then need to determine how a legislative institution should be designed to ensure political actors are held to account on behalf the political community in between elections.

### *Legislative Oversight*

To begin with, we must recognise how legislative institutions secure political accountability by organising political life. *Legislative oversight* describeshow legislative institutions organise political life in ways that enable legislators, individually or collectively, to engage in behaviour that intentionally or unintentionally influences the behaviour and performance of certain political actors, such as members of the executive, civil servants, committee members, parties and other legislators.[[1270]](#footnote-1270) Legislative oversight is distinctive in three senses. First, legislative oversight rarely empowers members of the legislature to sanction political actors. Instead, it enables a multi-layered approach for holding political actors to account. This is necessary to ensure political actors are accountable to the wide and often conflicting interests represented within the legislature. Second, legislative oversight is performed through multiple accountability mechanisms, often simultaneously. This provides for a resilient and systemic method for holding political actors to account. Third, legislative oversight is performed through both active and reactive accountability mechanisms.

Legislative oversight primarily occurs once the act of delegation has occurred. Traditionally, scholars from the Westminster tradition use the word *scrutiny* as an all-inclusive term to capture the legislature’s interactions with the executive within the policy cycle.[[1271]](#footnote-1271) The policy cycle can be conceptualised as containing both pre-legislative and post-legislative phases, with the terms *scrutiny* and *oversight* emphasising different sections within the policy cycle.[[1272]](#footnote-1272) Within the logic of the principle and agent model, scrutiny refers to ex-ante attempts to reduce agency problems and asymmetrical information occurring when the legislature must delegate responsibility to another political actor. In contrast, post-legislative oversight refers to ex-post attempts to reduce agency problems and asymmetrical information occurring once the legislature has delegated responsibility to another. It is important to remember that the policy cycle is often an infinite loop, with scrutiny and oversight feeding into one another.[[1273]](#footnote-1273) For example, scrutiny can identify issues that legislators may wish to oversee closely once a policy is enacted. Similarly, oversight may influence the issues legislators will scrutinise more closely when deciding on future policies.[[1274]](#footnote-1274) It is also important to remember that legislative scrutiny cannot identify all the possible problems that might arise when delegating. As a result, the legislature will always need to monitor those political actors it has delegated responsibility to. Legislative oversight aims to reduce agency problems and information gaps on behalf of the political community, by enabling the legislature to identify wrongdoing and to collect and communicate information regarding the behaviour of political actors to the community, enabling them to make a more informed decision at the ballot box.

#### Legislative Oversight as Ordinary Politics

Legislative oversight is often overlooked or underappreciated because it primarily occurs through the legislature’s more mundane activities, rather than through the high politics of impeachment processes and confidence votes. This is because legislative oversight rarely appears to visibly empower the legislature for several reasons. First, unlike legislative scrutiny, oversight does not allow the legislature to directly express its influence in a visible manner, like directly amending legislation. This is simply a consequence of the legislation being already enacted at this point in the policy cycle. Oversight may, however, subtly influence how the legislature develops and amends subsequent pieces of legislation. Oversight might also subtly affect the working relationship between political actors through affecting the levels of trust between the legislature and its agents. Second, oversight does not directly empower legislators to remove political actors (whether they be executive or individual legislators) for their behaviour. Of course, sanctions may come in other forms, such as public and private humiliation. Legislative oversight ensures the power to remove political actors remains primarily (and practically) reserved to the voters, through the electoral system, but affords the legislature a significant part to play in the process of using elections to judge and hold political actors to account.

Legislative oversight serves a less visible but critical role of reducing asymmetrical information gaps developing between the polity and the state. In chapter two, we noted communication was an important aspect of the legislature’s linkage function. If appropriately designed, the legislature can collect information on behalf of the political community and disseminate information to it. By reducing the information imbalance, oversight aims to empower the people to pass better judgment over their political actors at election time. In essence, legislative oversight brings the political community and the legislature together in a collaborative enterprise for holding political actors to account. Legislative oversight aims to increase the ability of legislators and voters to reach a more balanced judgment over the behaviour of political agents and the merits of enacted legislation. Consequently, legislative oversight has important implications for how political actors pursue their goals and behave. In reducing the potential information imbalances between the principal and agent, legislative oversight aims to deter inappropriate political behaviours, discouraging political actors from behaving like an aristocracy who have little to no regard for the concerns of their polity. At its most effective, legislative oversight should institutionally incentivise political actors to intentionally or unintentionally engage in anticipatory behavioural logics. When political actors are aware, they may be required to publicly account for their behaviours and are more likely to adjust their preferences and behaviour in anticipation.

In order to fully appreciate how legislative oversight ensures political accountability, even when legislators cannot remove their agents, we must recognise the multiple forms of accountability that occur through ordinary politics. Political accountability is multi-layered and consequently best achieved through multiple oversight mechanisms within the ordinary democratic process. In practice, political accountability is multi-layered because it is placed upon those who are being held to account, some of whom are more demanding than others. [[1275]](#footnote-1275) At its least demanding level, there are *redirectory* forms of accountability. Here political accountability is secured when political actors re-direct a question to a person or body who should be held to account.[[1276]](#footnote-1276) For example, a voter may complain to their legislative representative about a local issue, which is reserved to local, devolved or federal government. On a more demanding level, the *informational* forms of accountability require the agent to provide information to the principal when requested.[[1277]](#footnote-1277) For example, a legislator may request information from a minister on the amount being spent on a certain issue. Accountability takes an *explanatory* form, which is more demanding. Here the political actor must also provide an explanation for the contents of their account.[[1278]](#footnote-1278) Thus, the minister is required to explain why their department is spending a certain amount on the issue. If one is unhappy with the level of information or the explanation provided, an *amendatory* form of accountability might be required.[[1279]](#footnote-1279) For example, the minister might have to provide more information or increase/decrease the amount of spending. This might result in a reversal or reconsideration of a decision, or even the establishment of a new process.[[1280]](#footnote-1280) At the highest and most demanding level, accountability requires *sacrifice* from the agent. [[1281]](#footnote-1281) Political actors must be punished for their behaviour; a minister may be dismissed, or a legislator may be removed by their voters at the ballot box. Although legislative oversight does not enable the legislature to directly sanction political actors, it does create the possibility for *redirectory*, *informational*, *explanatory* and *amendatory* forms of political accountability to occur.

This is important because it reflects the fact that political actors are held to account by different actors, with different standards, for different reasons. Much like the electorate, a legislature is best understood as a principal, made of multiple individuals with competing goals and priorities. For example, an Education Minister will be held to account by different legislators for different reasons and with different standards. Legislators who supported the policy have an interest in monitoring the Minister to ensure they are not frustrating or undermining the policy and may demand amendatory action to be taken. Legislators who opposed the policy will hold the Minister to account to extract information and explanations about problems with policy in practice. Legislators within a specific interest such as disabled students, may simply want information regarding the policy’s effects on the disabled. Legislators with interest in teachers may hold the minister to account to find out about its effects on recruitment in Yorkshire. Here the minister may redirect them to consult with the local government in large of teaching recruitment in their area. When different legislators with different perspectives can engage in oversight, more information can be acquired and disseminated.[[1282]](#footnote-1282)

#### Systemic Legislative Oversight

*Legislative oversight* is also distinctive (and attractive) because it can be performed through a range of multiple accountability mechanisms simultaneously. In order to provide these different forms of accountability, the designer will need to institutionalise multiple accountability mechanisms. Legislative designers are unlikely to identify a single mechanism capable of performing all these different forms of accountability simultaneously. Some accountability mechanisms will be better suited for creating opportunities for informationaland explanatory forms of accountability. Others may only provide for one form. For example, rules requiring a political actor to publish an annual expenditure report are better suited to providing information about their behaviour but are less suited for demanding the political actor explain their actions or make amends.

Legislative design can establish a resilient and systemic means of holding political actors to account through institutionalising multiple mechanisms. To rely upon a single mechanism is akin to using a fine piece of string to control a lifeless puppet. Political actors however are not lifeless puppets as they have agency of their own. Therefore, something stronger and more resilient is required to retain control over the political actor. When multiple pieces of string are twisted and braided together into a rope, their combined tensile strength is far greater than each individual piece. The more pieces of string one twists and braids, the greater the tensile strength of the rope becomes.[[1283]](#footnote-1283) Similarly, legislative oversight is far more resilient when it relies upon multiple mechanisms. Instead of searching for an all-encompassing accountability mechanism, the designer should instead seek to institutionalise multiple mechanisms.

In practice, legislatures rely upon a range of different mechanisms, like a strong rope, to hold political actors to account. This allows for a systemic form of legislative oversight, as multiple mechanisms allow for a division of labour, with the strengths of some mechanisms in certain circumstances compensating for the weakness of others.[[1284]](#footnote-1284) For example, while written questions are better suited to providing redirectory, informational and explanatory forms of accountability, the private nature of the correspondence is less effective at putting political pressure upon the agent to take amendatory action. In contrast, public debates are better suited to placing pressure upon the agent to take amendatory action but are poorly suited to acquiring complex and technical information about the agent’s behaviour. Indeed, in public debates, political actors may actively resist revealing information about certain aspects of their behaviour, but they may find it difficult to resist sustained questioning by a specialist oversight committee. As was noted above, the effectiveness of any accountability relationship can be undermined by the inherently unpredictable nature of politics. Political accountability may intentionally or unintentionally be frustrated by the actions of different and competing political actors. For example, some legislators may fail to use certain accountability mechanisms to protect their own interests, or they are under pressure from their party or the media to turn a blind eye. Alternatively, a mechanism might fail because of human error. Some mechanisms may fail, and some will not work as they were intended. Institutionalising multiple mechanisms provides redundancy within the system. In the event one mechanism fails, others may still provide alternative opportunities to hold political actors to account.

#### Police Patrol and Fire Alarm Oversight

Legislative institutions organise political life through establishing different types of accountability mechanisms. Some mechanisms are active, others are reactive. Some are internal to the legislature, others are external but ultimately operate in the service of the legislature. While many mechanisms are dependent on legislators acting collectively, some can be used effectively by a single legislator. Some mechanisms foster routine and permanent forms of oversight, others are more event driven and *ad-hoc* in nature.

Mathew McCubbins and Thomas Schwartz provide an influential approach to understanding legislative oversight through their *Police Patrol* and *Fire Alarm* typology.[[1285]](#footnote-1285) Initially this typology was inspired by oversight within the United States Congress. However, it has since been applied in relation to other legislatures.[[1286]](#footnote-1286) McCubbins and Schwartz developed the typology to rebut the popular perception that congressional legislators were neglecting their oversight responsibilities.[[1287]](#footnote-1287) They theorised legislative oversight was performed through two types of mechanisms, one which was highly visible and relatively centralised within the legislature, but the other type was less visible and more sporadic in its operation. *Police patrol* describes a form of oversight which operates similarly to how the police patrol the streets for crime. The legislature uses accountability mechanisms to actively patrol for violations. Routine surveillance by the legislature deters other political actors from misbehaving, just as the presence of a police officer can deter criminal activity.[[1288]](#footnote-1288) Specialist oversight committees are a good example of a police patrol mechanism. In contrast, *fire alarm* oversight depends on external actors triggering an alarm. The legislature introduces formal and informal procedures which allow individuals and interest groups to alert the legislature to acts of misbehaviour or poor performance by political actors.[[1289]](#footnote-1289) As we shall see below, constituency service is a common example of a fire alarm mechanism. Significantly, whereas police patrol mechanisms enable the legislature to act on behalf of the political community, fire alarm mechanisms seek to bring the community and the legislature together into a dynamic relationship.

Police patrol mechanisms are more recognisable to constitutional scholars because they visibly correspond with the normative belief that the legislature is under a constitutional duty to monitor the behaviour of political actors. Yet McCubbins and Schwartz theorised that based on rational choice theory, legislators should be more reliant upon fire alarm mechanisms. Under the logic of rational choice, legislators are utility seekers whose behaviour is motivated by their need to be re-elected.[[1290]](#footnote-1290) From this perspective, fire alarm mechanisms offer several advantages over police patrol mechanisms. First, fire alarm mechanisms allow legislators to engage in extra-legislative parochialism and local constituency activities to gain credit from voters and relevant interest groups. For example, if a constituent triggers a fire alarm, the legislator can gain credit by responding to the alarm and attempting to resolve the problem.[[1291]](#footnote-1291) Although a legislator can use police patrol mechanisms to detect violations, these violations may not be of interest to their local constituents, meaning the legislator might not receive any credit for their efforts.[[1292]](#footnote-1292) Fire alarm mechanisms are better suited to detecting issues that directly affect the interest of citizens. Second, fire alarm mechanisms ensure a more efficient use of a legislator’s time. As McCubbins and Schwartz highlight, legislators who engage in police patrol can only examine a small sample of a political actor’s behaviour, and “as a result, they are likely to miss violations that harm their potential supporters, and so miss opportunities to take credit for redressing grievances, however fair the sample.”[[1293]](#footnote-1293) Legislators are likely to see police patrol mechanisms as a less efficient use of their limited time. Nevertheless, it should be noted that intentionally or unintentionally falsely triggered fire alarms may require a legislator to waste time and resources on a wild goose chase.[[1294]](#footnote-1294)

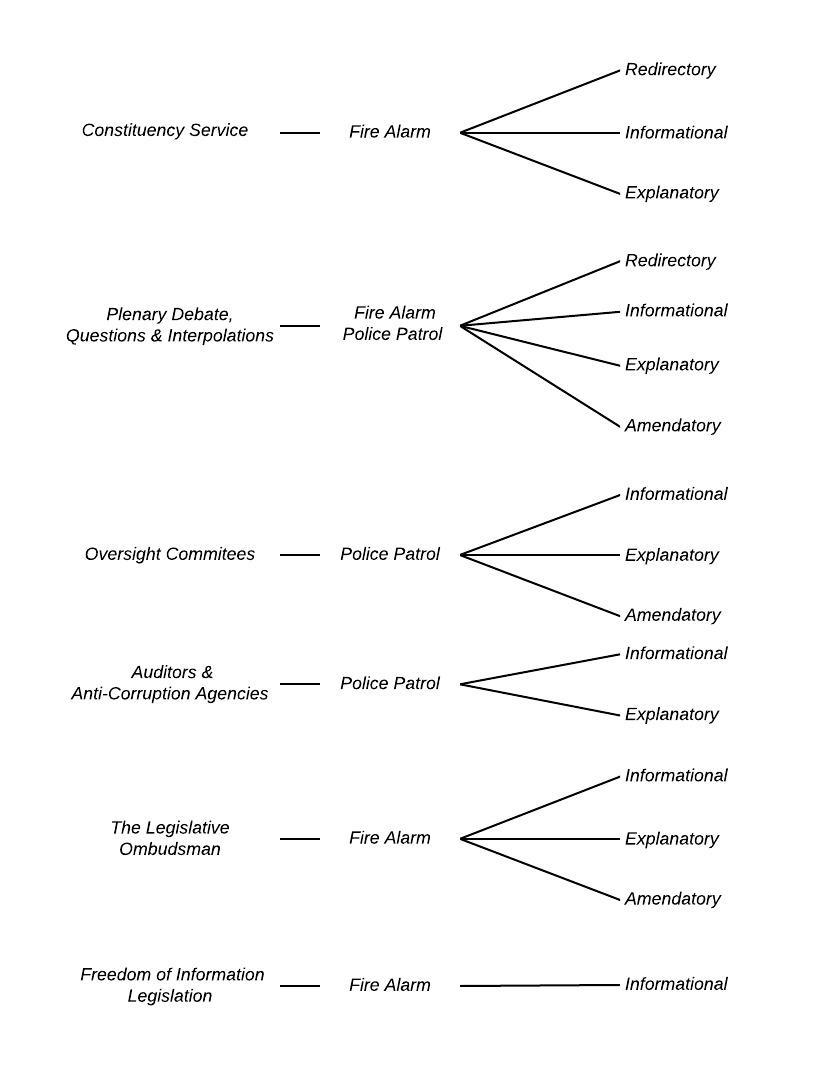
Fire alarm mechanisms offer advantages and disadvantages for the political community. One advantage is that they allow each and every individual to judge their political actors and policies based upon their standards. A second advantage is that fire alarm oversight is well suited to serving the entire community, rather then just the majority, as every citizen is granted the opportunity to alert their legislator, regardless of whether they are eligible to vote. As McCubbins and Schwartz posit, fire alarm oversight is better suited to emphasising the interests of the individual or interest groups, than those of the public at large.[[1295]](#footnote-1295) Minorities and interest groups representing the disenfranchised can alert their legislators to the human costs of a policy or the misbehaviour of political actors. This enables legislators to help those who cannot vote, such as children, the seriously disabled, or refugees, and hopefully alert voters to their concerns and needs. Accordingly, fire alarm mechanisms appear to provide a solution to Waldron’s and Tomkins’ belief that accountability must be owed to all, rather than just the majority.

However, fire alarm mechanisms can also have disadvantages for citizens, who will bear the cost of any bad or poor behaviour.[[1296]](#footnote-1296) One problem is that fire alarm mechanisms place responsibility upon the citizen to alert their legislator. However, a citizen might be unable to alert their legislators for several reasons. Citizens may be overwhelmed with the problem itself, they may be distracted by material inequalities, they may alert non-legislative actors such as lawyers, journalists and charities or they may simply give up. Furthermore, when responsibility for triggering the alarm rests with the citizen, individual legislators may become complacent towards their constitutional duties of promoting political accountability. Legislators may have the space to be complacent, particularly when they are detached from the problem in ways which mean they are unlikely to be blamed for failing to spot it.[[1297]](#footnote-1297) Fortunately, as McCubbins and Schwartz note, in practice most legislatures will institutionalise a mixture of police and fire alarm mechanisms, reducing the likelihood that legislators will completely neglect their constitutional duties by over-relying on the vigilance of the political community.[[1298]](#footnote-1298)

The police patrol and fire alarm typology was developed as a theory for understanding legislative oversight. Unfortunately, McCubbins and Schwartz only presented limited empirical evidence to justify their claims.[[1299]](#footnote-1299) For example, Steven Balla and Christopher Deering’s empirical research upon US congressional hearings casts some doubts on McCubbins and Schwartz’s claims. Bella and Schwartz sought to measure whether US congressional hearings were routine investigations (police patrol) or event driven (fire alarm).[[1300]](#footnote-1300) Their findings indicated that although there were examples of congressional hearings occurring out of routine and in response to events, counter to McCubbins and Schwartz theory, the hearings were more driven by routine, rather than events.[[1301]](#footnote-1301) Nevertheless, Balla and Deering’s evidence does not completely reject McCubbins and Schwartz’s theory. One problem with Bella and Deering’s study is that they narrowly interpret or misconstrue McCubbins and Schwarz’s theory. McCubbins and Schwartz did not claim fire alarms would always result in a congressional hearing. Rather, they explicitly suggested that fire alarms may not always require Congress’s direct involvement. Alarms can be dealt with by constituency staff, administrative agencies and the courts.[[1302]](#footnote-1302) For our purposes, McCubbins and Schwartz’s theory is sufficient to help us reflect upon how multiple types of legislative oversight can be institutionalised through legislative design.

### *Legislative Oversight Mechanisms*

When appropriately designed legislative institutions provide opportunities for legislative oversight via multiple police patrol and fire alarm accountability mechanisms. Legislative oversight offers a versatile and systemic method for holding political actors to account on behalf of and in collaboration with the political community in gaps between elections. Having presented a more accurate understanding of how political accountability is secured through legislative institutions between elections, we must determine how legislative oversight should be secured through legislative design. Based upon the analysis above, the designer should seek to establish as many police patrol and fire alarm mechanisms as possible, but in order to do that, the designer must identify these various police patrol and fire alarm mechanisms that can be used to institutionalise legislative oversight. These mechanisms include constituent services, legislative debate, questions and interpellations, permanent or *ad-hoc* oversight committees, auditors and anti-corruption agencies, legislative ombudsman, and freedom of information legislation (see *Figure 1.1*). It should be noted that some of these mechanisms have previously been discussed in chapter four, albeit from the perspective of mechanisms for allowing different groups to influence bills via legislative scrutiny.

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*Figure 1.1 own elaboration*

#### Constituency Service

Constituency and district services are common examples of fire alarm oversight mechanisms.[[1303]](#footnote-1303) Constituency service is the “nonpartisan, non-programmatic effort to help individual constituents in their dealings with the larger government, and to defend and advance the particularistic interests of the constituency in the councils of the larger government.”[[1304]](#footnote-1304) Legislators are incentivised to engage in this behaviour because they will need to be re-elected by their constituents to remain in office and pursue their political goals.[[1305]](#footnote-1305) The goal of being re-elected is almost always central to pursuing their other political goals; such as becoming a prominent member of the government, developing policy expertise or promoting certain issues. Consequently, to increase their reputation within their constituency, legislators often internalise the belief that constituency work will help them be re-elected.[[1306]](#footnote-1306) Alternatively, as David Arter suggests, legislators may view constituency work as appropriate behaviour because it is considered an essential aspect of their job specification.[[1307]](#footnote-1307) Therefore, in the gaps between elections, legislators are encouraged to engage in constituency work that aims to represent, communicate with and hold political actors to account on behalf of their constituents. In order to do this as efficiently and effectively as possible, legislators establish or inherit a constituency office within their local area. This office will normally be staffed by the legislator and a small dedicated team.[[1308]](#footnote-1308)

A significant part of constituency work will involve dealing with their constituents’ grievances and problems. In this regard, the legislator functions as a pseudo welfare officer or ombudsman for their constituents.[[1309]](#footnote-1309) Although some grievances might involve local issues, some grievances may involve the behaviour of national and local political actors and the consequences of certain enacted policies. As both Philip Norton and David Arter highlight, constituency work has increased as the state has grown in size and complexity.[[1310]](#footnote-1310) In this sense, citizens have become more dependent upon their legislators to cut through bureaucracy and help them deal with problems caused by the policies and behaviour of political actors. Therefore, constituency services provide a fire alarm mechanism for constituents to alert legislators to potential acts of misbehaviour or unforeseen consequences. A legislator can redirect their constituents to a more relevant political actor in relation to their grievance, or demand information, explanation and amendatory forms of accountability on their behalf.

Importantly, as a traditionally non-partisan activity, constituency work institutionalises the belief that legislators should provide their services to all who dwell within their constituency, regardless of whether they support them or whether are eligible to vote. This is because legislators tend to perceive that is a risk that rejecting a constituent’s request for help because of partisan reasons may yield negative local publicity and may be jumped upon by their local opponents or receive disciplinary action from their own party. Moreover, holding political actors to account on behalf of those who cannot vote, provides opportunities for the legislator to communicate their values and policies to their constituents. For example, helping the homeless might yield a positive piece in the local newspaper. In this article, the legislator can advertise themselves and their values to their constituents via carefully worded quotes or framed photos. Consequently, there are strong incentives for legislators to see each and every one of their constituents and their concerns as a potential vote winner at the next election.

There are two practical limitations of a constituency service. First, there is the common requirement that a citizen must live within the legislator’s constituency to access its support. This exists simply ensure a legislator is not overwhelmed with to the grievances of the wider community. Second, the size of constituency can affect the link between the legislator and their constituents. Nevertheless, it is plausible to imagine legislators waving this requirement on particular issues or in relation to particular circumstances that align with the legislator’s values and interests.[[1311]](#footnote-1311) The problem is that in large constituencies, legislators can be easily overwhelmed by the number of constituents and their grievances. Furthermore, within large constituencies, constituents might be less able to access their legislator. Ultimately however, constituency service is an underappreciated but normatively valuable feature of the ordinary political process. It provides a fire alarm mechanism to connect members of the political community and their legislators in the enterprise of holding political actors to account in the periods between elections. Nevertheless, to be an effective fire alarm mechanism, once the alarm has been triggered by a constituent, their legislator must be able to act on their behalf and pursue their grievance within the legislature.

#### Plenary Debate, Questions and Interpellation

Chapter four argued that institutional rules and practices organise political life within the legislature through providing opportunities for legislators to engage in plenary debates, specialised and general question sessions and interpellation. It was argued that these were valuable because they enabled and regulated how different legislative actors communicated with the public and influenced the legislative agenda. These rules also affect how legislators hold other political actors to account on behalf of their constituents in the periods between elections. Plenary debates, questions and interpellations are often underappreciated as a means of holding political actors to account, because these institutional rules and practices can be used by legislators for policy positioning and agenda influencing. As a result, the line between what constitutes oversight and political positioning is inevitably often blurred. While this is certainly the case and an unavoidable consequence of legislative politics, we must recognise how institutional rules and practices that regulate plenary debate, questions and interpolations also creates opportunities for legislative oversight.

Plenary debate, questions and interpellation are important oversight mechanisms for two reasons. First, they establish opportunities for redirectory, informational, explanatory and amendatory forms of accountability. For example, specialised question time sessions are traditionally used by legislators to force information and explanations out of certain political actors and place pressure upon them to take amendatory action. Interpellation, oral and written questions function as a means for redirectory, informational and explanatory forms of accountability to occur.[[1312]](#footnote-1312) Second, each of these mechanisms can function as both police patrol and fire alarm oversight mechanisms. For example, a legislator with personal interest in human rights policy may routinely use written and oral questioning as a means of patrolling for violations and misbehaviour. Alternative, a legislator may submit questions to a political actor in response to a fire alarm being triggered by one of their constituents.

Plenary debate, questions and interpellation are potent oversight mechanisms because they can be initiated regularly and quickly by multiple legislators. Oral questions provide opportunities to initiate lengthy back and forth discussions between legislative principals and their political agents. For example, oral questioning can be extremely demanding for the political actor being held to account, simply because of the large number of legislators who engage in questioning and place different demands upon the political actor. Within a single session, a political actor may have to repeatedly provide information and explanations about multiple aspects of their behaviour and promise amendatory action. This is particularly the case if there are no standing orders requiring that legislators submit their questions in writing in advance of the debate or question time. Written questions also provide opportunities for a more subtle form of oversight and ensure the efficient use of plenary time and debate. Written questions are valuable because they can be submitted by any individual legislator at any time. Thus, written questions are not conditioned by the legislative agenda. Moreover, since political actors are also able to respond via written communication, their responses do not waste plenary time and provide more detailed information and explanations than practically possible via oral communication. Information and explanations can be more detailed because the political actor has more time to construct their response. However, an important distinction between oral and written questioning is that written questioning remains relatively private between the legislator and political actor. This is beneficial for the political actors, as they will not be bombarded by follow up questions from other legislators. Consequently, written questions are also valuable oversight mechanism as a means of filtering out less important issues before and acquiring information ahead of, plenary debate and specialised question time sessions. It also helps partisan actors spend more time within plenary debates to advertise their policy positions and focus the debate on the issue at hand. Interpellations are more formal variants of oral questions triggered by legislators on a collective basis for the purpose of provoking short, focused debates.[[1313]](#footnote-1313) These normally occur once a fire alarm has been triggered. These emergency debates require members of the government to attend and provide a statement.[[1314]](#footnote-1314)

Plenary debate, questions and interpellation are key police patrol and fire alarm mechanisms that enable legislators to hold political actors to account on a daily basis within the legislature. Nevertheless, these mechanisms by themselves are not well suited for complex and technical oversight. Consequently, a legislative institution must also institutionalise mechanisms capable of performing detailed and technical oversight.

#### Oversight Committees

Committees are a common feature of legislative design, once established, they are delegated specific tasks and responsibilities by their parental chamber.[[1315]](#footnote-1315) The parental chamber is free to delegate whatever task it sees fit to its committees, including responsibility for overseeing certain actors or policy areas.[[1316]](#footnote-1316) Committees are often seen as the engine rooms of legislative activity, due to their capacity to deal with complex and technical issues that cannot be appropriately addressed through plenary debates, questions and interpolations within the main chamber.[[1317]](#footnote-1317) This ability to handle complex and technical matters renders them particularly well-suited for performing technical and demanding forms of oversight on behalf of the main chamber. This can include collecting and analysing complex information, demanding explanations, and amendatory tasks through detailed questioning and reports. Since oversight committees are established by institutional rules for the explicit purpose of routinely monitoring for violations, they are traditionally classified as a police patrol oversight mechanism.

Legislative institutions primarily use oversight committees to reduce information imbalences regarding a political actor’s behaviour. However, legislative scholars maintain that for this to occur, the legislature will need to provide sufficient institutional incentives for legislators to become willing and experienced members of its oversight committees. This legislative will and tenure is necessary too if legislators are to develop the specialist knowledge and skills required to provide technical oversight.[[1318]](#footnote-1318) Futhermore, legislative scholars have also long recognised that the strong influence of political party discipline can reduce the committee’s oversight capabilities.[[1319]](#footnote-1319) In addition to this, oversight committees will need sufficient resources and powers to perform their investigation; they will need access to government information and relevant personnel, the power to hold public and private hearings, the necessary staff, academic links and time.

It is important to recognise that both transformative and arena legislatures rely upon committees to perform oversight over the administration of their enacted policies. However, as previous chapters have demonstrated, the responsibilities and resources granted to their committees are conditioned by wider considerations about the legislature’s role within the political process. For example, chapter three and four noted how committees within a transformative legislature are provided with greater responsibilities and institutional resources than their counterparts within an arena legislature. Although this mostly affects their ability to influence and reshape legislation, it can also, to a lesser extent affect their capacity to perform effective oversight. In order to perform more detailed and technical forms of oversight, there must be sufficient institutional incentives for legislative actors to specialise within a committee policy area. Within a transformative legislature, committees are the focal point of the legislative process, which in turn provides incentives for legislators to become committee members and focus their efforts on committee work. Conversely, within the arena legislature, partisan competition within the main chamber is the focal point of the legislative process, which can risk reducing the institutional incentives for legislative actors to pursue a career on a specialist oversight committee. Consequently, incentivising effective oversight within an arena legislature is likely to be more difficult than within a transformative legislature. When designing in the context of the arena legislature, the designer will need to focus on ensuring a career within an oversight committee presents an attractive career prospect for legislators to invest in.

In addition to permanent oversight committees, legislative institutions can also establish ad-hoc oversight committees. Whereas permanent oversight committees have continuous jurisdictional oversight over specific policy areas, usually designed to ensure routine oversight of government departments or special cross-cutting policy areas,[[1320]](#footnote-1320) *ad-hoc* committees can only exist for a limited period of time and have considerably narrower jurisdiction, which focuses mainly on a specific issue.[[1321]](#footnote-1321) An *ad-hoc* committee can be established as a means of anticipating problems ahead of time, or as a reaction to a fire alarm being triggered. In the former case, an *ad-hoc* committee is established as part of a sunset or annual review clause within the specific bill. Thus, these ad-hoc committees monitor how the legislation or a specific provision within legislation is being implemented by political actors and reporting their findings to the parental chamber. Ad-hoc committees may also be established in reaction to a fire alarm being triggered. In practice, this is likely to be a less common occurrence, particularly if a permanent legislative committee triggers its own investigation into the matter.

Once either a permanent or ad-hoc oversight committee has pursued its investigation and interrogated the relevant political actors for information and explanations about their behaviour, the committee will publish a report for the main chamber to digest. These reports are valuable in at least three senses. First, the report itself can recommend (or demand) amendatory action. Second, reports provide the necessary information for legislators to use in plenary debates, questions and interpolations as a means of further holding political actors to account. Third, reports provide opportunities for the legislature to anticipate future problems, which will require vigilance or must be considered when scrutinising similar future bills.[[1322]](#footnote-1322) Unfortunately, there is no guarantee that the main chamber or a political actor being held to account will respond to the committee’s recommendations.[[1323]](#footnote-1323) Whether a political actor responds will be conditional on the willingness of the committee and the main chamber to further pursue the matter and place pressure upon the actor. Comparative empirical data on the success rate of committee recommendations is limited. Nevertheless, Meghan Benton and Meg Russell’s research on Select Committees within Westminster found that their recommendations were considered and often accepted, in some form, by the executive.[[1324]](#footnote-1324) Therefore, we can conclude that oversight committees provide opportunities for police patrol oversight that bring about informational, explanatory and amendatory forms of political accountability within a legislative institution.

#### Auditors and Anti-Corruption Agencies

Legislative institutions can also establish through legislation external actors to assist with their ability to hold political actors to account. Auditors or anti-corruption agencies are external bodies which provide informational and explanatory forms of accountability. Both auditors and anti-corruption agencies are best classified as police patrol, as the legislature establishes to provide routine patrols of certain policy areas and activities, for violations. Both auditors and anti-corruption agencies are useful mechanisms for collecting information and explanations from political actors about their behaviour. Auditors patrol for violations by performing financial and legal compliance audits of the governmental and bureaucratic behaviour and presenting their findings back to the legislature via annual or periodic reports.[[1325]](#footnote-1325) Auditors can also work closely with oversight committees to further enhance the legislature’s ability to collect information necessary for holding political actors to account.[[1326]](#footnote-1326) Riccardo Pelizzo and Frederick Stapenhurst describe the relationship between auditors and the legislature as symbiotic. For the legislature, auditors are vital for reducing the information gap between themselves and their political agents, and the auditor provides the legislature with independent and accurate information about the behaviour of the political actor. However, for auditors to be effective, they must have sufficient resources and staffs, and therefore they are dependent on securing their budgetary feed from the legislature.[[1327]](#footnote-1327) Anti-corruption agencies perform a similar role, in that they also patrol for violations, investigate wrong-doing and report their findings to the legislature.[[1328]](#footnote-1328) In essence, auditors and anti-corruption agencies provide a catalyst for other forms of accountability to occur within the legislature.

#### The Legislative Ombudsman

The Legislative Ombudsman is another example of an external body which is established to assist the legislature in providing oversight between elections. Whereas auditors and anti-corruption agencies are police patrol mechanisms which directly serve the interests of the legislature, the legislative ombudsman, in contrast, is a fire alarm mechanism, that serves the needs of the citizens. Through establishing an ombudsman, the legislature can enable the citizens to monitor the behaviour of political actors between elections. The ombudsman provides a fire alarm mechanism that can be triggered by citizens who believe they have been a victim of misadministration or poor behaviour by political actors.[[1329]](#footnote-1329) The ombudsman’s role is therefore to assist the legislature, through investigating complaints on behalf of the political community.[[1330]](#footnote-1330)

Once a citizen has triggered an alarm and the issues falls within the ombudsman’s statutory jurisdiction, the ombudsman will have responsibility to investigate the complaint and potentially the merits of the decisions taken by a political actor. If appropriately equipped, the ombudsman will have the statutory powers necessary to collect information and summon the relevant political actors to explain and justify their actions.[[1331]](#footnote-1331) At the end of their investigation, if the ombudsman concludes that maladministration has occurred, they will publish a report containing suggestions to remedy the affected citizen.[[1332]](#footnote-1332) However, the ombudsman may lack the statutory powers to enforce said remedies, if a political actors resists.[[1333]](#footnote-1333) Although the ombudsman may not always be able to enforce their recommendations, they are still required to report to an oversight committee within legislatures, notifying of their findings and the failure of political actors to respond. In this sense, even if the legislative ombudsman fails to provide an amendatory form of accountability, it may still nevertheless secure informational and explanatory forms of accountability. Furthermore, in reporting their investigations to the legislatures, the legislative ombudsman can provide information which it might have lacked otherwise, thus reducing asymmetrical information gaps between the legislature and their political agents.[[1334]](#footnote-1334)

Nevertheless, the effectiveness of the legislative ombudsman is dependent on the statutory framework established to regulate its role. For example, some restrictions might be prudent, such as limiting the ombudsman’s jurisdiction to those areas which are not covered by other complaint mechanisms.[[1335]](#footnote-1335) On the other hand, the statutory framework might constrain the ombudsman’s ability to investigate certain issues, in turn constraining the political community’s ability to hold their political actors to account. For example, in the United Kingdom, the Parliamentary Ombudsman is regulated through the *Parliamentary Commissioner Act 1967*. Controversially, Section 5 of the Act requires that citizens who wish to trigger the parliamentary ombudsman as fire alarm, must do so through an intermediary – a Member of Parliament.[[1336]](#footnote-1336) This “MP filter” can be justified as respecting and preserving the MP’s status as the primary representative of the people.[[1337]](#footnote-1337) As was argued above, MPs have an distinct interest in preserving their status as the sole welfare officer or ombudsman for their constituency. By providing constituency services, they can accrue positive PR and votes by standing up for their constituents. However, this has consequences on the effectiveness of the Parliamentary Ombudsman. The filter aims to ensure that in the eyes of voters, it is the MP rather than the Parliamentary ombudsman who solved the issue. In an attempt to prevent the ombudsman supplanting constituency service as the primary fire alarm, the filter casts the ombudsman as a supplementary fire alarm mechanism.[[1338]](#footnote-1338)

Yet as critics have argued, the MP filter unduly restricts citizens’ access to the service, and consequently should be removed.[[1339]](#footnote-1339) First, to access the service the citizen must receive the consent of an MP, if their complaint is to be forwarded to the ombudsman.[[1340]](#footnote-1340) However, an MP may refuse to forward the complaint on the grounds they will handle the matter themselves, through promoting the issue within the legislature. However, this also introduces the risk that an MP may intentionally or unintentionally prevent the fire alarm being triggered, thus frustrating the possibility of accountability occurring. Second, the MP filter hides the ombudsman services away from the political community.[[1341]](#footnote-1341) If citizens are unaware of this fire alarm, they cannot trigger it when they spot problems. Third, certain minority groups, such as those detained in prison, psychiatric hospitals or immigrations centres cannot access the ombudsman service.[[1342]](#footnote-1342) Since these groups already struggle to access their MP because of their incarceration, they cannot in turn access the ombudsman’s support either. It should be noted that in other countries, access to the ombudsman services is not restricted by a legislator filter. Alternatively, the ombudsman could also be empowered by the statutory framework to perform investigation under their own initiative, thus allowing them to also provide police patrol oversight.[[1343]](#footnote-1343)

In general, because of their external nature, auditors, anti-corruption agencies and ombudsmen are not directly affected by whether a legislature is transformative or arena in nature. Their effectiveness is dependent on common variables. First, they must be sufficiently independent of the executive. This requires that the legislature secure and protect their independence from the influence of executive and bureaucratic actors. Second, both the legislature and these external bodies must develop and maintain a strong working relationship. In particular, the onus is on the legislature to provide these external bodies with the legal powers and resources necessary to carry out their oversight duties. Third, as with all other mechanisms discussed above, the effectiveness of these tools is contingent upon the willingness of legislators to act on external actors’ reports and recommendations.[[1344]](#footnote-1344)

#### Freedom of Information Legislation

In addition to constituency services and parliamentary ombudsman, legislators can also provide the political community with another fire alarm mechanism, in the form of freedom of information legislation. Freedom of information legislation empowers citizens and collective groups, such as pressure groups, journalists and NGO’s, to legally demand (subject to statutory limitation) information about the actions of certain political actors. In essence, freedom of information legislation aims to provide opportunities for informational forms of accountability. It is a fire alarm mechanism in the sense that individuals use the legislation when they suspect misbehaviour is occurring, rather than routinely patrolling for violation. Nevertheless, there is still the potential for journalists and pressure groups to use freedom of information legislation as a means of routinely patrolling for violations. There are of course many high-profile citizens (or more accurately journalists) using freedom of information to cast a light on questionable behaviour, such as an abuse of parliamentary expenses,[[1345]](#footnote-1345) but the legislation can be used for less publicised and mundane requests or politically sensitive issues.

Importantly, freedom of information legislation can be used in conjunction with the other oversight mechanisms discussed. In particular, it is a valuable mechanism for enabling citizens to alert their legislators to problems. Benjamin Worthy’s study of Freedom of Information requests within the UK identified multiple examples of citizens and pressure groups passing the information they had successfully received via the legislation to their MPs.[[1346]](#footnote-1346) Legislators themselves can also make use of freedom of information legislation, either in reaction to their constituent concerns or through their own initiative. Unfortunately, empirical evidence suggests legislators in Commonwealth states have made only limited use of their Freedom of Information legislation.[[1347]](#footnote-1347) The sporadic nature of the requests suggests that legislators have used these based upon a gut feeling or hunch, rather than an intentional attempt to systematically acquire information on the behaviour of political actors.[[1348]](#footnote-1348) Worthy theorises that the reason legislators have not made full use of their freedom of information legislation is that unlikely citizens, they have access to other oversight mechanisms, such as parliamentary questions, to acquire information.[[1349]](#footnote-1349) Indeed, one MP interviewed by Worthy suggested there were greater incentives for them to use Parliamentary Questions, as it would often produce quicker “ready-made press releases.”[[1350]](#footnote-1350) Nevertheless, although legislators have limited use of freedom of information legislation, it remains a valuable tool for citizens and is therefore a vital tool within a systemic form of political accountability, that is encouraged through legislative design.

## *Conclusion*

This chapter has demonstrated that legislative design matters because it affects the ways in which legislative institutions organise political life by creating opportunities for political accountability. The existing literature on political constitutionalism had insufficiently explained why legislative institutions were vital to the promotion of accountability. Yet as this chapter has contended, legislative institutions are the link between the political community and the state, a conduit through which the political community attempts to hold the state to account. Although political constitutionalists are right to highlight how electoral politics helps ensure those who exercise state power remain accountable to their community, elections are only one aspect of ordinary politics. In the gaps between elections, the political community is dependent upon the legislature being able to hold political actors to account on behalf of the community. Therefore, legislative design can either empower or constrain the political community’s ability to hold the state to account. Through their design, legislative institutions can provide a resilient, systemic and multi-layered form of political accountability in the periods between elections. Through establishing various police patrol mechanisms and fire alarm mechanisms, legislative designers can ensure the legislatures provide legislators and the political community with the institutional opportunities and resources necessary to oversee the behaviour of their political agents, in turn influencing their behaviour and performance. Political accountability can often be unpredictable and volatile, but through legislative design we reduce the uncertainties of political life and of political accountability.

# VII

# *Conclusion*

This thesis has sought to deliver a new contribution to knowledge through interrogating political constitutionalism’s understanding of legislative institutions and their design. It has argued that political constitutionalism is valuable for making sense of contemporary constitutional orders. Traditionally public lawyers have valued political constitutionalism as a means of challenging aspects of legal constitutionalism, in particular judicial power.[[1351]](#footnote-1351) This thesis has offered a different view, arguing we should also appreciate political constitutionalism as a conceptual theory or model for exploring, explaining and analysing the often overlooked or underappreciated political aspects and practices in our modern constitutions. From this perspective, political constitutionalism is particularly valuable due to its distinctive focus on legislative institutions. Constitutional scholarship has often ignored or looked unfavourably upon legislative institutions.[[1352]](#footnote-1352) Legislatures are often viewed as a threat to the promotion of fundamental rights[[1353]](#footnote-1353) or as being too submissive to the whims of the executive branch[[1354]](#footnote-1354) or simply of reduced relevance when studying modern constitutional orders.[[1355]](#footnote-1355) In contrast, the legislature is at the centre of political constitutionalism’s conceptual model. The political model advances that a constitutional order should be organised around the ordinary democratic process, expressed through the principle of legislative supremacy.[[1356]](#footnote-1356) Consequently, political constitutionalism advances that the legislature should have a primary role in securing constitutional goods, such as political equality, human rights and the rule of law.[[1357]](#footnote-1357) Through advancing and defending this unique normative model of a constitutional order, political constitutionalism has attempted to challenge negative and inaccurate claims about legislative institutions within contemporary constitutional discourse. Accordingly, political constitutionalism should be valued because of its distinctive focus on legislative institutions.

Paradoxically however, relatively little attention had been given to questions regarding how legislative institutions were understood by political constitutionalism and how its understanding might inform issues of legislative design. No consideration had been given as to whether there was a shared understanding about legislatures among political constitutionalists. Nor had any consideration been given as to how political constitutionalism could be used to make sense of issues of legislative design. These gaps within our existing knowledge are troubling because legislatures are political institutions that impose material constraints upon the exercise of political power.[[1358]](#footnote-1358) Through their design, legislative institutions shape and determine how political action is channelled through the ordinary political process.[[1359]](#footnote-1359) Accordingly, we must recognise that the design of our legislative institutions is of great constitutional importance, as it determines the ways in which political life is organised and how our legislative institutions shape, channel and ultimate manage political disagreements. In response, this thesis has sought to provide a valuable contribution to knowledge through interrogating and enhancing political constitutionalism’s understandings about the constitutional significance of legislative institutions and their design. Through refining and improving political constitutionalism, this thesis has aimed to help public law more broadly make better sense of legislatures as a critical component within the political dimensions of a constitutional order. In order to make this contribution, the thesis pursued the following central research question; *how should legislative institutions be designed or reformed according to political constitutionalism?*

Answering this central research question required addressing five secondary questions. First, what is the value of political constitutionalism? Second, what is the institutional content of political constitutionalism? Third, is there any unity of thought among political constitutionalists about legislative institutions? Fourth, why does the design of legislative institutions matter? Fifth, how should political constitutionalism respond to the choices that arise in the process of legislative design? This final chapter provides a summary of the thesis’s central findings, as well as reflections upon whether these findings can have practical implications for real world issues of legislative design, and finally the future research questions that arise out of them.Accordingly, the structure of this final chapter is as follows. To begin with, sections one and two summarise the thesis’s central findings. Section three suggests how normative reflections about legislative design can help improve real-world debates about legislative design, through helping political actors and public lawyers engage in public reasoning. Finally, section four reflects on and proposes future research questions that may further improve political constitutionalism’s institutional content.

## *How are Legislative Institutions understood by Political Constitutionalism?*

Determining *how* political constitutionalism understands legislative institutions required analysing *why* political constitutionalism argues that the constitutional order should be organised around the legislature. Chapter two’s analysis of the existing literature revealed that political constitutionalism contends the legislature is pivotal to ensuring the constitutional order respects the “the circumstances of politics.” This describes the circumstances whereby a political community accepts that it must make a decision in order to perpetuate itself, “even in the face of disagreement about what that framework, decision or action should be.”[[1360]](#footnote-1360) Accordingly, to political constitutionalists, the circumstances of politics apply to questions of policy, principle, and even constitutional design. For the constitution to manage and respect the circumstances of politics, it must function as decision-making framework, premised around the norms of political equality, majority rule and the principle of contestability.[[1361]](#footnote-1361)

Proponents of political constitutionalism deploy these norms in a comparative analysis of legislative and judicial institutions. From this analysis, political constitutionalists have concluded that legislative institutions, as an essential components of ordinary democratic process, are better suited to respecting the circumstances of politics.[[1362]](#footnote-1362) This is because they generally view the ordinary democratic process and representative democracy as largely synonymous.[[1363]](#footnote-1363) Legislatures are understood as institutions that secure political equality among their membership, rely upon majority rule to make decisions, and are capable of contesting their own past actions. Moreover, legislatures are understood as institutions that allow their membership to be contested. Citizens can appoint or remove their legislative representatives via elections.[[1364]](#footnote-1364) Political constitutionalism conceives legislative institutions as pivotal to ensuring the constitution manages and respects the circumstances of politics. Consequently, it advocates that the constitutional order should be organised around the legislature. This requires the principle of legal sovereignty to be vested in the national legislature.[[1365]](#footnote-1365) This ensures the legislature’s statutory outputs are the highest source of law within the constitutional order and prevents the legislature from being constrained at law by its own past decisions or by other constitutional actors, such as the judiciary.[[1366]](#footnote-1366)

Despite the central position of the legislature within the political model, political constitutionalism did not make any detailed claims about the nature of legislature or its design. In response, chapter two engaged in a deeper analysis of the existing literature, by interrogating how the legislature is understood by the three main schools, or as this thesis labelled them, ‘strands’ of political constitutionalist thought. This thesis observed that political constitutionalism’s understanding of democracy was not grounded within a single theory of democracy. Instead, over time different proponents had sought to justify and ground political constitutionalism with different political theories. Consequently, on closer analysis, chapter two detected the presence of liberal, republican and democratic socialist strands of political constitutionalist thought. This challenges the assumption within contemporary public law thought about the degree of relative unity of thought among proponents of political constitutionalism.[[1367]](#footnote-1367) For example, the liberal strands theorised that the political model was necessary to promote individual autonomy.[[1368]](#footnote-1368) The republican strand contended it was needed to promote freedom from domination.[[1369]](#footnote-1369) The democratic socialist strand believed only the political model would allow for the gradual transition towards a socialist state.[[1370]](#footnote-1370)

Since political constitutionalists claim that the circumstances of politics apply not only to questions of policy and principle, but also to questions of constitutional design, it was hypothesised and subsequently demonstrated that these different strands might articulate subtle differences in their understandings of legislative institutions. However, this is not immediately clear from the literature itself, as each strand still appeared to understand the legislature in an often highly abstract and imprecise manner, albeit to different degrees. At one level, this provided an unflattering impression that political constitutionalism viewed all legislatures as the same or sufficiently similar; as black boxes, in which all political inputs are seamlessly be converted into law. However, on a deeper level, it demonstrates a failure by political constitutionalism to sufficiently capture how and explain why legislative institutions matter in relation to political action.

The problem was that political constitutionalists had intentionally or unintentionally avoided addressing questions of institutional design. This thesis detected two approaches that allowed political constitutionalists to avoid reflecting upon complex questions regarding the nature of legislative institutions. The minimalist approach was premised on the belief that in the circumstances of politics, it would be inappropriate for the political model to prescribe anything more than the bare minimum conditions for managing disagreement.[[1371]](#footnote-1371) In embracing this approach, political constitutionalists are reluctant to prescribe institutional arrangements (at least in any real detail), which in turn prevents them developing a more sophisticated understanding of legislative institutions. There is little need to reflect on how the legislature design might affect political action, if one believes this would be to prescribe far too much detail. Consequently, this resulted in some political constitutionalists appearing to understand the legislature as a black box, which had no effect upon political action.[[1372]](#footnote-1372) In contrast, the alternative ‘exceptionalist’ approach advanced the view that the legislature should be understood exclusively through the lens of the UK’s Westminster Parliament, with legislative design simply needing to mimic the Westminster Parliament.[[1373]](#footnote-1373) However, this approach was premised on an insufficiently comparatively and ahistorical approach to understanding legislative institution. There was little attempt to gain insight from other legislatures or to reflect on historical developments that had led to the institutional arrangements of Westminster Parliament.

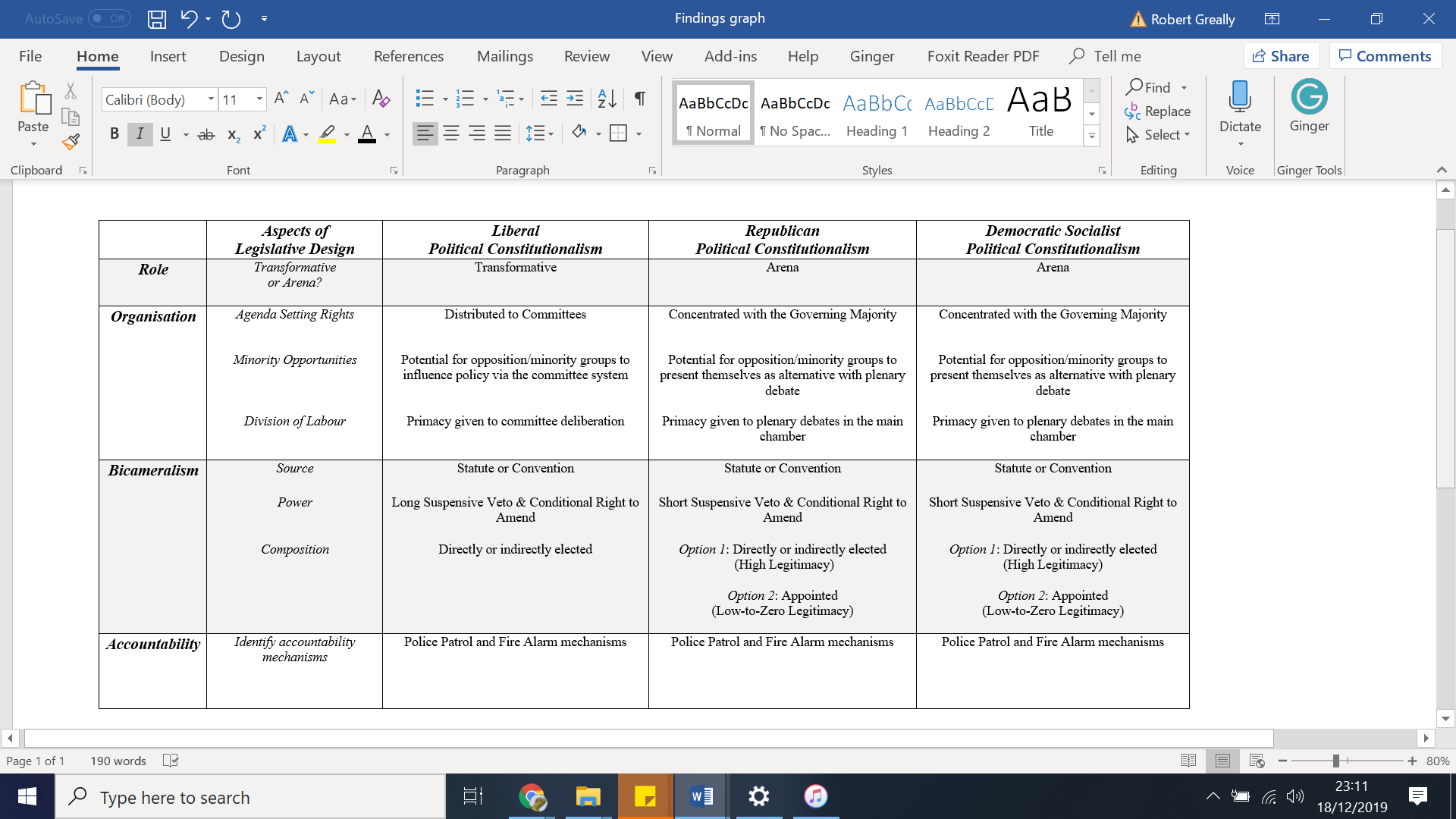
Therefore, in response to the first research question, this thesis’s analysis revealed an unusual paradox. Although political constitutionalism has advanced that the constitutional order should be organised around the legislature, the existing literature frequently displayed an underdeveloped understanding of legislative institutions. Political constitutionalism was insufficiently *institutional* in its understanding. In other words, it did not adequately capture and explain the complexities of the legislature as a political institution because it did not recognise how institutions are, for better or for worse, a material constraint upon the exercise of political power. Drawing upon political institutionalism, this thesis has maintained that institutions, such as the legislature, should be understood as relatively enduring collections of rules, practices and narratives that shape and channel political action through providing resources and constraints upon political actors and citizens.[[1374]](#footnote-1374) To overcome this paradox and enhance the political model’s usefulness as a conceptual model explaining, illuminating and re-appraising the constitutional importance of legislatures, political constitutionalism needed to synthesise insights from institutionalism. Through embracing institutionalism, political constitutionalism can become “institutional” in its explanations and analysis of political institutionalists such as the legislature. Institutionalism enables political constitutionalism to draw out those hidden or underappreciated values and practice, which are crucial to our understandings about a constitution’s political dimensions. Accordingly, the thesis central research question aimed to draw out these values in relation to the design of legislative institutions, and through reflecting upon how political constitutionalism can respond to issues of legislative design.

## *How should a Legislative Institution be designed according to Political Constitutionalism?*

Having addressed political constitutionalism’s value, its insufficiently institutional content and the lack of unity among proponents, the thesis answered the central research question through demonstrating the constitutional importance of legislative design in managing political disagreement, through mapping out and applying the different strands of political constitutionalism to issues of legislative design. This task was complicated because the existing political constitutionalist literature was insufficiently institutional in its understandings about legislatures. Therefore, this thesis applied political constitutionalism to several key design questions, each of which required political actors to confront design dilemmas and makes choices with incommensurable trade-offs. Since legislatures are large and complex institutions, it was not possible to cover every design issue. Instead, analytical priority was given to four common design questions: *What should the legislature’s role be within a political constitution? How should the legislature organise political life according to political constitutionalism? How can bicameralism be institutionalised in a way which is compatible with political constitutionalism? How should political accountability be institutionalised through the legislature’s design?* Through applying insights from the existing political constitutionalist literature, the thesis sought to identify how the liberal, republican and democratic socialist strands of political constitutionalism could respond to these design questions. Importantly, these strands can respond to these design dilemmas in different ways and yet remain compatible with political constitutionalism’s goal of ensuring the constitutional order respects the circumstances of politics.

This thesis’s findings are subject to two important caveats: First, the thesis adopted a rational choice approach to institutional design. It assumed institutional rules and practices shaped political action through incentivising political actors to behave in certain ways.[[1375]](#footnote-1375) Accordingly, this thesis’s analysis assumed political actors act rationally. However, in practice, political actors may not always behave rationally all the time. As will be explained in further detail in section three, human agency has important implications for institutional designing, as the rational and irrational behaviour of political actors can distort or prevent institutional designs working as the designer intended. Second, to avoid addressing cultural, historical or political specific variables, this thesis adopted a universalistic and non-contextualised approach to addressing questions of legislative design. In practice, legislative design and reform will need to take in account these variables alongside other constraints, such as time and financial limitations.

As discussed above, because this thesis identified three main strands of political constitutionalist thought within the literature, the thesis hypothesised that the subtle differences in how these strands understand ordinary democratic process, and consequently the legislature role within it, would result in different responses to questions of legislative design and reform. In turn, this would result in different understandings about how the legislature should be designed and reformed. This hypothesis was proven correct. The liberal strands provided a distinctively different response to these design questions. In contrast, the republican and democratic socialist’s strands provide mostly similar visions about how the legislature should be designed. This thesis’s finding are summarised in figure 1.1 and in more detail below.

*Figure 1.1 own elaboration.*

### *Legislative Design According to the Liberal Strand of Political Constitutionalism*

According to the liberal strand, the constitutional order should respect the liberal notion that individuals are moral agents “endowed with dignity and autonomy” and should be trusted “*en masse* with the burden of self-government.”[[1376]](#footnote-1376) This strand is most visibly expressed through the works of Jeremy Waldron.[[1377]](#footnote-1377) In response, it maintained that within the ordinary political process, the legislature should ensure decisions - regarding the deployment of the state’s coercive power against the individual - are reached through a decision-making process that incentivises legislators to engage in responsive deliberation and to recognise their duty of care towards the individual.[[1378]](#footnote-1378)

Chapter three addressed the first design question which was *what should the legislature role be?* This thesis observed that although legislative institutions perform a similar set of core functions *–* law-making, linkage, enabling and constraining the executive, legitimation and political training *–* the performance of these functions varies from state to state because legislatures are institutionalised differently from one another. Comparative scholars have observed that legislative institutions perform either a transformative or an arena role within their democratic societies.[[1379]](#footnote-1379) The role of a transformative legislature was to transform electoral inputsthrough fostering compromise.[[1380]](#footnote-1380) In contrast, the arena legislature performed a different role, representing electoral inputs through formally authorising them into law and providing a formal arena for political factions to influence future public debates and elections.[[1381]](#footnote-1381) Therefore, determining the legislature’s role required choosing whether the legislature should perform a transformative or an arena role. Accordingly, the first design dilemma was whether legislature perform a transformative or arena role within the ordinary political process? This thesis concluded the liberal strand would argue the legislature should perform a transformative role within the ordinary political process. This is because the liberal strand believed the legislature should be a place for deliberation and compromise. Accordingly, the legislature should, through deliberation, *transform* competing electoral inputs into deliberative compromises.[[1382]](#footnote-1382)

Chapter four addressed the question of *how to organise the legislature* to perform a given role. Institutions organise political life through establishing formal and informal rules and practices that provide political actors with resources for and constraints upon their actions.[[1383]](#footnote-1383) This thesis observed that within legislative institutions plenary time was the most precious resource[[1384]](#footnote-1384) Consequently, the second design dilemma was how plenary resources should be distributed between majority and minority groups, as well as the division of labour within the legislature. Agenda setting rights are formal rules and informal practices that determine how plenary time is spent within the legislature.[[1385]](#footnote-1385) This thesis’s analysis suggested that in order to incentive the legislature to perform a transformative role, two main types of rules or practices need to be institutionalised. First, the rules that govern who controls the legislative agenda should distribute agenda-setting rights between multiple groups and actors. The most effective way to achieve this was to distribute agenda-setting rights across multiple independent committees.[[1386]](#footnote-1386) Second, the legislature’s rules and practices should guarantee a division of labour that ensures more plenary time is spent within committee deliberation. This is because there is strong evidence to suggest committee structure is better suited at incentivising deliberation and compromise than the main chamber.[[1387]](#footnote-1387) Moreover, committees provide minority actors and groups with the opportunity to influence and shape the policy agenda. Committees allow the production of legislation to become a more collaborative-based effort between members of the majority and the minority.

Chapter five addressed the question of *how bicameralism could be institutionalised in a way that was compatible with political constitutionalism.* Bicameralism presents an extremely complex design dilemma regarding how the legislature should institutionalise the working relationship between two legislative chambers. This involves determining whether the legislature should institutional strong or weak form of bicameralism. The former institutionalises a relatively symmetrical relationship between two chambers; the latter institutionalise an asymmetrical relationship between the two chambers, normally at the expense of the second chamber.[[1388]](#footnote-1388) Somewhere between these two extremes is what is known as “a one and a half-house” form of bicameralism. [[1389]](#footnote-1389) This institutionalises a relationship that allows the first chamber to be the more powerful of the two chambers, but prevents it from being able to easily ignore the second chamber’s views. However, this question is far from straightforward, because in practice one must account for the subtle interplay between a second chamber’s formal constitutional powers and the legitimacy of its composition.[[1390]](#footnote-1390) The liberal strand ought to adopt “a one and a half-house” form of bicameralism, as a means of promoting deliberation and a duty of care.[[1391]](#footnote-1391)

This thesis’s analysis suggested strong second chambers can help incentivise the legislature to perform a transformative role through promoting inter-cameral deliberationand compromise.[[1392]](#footnote-1392) In response, this thesis identified that to incentivise a transformative role, one should seek to institutionalise a second chamber with strong formal powers and a directly elected membership. Importantly, and regardless of the strand, in the absence of an entrenched constitution a second chamber’s powers should be established through contestable formal rules such as legislation, or through informal practices, such as a political convention. This thesis recommended providing a second chamber with a suspensive veto and a conditional right to amend legislation. Bicameral scholars have observed that in practice bicameral power is also determined by political legitimacy.[[1393]](#footnote-1393) The legitimacy of a second chamber may informally enhance or constrain the second chamber’s formal powers. In a political constitution, legitimacy will be conditioned by the extent to which the second chamber conforms to the norms of political constitutionalism. Accordingly, to incentivise strong bicameralism will require the second chamber’s composition to be directly or indirectly elected. Together this should institutionalise a bicameralism relationship that is akin to what Bruce Ackerman labels “a one and a half-house” situation,[[1394]](#footnote-1394) in that it avoids a legitimacy-tie developing between the legislative chambers.

Chapter six addressed the final design choice concerning *how political accountability should be institutionalised.* The liberal strand advances institutionalising accountability was an important way for the legislature to respect the individual as moral agent. As with all the strands, it recommended ensuring legislators are rendered accountable through the electoral system. Importantly, in reaction to the strand’s reduced emphasis upon the concept of electoral mandate, it sought to ensure legislature was accountable to all, rather than just the electoral majority. However, the liberal strand did not address how this could be achieved in practice. In response, this thesis sought to analyse and explain the value of multiple accountability mechanisms that can be adopted to promote accountability through the legislature. In response, this thesis argued that political accountability required institutionalising legislative oversight through multiple accountability mechanisms. Legislative oversightoccurs when legislators, individually or collectively, engage in behaviour that intentionally or unintentionally impacts on the behaviour and performance of certain political actors, such as the executive, legislative committees, the leaders of the governing majority and individual members.[[1395]](#footnote-1395) Legislative oversight should be institutionalised through a combination of multiple “police patrol” and “fire alarm” accountability mechanisms.[[1396]](#footnote-1396) Police patrol mechanisms are rules and practices that enable the legislature or via specific groups and actors to patrol for trouble. This includes rules that establish oversight committees, plenary debates, question time sessions, and interpolations, auditors and anti-corruption agencies. In contrast, fire alarm mechanism are mechanisms used by citizens to alert the legislature to wrong-doing by political actors. These primarily included rules which encouraged legislators to provide constituency-based services, and rules that establish legislative ombudsmen and freedom of information. Importantly, these fire alarm mechanisms can be used to spring police patrols.

To conclude, the liberal strand of political constitutionalism posits that legislature should be designed to perform a transformative role within the ordinary political process. Consequently, this requires that the legislature should be organised to ensure the committee system is the focal point of legislative activity. This requires institutionalising the distribution of agenda-setting rights to an independent committee system. Furthermore, the legislature should also institutionalise a “one and a half-house” strong form of bicameralism. This can be achieved through an elected second chamber with the powers to delay and amend legislation. Finally, to institutionalise political accountability, the legislature should establish a range of accountability mechanisms including police patrol and fire alarm based mechanisms.

### *Legislative Design According to the Republican and Democratic Socialist Strand of Political Constitutionalism*

This thesis’s analysis showed that both the republican and democratic socialist strands made broadly similar claims about legislative design. Therefore, it is easier to discuss their claims together, avoiding unnecessary repetition.

According to the republican strand, the constitutional order should promote freedom-via-non-domination. Republican political constitutionalists contend only the political model can avoid domination. Most republican theorists believe the avoidance of domination does not necessarily require adoption of the political model. The republican strand is exemplified through the works of Richard Bellamy and Adam Tomkins.[[1397]](#footnote-1397) Importantly, their accounts are noticeable different. Bellamy presents a universalistic and non-contextualised normative model. In contrast, Tomkins deploys republicanism as a means of interpreting and normativising the UK’s predominately political constitution.

The democratic socialist strand advances that the political model can provide necessarily constitutional conditions for enabling the gradual transition towards socialism. There is no one single author or work that can best exemplify the democratic socialist strand. Rather, the strand has been expressed over time through various authors. The strand’s main claims have been visibly expressed during two periods of British constitutional history. The strand originates in late 19th century/early 20th century thought. During this period, various socialist theorists and politicians sought to reinterpret and repurpose Britain’s existing constitutional order to accommodate their socialist goals.[[1398]](#footnote-1398) More recently, the strand has been expressed through the works of left-leaning public lawyers such as J.A.G. Griffith,[[1399]](#footnote-1399) Keith Ewing[[1400]](#footnote-1400) and Danny Nicol.[[1401]](#footnote-1401) These public lawyers have sought to defend the political model from the perceived shift towards liberal legalism (or legal constitutionalism) in contemporary public law thought and reform.

On the question of *the legislature’s role within a political constitution*, Chapter Three concluded that both the republican and democratic socialist strands would argue the legislature should perform an arena role. The arena legislature’s role is to represent electoral inputs and formally authorise them into law while simultaneously providing a formal arena for political factions to influence future public debates and elections. This is because the strands understand the electoral system as the ultimate decision-making site within the constitution as a deliberative system. Accordingly, the legislature’s role is not to substantially modify or transform electoral demands. Instead, its role is simply to enact the electorate wishes into law.[[1402]](#footnote-1402) At the same time, the legislature should perform an important role in providing a formal arena for the majority and minority groups to communicate their views via plenary debate. Deliberation also occurs through development of policy inside political parties and through wider public deliberation, periods between and in the run up to elections. Accordingly, substantive compromise is understood to occur outside of the legislature, rather than from within the legislature.[[1403]](#footnote-1403)

Consequently, the republican and democratic socialist strands must adopt a different understanding about how the legislature should organise political action. Chapter Four’s analysis concluded that to institutionalise the legislature to perform an arena role, it would need to be organised in the following ways. First, the rules that govern who controls the legislative agenda should ensure these rights are concentrated with the majority. This could be achieved through an office or committee whose membership is completely compromised of members of the governing majority. Second, the chamber needs to institutionalise public debate.[[1404]](#footnote-1404) This can be achieved through requiring the government to justify their policies and face opposition in plenary debates. Rules and practices should bestow upon the minority groups opportunities to present themselves and their policies as an alternative to the governing majority.[[1405]](#footnote-1405) This could be achieved through rules establishing parliamentary question time, plenary questions, interpellations and allowing the opposition to control the agenda on certain days. The legislature should provide competing groups with relatively “equal access to electorate.”[[1406]](#footnote-1406) Third, rules and practices that ensure legislature’s division of labour favours the main chamber over the committee system. The best way to achieve this is through ensuring committees perform an investigatory role, rather than a policy development role. Committees should focus on performing the technical scrutiny of bills and acquiring information on behalf of the main chamber.[[1407]](#footnote-1407) When committees perform this function, they can enhance the amount of time for debating and the quality of debate within the main chamber.

Since the republican and democratic socialist strands suggest the legislature should perform an arena role, their response to the question of bicameralism also differs from the liberal strand’s response. Moreover, both strands have questioned the value of bicameralism within a political constitution. For example, Richard Bellamy infers bicameralism can result in domination.[[1408]](#footnote-1408) Similarly, democratic socialists have seen bicameralism as a capitalist means of supressing the goals of socialist parties.[[1409]](#footnote-1409) Therefore, this thesis concluded that only a weak form of bicameralism could be compatible with these strands. Under weak-form bicameralism, the second chamber is subservient to the first chamber because it lacks the powers or political legitimacy necessary to challenge the first chamber. Accordingly, the second chamber cannot transform the preferences of the first chamber. To institutionalise weak-form bicameralism, statute or convention should constrain the second chamber with limited powers to apply short suspensive veto and conditional rights to amend. The short suspensive veto limits the second chamber’s ability to delay legislation for short periods, conversely empowering the first chamber with freedom to quickly over rule the second chamber’s preferences if it so desires. Interestingly, on the choice of composition and its relationship with the legitimacy of the second chamber, this thesis proposes two options. The first option is to ensure the second chamber has an elected or indirectly elected composition. On the one hand, this would ensure the chamber is legitimate with norms of political constitutionalism. On the other hand, there is the risk that democratic legitimacy will in practice enhance the second chamber’s powers. Alternatively, the second option is to intentionally deprive the second chamber of democratic legitimacy, through ensuring it is comprised of appointed members. Under this option, the lack of legitimacy further constrains the second chamber’s ability to challenge the first. Inevitably, choosing between these options involves weighing up the importance of the second chamber’s legitimacy against wider considerations about the legislature’s appropriate role within a political constitutionalism

Finally, Chapter Six addressed the question of how to institutionalise accountability. Both the republican and democratic socialist strands emphasised the importance of accountability, albeit for different reasons. For the republican strand, accountability is necessary to avoid domination. In contrast, the democratic socialists view accountability as a means of removing those who would implement socialist goals, and for improving the administration. Both strands tended to be focused on elections and parties as principal mechanisms for promoting accountability. However, like the liberal strand, they failed to explore how the legislature could provide other mechanisms which ensure the legislature is both accountable to people and can work to hold others to account on behalf of the people. Accordingly, as with the liberal strand, this thesis recommended that legislature should perform oversight through a combination of multiple police patrol and fire alarm accountability mechanisms.[[1410]](#footnote-1410)

To conclude, these findings suggest there is little unity of thought among the different strands of political constitutionalist thought regarding how the legislature should be designed. The liberal strand’s understandings about the legislature results in a different approach to institutional design then the approach taken by the republican and democratic socialist strands. Importantly, the different approaches taken by the strands suggest there are multiple ways for a legislative institution to shape and channel political action in ways which respect the circumstances of politics. These findings should help political constitutionalists further reflect on the implications of their understandings and they might respond real world issues of institutional design and reform. Yet this raises the question; can political constitutionalism understandings influence the design and reform of real-world legislative institutions?

## *Legislative Design as Ordinary Politics*

It might be argued that although reflecting on issues of legislative design is an interesting exercise of normative thinking, it has no practical value, because real-world legislatures cannot really be designed. Depending on your perspective, legislative institutions might appear to be organic products, which have evolved over time because of certain structural variables, rather than through intentional design. Conversely, from another perspective, legislative institutions might appear to be monolithic, impervious to the whims of those interested in designing and reforming. This is the classic dilemma of agency versus structure: are legislative institutions the result of deliberate choices by policy makers (agency) or the result of underlying structural forces that shape them? For our purposes, this dilemma leads us to ask whether legislative design is actually possible, and if so, can normative understandings have practical value or influence? In response, this section argues that we must recognise that institutional design is possible and that it is an inherently political activity. Institutions are maintained and reformed by human agency, sometimes acting in response to structural variables, and sometimes acting by their own free accord.[[1411]](#footnote-1411) Ultimately however, legislative institutions are designed and redesigned through political disagreement between political actors. As a result, there is potential for using political constitutionalism’s understandings about how legislative institutions should be designed as a way of encouraging and helping political actors reflect upon and clarify their own normative beliefs about the legislature’s design.

Throughout this thesis, it has been argued that legislatures should be understood as political institutions, which shape and channel political action, through the provision of resources and constraints upon political actors. This understanding has drawn upon the prominent institutionalists James March and Johan Olsen’s definition of institutions as “*relatively* enduring collection of rules and organized practices, embedded in structures of meanings and resources that are *relatively* invariant in the face of turnover of individuals and *relatively* resistant to idiosyncratic preferences and expectations of individual and changing circumstances” (emphasis added).[[1412]](#footnote-1412) March and Olsen’s use of the word ‘relatively’ is significant, because it highlights that institutions have a Janus-faced quality. Institutions enable and constrain political actors through rules, practices and narratives and yet these rules, practices and narratives are themselves created by political actors.[[1413]](#footnote-1413) To explain this Janus-faced quality requires understanding of the relationship between institutional change and human agency.

First, although legislative institutions provide political actors with stability, they are not static in nature; rather, institutions change over time. For example, it would be extremely difficult to observe an institution like the Westminster Parliament over the course of the 20th century and conclude nothing had changed.[[1414]](#footnote-1414) In response, institutionalists (particularly those belonging to the rational choice and historical institutionalist schools of thought) theorise that institutions change through a combination of gradual path-dependency and periods of punctured equilibrium.[[1415]](#footnote-1415) Path dependence is used to explain why institutional rules, practices and narratives remain sufficiently stable over periods of time. Path dependence suggests that once one starts down a specific path, the cost of reversing direction or changing paths becomes extremely high.[[1416]](#footnote-1416) As Paul Pierson explains, the perceived benefits of the current path, in comparison to the possible benefits offered by other paths, increases over time because “the costs of exit - of switching to some previously plausible alternative – rises.”[[1417]](#footnote-1417) Political actors are deterred from switching because it can have costly short and long-term consequences. In the short term, changes can significantly disrupt their day-to-day activities. However, even if switching would help secure a goal that made it worth accepting a degree of short-term disruption, political actors may still fear the long-term consequences of switching and because there are uncertainties about whether a new path would benefit them in the long run. Vivien Lowndes and Mark Roberts highlight the QWERTY keyboard as a prime example of path-dependency.[[1418]](#footnote-1418) We retain the QWERTY layout because we fear the costs of switching to a different layout will be too high. In contrast, change can occur through moments of punctuation in the institutional equilibrium. Moments of crisis, caused by endogenous and exogenous shocks, provide critical junctions at which political actors can switch paths, changing their institutional rules and practices.[[1419]](#footnote-1419)

Second, although legislative institutions can change, they cannot change by themselves. Legislative institutions are dependent upon political actors to bring about change.[[1420]](#footnote-1420) Inevitably, this requires that political actors have some degree of agency to bring about a change within their institution. It is important to recognise that although legislative institutions impose constraints upon political actors, these constraints do not eliminate their autonomy, they merely supress it to a certain degree within certain situations. The reason institutions merely suppress agency is because of the inherent weaknesses involved in the making and following of rules, practices and narratives. As Wolfgang Streek and Kathleen Thelen remind us, “the enactment of a social rule is never perfect and that there always is a gap between the ideal pattern of a rule and the real pattern of life under it.”[[1421]](#footnote-1421) As a result, change can occur through the ongoing relationship between institutional rule-makers and rule-takers. Rule-makers are often constitutional designers and legislative reformers who establish the institution’s rules, practices and narratives; in essence, this thesis’s hypothetical designer. Rule-takers are those who have to live under these rules. Importantly, the ruler-maker may also become the rule-taker under their own rules. Their relationship is always one of ambiguity and flexibility, creating the potential for agency. Streek and Thelen provide four reasons for this. First, “the meaning of a rule is never self-evident and always subject to and in need of interpretation.”[[1422]](#footnote-1422) The rule maker cannot be fully aware of all situations in which his rules might need to be applied. Therefore, the rule-maker issues commands in an abstract way providing the rule taker with some degree of discretion over how they interpret and apply the rule in a given situation.[[1423]](#footnote-1423) Second, even the honest application of the rule-maker’s command can result in unforeseen consequences. Consequently, rule-makers may need to be adaptive and engage in a process of feedback, through observing the application of their rules.[[1424]](#footnote-1424) For example, we observed in chapter six how legislative institutions establish “police patrol” and “fire alarm” mechanisms to gain feedback regarding how political actors have followed and applied their laws. Third, in addition to following rules, some rule-takers may actively revise the rule-maker’s commands, for example by exploiting ambiguities.[[1425]](#footnote-1425) Fourth, the rule-maker is always limited in their abilities to “prevent and correct unintentional or subversive deviation” by rule-takers.[[1426]](#footnote-1426) As Lowndes and Roberts aptly point out, “in politics… rules exist to be broken as well to be obeyed!”[[1427]](#footnote-1427) Accordingly, the practical limitations of institutional constraints create the opportunity for agency, and agency in turn creates possibility of change.

Nevertheless, when it comes to institutional designing, human agency is a double-edged sword. Human agency simultaneously creates the potential for institutional design and the potential to frustrate it. As Streek and Thelen’s account of the relationship between institutional rule-makers and rule-takers implies, attempts at institutionalising new rules, practices and narratives can be fraught with hurdles. Since legislative institutions are typically large organisations made up of hundreds of political actors, the circumstances of politics will inevitably arise during any process of institutional design. Different political actors, with different normative beliefs and goals, will disagree about how their legislative institutions ought to shape and channel political action. As a result, Thelen has argued that political disagreement can constrain institutional design and reform in at least three main ways. First, “institutional designers can never fully control the uses to which their creation are put.”[[1428]](#footnote-1428) Over time, the rule-maker’s normative designs may be misapplied, blurred, forgotten, frustrated or repurposed by political actors. Second, in practice the need to overcome disagreement means “institutional-building is often a matter of political compromise.”[[1429]](#footnote-1429) However, this creates problems because coalition building can foster the need for ambiguous institutional rules, practices and narratives to allow competing groups to agree to disagree on their precise meanings.[[1430]](#footnote-1430) Third, the losers of any disagreement over the adoption or abandonment of an institutional constraint will not simply disappear.[[1431]](#footnote-1431) Since institutional constraints are inherently political products, they will give rise to disagreement and active resistance. In one sense, old logics of appropriateness might haunt and actively undermine newer logics. In another sense, losers may “find ways to occupy and redeploy institutions not of their own making.”[[1432]](#footnote-1432) Unsurprisingly, Robert Goodin suggests it would be more appropriate for us to recognise that “there is no single design or designer. There are just lots of localised attempts at partial design cutting across one another.”[[1433]](#footnote-1433)

Consequently, one must accept that regardless of how intelligent or normatively desirable political constitutionalism’s understandings of legislative design may appear, there is always the risk that our attempts to apply them may “fall upon the procrustean rocks of day-to-day partisan politics with its relatively short time-cycles and irrational incentives.”[[1434]](#footnote-1434) Even in the event that a design coalition can overcome these hurdles, the rule-maker will need to ensure their designs stick. This requires the coalition supporting the rules to actively maintain and enforce them.[[1435]](#footnote-1435) Institutional maintenance requires determination from the designer and a willingness to secure their design through the enforcement their new logics of appropriateness upon political actors.[[1436]](#footnote-1436) Nevertheless, rule-makers cannot be dogmatic in their approach; they must also be sufficiently adaptive;[[1437]](#footnote-1437) as ensuring their new logics stick requires making sure their logics must also be capable of adapting to new situations and circumstances. As Goodwin stresses, institutional designs must be capable of binding the behaviour of political actors, to deter them from engaging in deviate actions, yet they cannot be so brittle that they are easily destroyed by changing circumstances and must be capable of adapting to new situations.[[1438]](#footnote-1438)

Although these hurdles reveal the difficulties of institutional design, they also reinforce the practical importance that normative understandings can have upon disagreements about institutional designs. As Vivien Lowndes and Mark Roberts conclude, “institutional design with a capital ‘D’ is likely to fail (in the sense of not meeting all of its objectives); but it is also an inevitable and entirely appropriate aspiration for political actors.”[[1439]](#footnote-1439) As they quite rightly point out, we must recognise that political actors will continue to attempt to redesign their legislative institutions, regardless of these practical hurdles. Institutional design must be understood as an inherently political activity and consequently an undeniable aspect of ordinary politics. The circumstances of politics mean political actors will always disagree about their legislative institution’s design and will always compete with one another to become the institutional rule-maker. It is partly through the process of debating issues of institutional design that political actors express their values and understandings about how the ordinary political process should and does operate. In practice, debates about institutional design can help render the hidden values that underpin our existing political institutions more visible.[[1440]](#footnote-1440) As March and Olsen rightly point out, debates about legislative design and reform provide a unique opportunity for discovering, clarifying and elaborating our normative values.[[1441]](#footnote-1441)

These debates about legislative design are constitutionally significant because legislatures are public serving institutions. Debates about legislative design and the normative values that are and should be institutionalised within our political institutions matter because the legislature provides opportunities and constraints not just upon elite political actors, but also upon ordinary people. They shape and channel the ways in which all our voices can be heard; our ability to participate in and influence the decision-process, and the rules and practices that regulate our political communities.[[1442]](#footnote-1442) Legislative institutions must serve the needs of public, not just the political elite. Political actors engaged in debates about legislative design should be under a strong obligation to justify their views in a publicly defensible manner.[[1443]](#footnote-1443) Unfortunately, given that legislative actors will be the most directly affected by any changes to the legislature’s design, there is a dangerous temptation for them to engage in debates about institutional design in an insular and elite focused manner. Political actors may become short sighted in their attitudes towards institutional design, potentially jeopardising important constitutional values for their own short-term goals. This temptation must be resisted. Debates about the design of public serving institutions should always aim to be public focused. Legislators must engage in public reasoning, expressing their views in a truthful and publicly accessible manner that appeals to the public good, rather than their own self-interests.

To help do this, legislators will need to reflect on the design choices before them, and on the normative values that underpin them. It is here that the different strands of political constitutionalism’s understandings about legislative design can be of practical value. As we have seen throughout this thesis, questions of legislative design - whether they be about the legislature’s role; how it organises and distributes resources; how different bicameral relationships can be institutionalised; and how it can provide the means for promoting political accountability - all raise constitutionally significant and yet often underappreciated issues regarding how the legislature manages political disagreement. Although the strands present different answers to these questions, each strand has sought to justify its reasoning in relation to the promotion of important constitutional values and goods. Therefore, they have the potential to help political actors reflect and deliberate upon issues of legislative design, in a way that respects the circumstances of politics.

For example, consider the recent debates around *Standing Order 14* atthe Westminster Parliament within the UK’s predominantly political constitution. *Standing Order 14 (1)* states: “government business shall have precedence at every sitting.”[[1444]](#footnote-1444) *Standing Order 14* is a formal institutional rule, which in effect concentrates legislative agenda settings rights with the governing majority’s leaders. It is the linchpin of executive dominance within the House of Commons, and key to ensuring the Westminster Parliament performs a predominantly arena role within the UK’s political constitution. On the 25th of March 2019, *Standing Order 14* became the subject of deep political disagreement. A heavy combination of endogenous and exogenous shocks - the public voting to leave the European Union via a referendum in 2016; the 2017 election result producing a minority government, and the tight time-constraints and consequences imposed by the UK’s withdrawal from the EU[[1445]](#footnote-1445) - culminated to form a critical junction in which it became possible for *Standing Order 14* tobe modified or abandoned. Fearing the UK would crash out of the EU on March 29th without a deal, a cross-party group of MPs tabled a motion to temporarily suspend *Standing Order 14*. The Commons voted 327 to 300 to suspend *Standing Order 14* for several days, allowing them to experiment with various options that might prevent the UK leaving the EU without a deal.[[1446]](#footnote-1446) The competing attitudes adopted by the different strands of political constitutionalism towards the issue of agenda-setting rights could have enhanced public reasoning through allowing public lawyers and legislative actors to better make sense of the issues before them and the normative values that are institutionalised through *Standing Order 14.* For example, those who embrace a liberal conception of political constitutionalism would emphasise reforming Standing Order 14 to help fostering compromise and deliberation following divisive referendum and election result. In contrast, those who embrace a more republican or democratic socialist conception might defend the current drafting of Standing Order 14 to preserve strong government, as well as the importance of trust in the political system following the referendum.[[1447]](#footnote-1447)

Accordingly, the question of how political constitutionalism understands legislatives institutions and issues of legislative design is not only a useful normative exercise, but it also has potential to influence real-world debates about legislative design, through helping political actors reflect and debate upon the normative values that underpin our real-world legislative institutions.

## *Future Research Questions*

Political constitutionalism is valuable because of its distinctive and positive focus upon legislative institutions. This thesis has sought to enhance political constitutionalism’s value further through interrogating its understandings of legislative institutions and legislative design. Nevertheless, this thesis is only the first step in the wider exploration of political constitutionalism’s institutional content. As explained in chapter one, the size and complexity of legislative institutions raises many questions about how they should shape and channel political action. Therefore, it was not possible within the scope of this thesis for every one of these questions to be addressed. Analytical priority was given to some aspects of legislative institutions at the expense of others. Inevitably, there were many questions which could not be covered within the scope of this inquiry, and many questions will arise from its findings. Nevertheless, these unanswered questions provide fertile ground for future research. Therefore, this final section reflects upon some of the potential areas for future research in relation to political constitutionalism’s institutional content.

First, future research could analyse the application of political constitutionalism to issues regarding the distribution of material resources within legislative institution. Chapter four analysed how the legislative institutions should organise and distribute the scarce resource of plenary time according to the different strands of political constitutionalism. However, legislative institutions must also distribute other important resources, such as personnel, finances and independent expertise. How these are distributed can affect the ways in which political action is shaped by and channelled through the legislature. For example, Nelson Polsby’s account of the United States’ House of Representatives, posited that “the growth of resources assigned to internal house management, measured in terms of personal, facilities and money” had been critical in institutionalising a sufficiently complex internal structure to enable the House of Representatives to perform a transformative role.[[1448]](#footnote-1448) However, even within an arena legislature, the availability of resources such as financial support, independent research, legal advice and the availability of support from legislative staff will also be assisting minority groups, the promotion of debate and the provision of technical scrutiny and oversight from the committee system. Accordingly, future research could analyse how political constitutionalism responds to questions regarding the organisation and distribution of important material legislative resources, such as personnel, remuneration, and independent information and legal advice.

Second, there needs to be greater reflection on how inter-legislative relations should be understood by the political model. This thesis mainly focused on the legislature operating in isolation from other legislative organisations,[[1449]](#footnote-1449) but in practice, legislative institutions are increasingly required to operate alongside and engage with other devolved, federal, foreign and supra-national legislative institutions. In recent decades, executive institutions have sought to use inter-governmental relations as means of sidelining legislative institutions from the policy-making process. Consequently, there has been increased pressure placed upon national, federal or devolved legislatures to develop their own inter-legislative relations to counteract the executives’ attempts to reduce their influence.[[1450]](#footnote-1450) Inevitably, this raises important constitutional questions regarding what the legislature’s role should be in response to inter-governmental policy-making. In turn, this would also raise questions regarding how different legislative design arrangements might incentivise or discourage legislative institutions in engaging in inter-legislative activities aimed at compensating inter-governmental activities by executive institutions. Accordingly, the political model could be enhanced through analysing how it might be applied to questions of inter-legislative relations. Furthermore, the ways in which political constitutionalism understands and responds to issues of inter-legislative relations will be of practical importance for our understandings about changes to the UK’s predominantly political constitution once the UK withdraws from the European Union. Brexit will present challenges to inter-legislative relations between Westminster and the Institutions of the EU, and between Westminster and the UK’s devolved legislatures.

During the UK’s membership of the EU, Westminster Parliament voluntary transferred some of its legislative competency to the EU inter-governmental policy-making institutions.[[1451]](#footnote-1451) Nevertheless, both the House of Commons and the House of Lords developed formal and informal institutional practices to allow them to influence EU based inter-governmental policy-making. The *Scrutiny Reserve Resolution* established the practice that Government Ministers should not give their consent to a draft EU policy until the Westminster Parliament has had the opportunity to scrutinise the legislation, unless exceptional circumstance apply.[[1452]](#footnote-1452) Accordingly, the scrutiny reserve enables the House of Commons *European Scrutiny Committee* and the *House of Lords European Union Committee* on behalf of their parental chambers to scrutinise draft EU policies submitted to them by Ministers.[[1453]](#footnote-1453) Similarly, the potential inter-legislative relations are secured via the EU’s commitment to principle of subsidiarity, legally reflected within *Article 5 (3)* and *Protocol (No 2)* of *the Treaty on European Union*.[[1454]](#footnote-1454) In particular, Protocol 2 enables national legislatures to register a complaint against the draft EU policy, if they believe it fails to respect the principle of subsidiarity, and if a third of national legislatures uphold the complaint, the draft policy may be amendment or withdrawn.[[1455]](#footnote-1455) More informally, the political parties within Westminster communicate with their parties’ representatives within the EU Parliament. However, if the UK opts to remain in a “regulatory” or “dynamic” aligned relationship with the EU, it is unclear how these inter-legislative activities may continue to operate or be replaced by new arrangements.[[1456]](#footnote-1456) Alternatively, if the UK decides to diverge from the EU, in favour of a trade deal with another state, the Westminster Parliament will need to develop specific bi lateral arrangements with their legislative counterparts in these other states. Similarly, Westminster will need develop a more proactive approach regarding how it scrutinises and ratifies treaties that the executive has negotiated with other states via its own inter-governmental activities.[[1457]](#footnote-1457) The political model will be enhanced if it can help public lawyers and political actors understand how inter-legislative relations between different national legislatures and international organisations could operate in a normatively attractive manner.

The UK’s withdrawal also prompts similar issues with regard to the inter-legislative relationships between the Westminster Parliament and devolved legislatures in Scotland, Wales and Northern Ireland.[[1458]](#footnote-1458) The inter-parliamentary relationship between Westminster and devolved legislatures is regulated through relevant Devolution Acts[[1459]](#footnote-1459) and the Sewel Convention, which establishes the shared institutional understanding that Westminster will not normally legislate on devolved matters without the consent of the relevant devolved institution(s).[[1460]](#footnote-1460) However, following the UK withdrawal from the EU, inter-parliamentary relations will also be heavily shaped by *Section 12* of *the European Union (Withdrawal) Act*.[[1461]](#footnote-1461) This Act seeks to preserve existing EU Law through converting it to a new type of law known as “retained EU Law.”[[1462]](#footnote-1462) Importantly, Section 12 amends statutes governing the devolved legislative competencies, in relation to the future modification of retained EU Law.[[1463]](#footnote-1463) Section 12 establishes a qualified presumption that devolved institutions may modify retained EU law that is within their established legislative competences. The UK Government nevertheless retains the right to restrict devolved competences by way of regulation, if it can get the consent of the relevant devolved institution with a 40-day period. However, in the event that the devolved legislature refuses to give its consent, the Minister may still proceed to lay before Parliament the regulation to restrict the devolved institution competency, as long as they provide an accompanying statement justifying their reasons for proceeding.[[1464]](#footnote-1464) Mark Elliot and Stephen Tierney predict that Section 12 will place considerable strain “upon the resources of devolved legislatures as they attempt to monitor the use of s.12 powers.”[[1465]](#footnote-1465) Consequently, it will be critical for devolved legislatures and Westminster to develop strong inter-legislative relations. Therefore, analysing how the political model can make sense of inter-legislative relations between federal and devolved legislatures will be particularly valuable in helping make sense of devolution within the UK’s predominantly political constitution.

Third, another area of future research could analyse political constitutionalism in relation to issues regarding the promotion of representative diversity via reforms designed to make the legislature more inclusive. Although political constitutionalism has often praised legislative institutions for their capacity to represent and incentivise a diversity of opinions,[[1466]](#footnote-1466) it has ignored issues regarding the diversity of representative personnel. Political constitutionalism’s often thin conception of political equality results in a tendency to assume that equality of voting influence is sufficient to ensure a diverse set of political representatives.[[1467]](#footnote-1467) However, in practice, political institutions such as the legislature and political parties can establish barriers to prevent certain groups taking an active role in the political process. Unfortunately, legislatures have historically been insufficiently inclusive institutions, established and maintained over time by a disproportionately white and male group of elite political actors.[[1468]](#footnote-1468) As a result, many legislative rules, practices and narratives reflect the values and traditions of an elite minority within the political community.[[1469]](#footnote-1469) Legislatures have intentionally or unintentionally established and maintained institutional rules, practices and narratives that have deterred women, the disabled, ethnic minorities and members of the LGBT community from becoming legislators. This failure has left legislative institutions vulnerable to criticisms of being out-dated and unrepresentative. There is a real risk that these problems weaken the legislature’s legitimacy within some sections of the political community. Although in recent years legislative diversity has certainly increased, there is still a long way to go.[[1470]](#footnote-1470) Consequently, it has become increasingly common for legislative institutions to adopt design strategies aimed at enhancing their inclusiveness and their representative qualities (such as allowing legislators with young children to vote by proxy).[[1471]](#footnote-1471) Therefore, it would be appropriate for future research into political constitutionalism to account for and incorporate considerations about diversity and inclusiveness of legislative institutions and the ordinary democratic process more broadly.

Fourth, this thesis’s findings suggest future research into political constitutionalism should focus on exploring and analysing political parties within the constitutional order. This particularly importantly in relation to the republican and democratic socialist strands’ conception of the political model. In chapter two and three, it was argued that the republican and democratic socialist strand’s advocacy for the legislature performing an arena role within ordinary political process was premised upon their belief that political parties, rather the legislative institutions, should play a critical role in promoting deliberative values, such as public reasoning and compromise. Since the party organisation, values and dynamics will vary from party to party, it is reasonable to suspect that the design and practices of some parties may supress rather than support these deliberative values. In practice, arguments for and against the adoption an arena legislature will be conditioned by the nature and qualities of political parties that will operate within the legislative arena. Therefore, there is an onus on proponents of the republican and democratic socialists strand to analyse and explain why and how the internal structures, values and dynamics of specific parties are of constitutional significance and are desirable. More broadly, the constitutional significance of political parties is often overlooked within constitutional law scholarship.[[1472]](#footnote-1472) To help constitutional scholars make better sense of the political dimensions of our modern constitutional orders, the political model needs to pay closer attention to questions regarding the role of political parties; how political parties understand their place within their constitution; how they attempt to bring about or supress constitutional changes; how their internal structures and dynamics manage political disagreements. Therefore, future research on political constitutionalism and political parties would be desirable.

Finally, if the political model is to function as a methodological tool for explaining and analysing the political dimensions of our modern constitutions, future research needs to interrogate political constitutionalism’s understanding of other ‘political’ institutions within the constitutional order, beyond the legislature. These could include devolved legislatures, political parties, judicial institutions, the executive, the civil service, central banks, supra-national organisations, local governance and regional authorities. Just as this thesis demonstrated that three strands of political constitutionalist thought presented different understandings about the legislature and its design, future research might consider whether there is unity of thought among the strands regarding their understandings of these other institutions. Furthermore, future research could draw upon institutionalism as used through this thesis to help explain and analyse how political action is shaped and channelled by these other important institutions. There may be a temptation for those sympathetic to the political model to deploy institutionalism to explain and analyse the politics of judicial institutions; however, it would be more useful to use institutionalism to enhance political constitutionalism’s understanding of the executive. In chapter two, it was observed that within the existing literature on political constitutionalism, proponents had tended to focus more on explaining and analysing the constitutional importance of legislative institution vs judicial institutions. As a result, the executive was often overlooked. Thus, the political model currently provides only an ambiguous understanding of the executive. Moreover, beyond political constitutionalism’s well-developed critique of judicial institutions, a handful of public lawyers have already deployed institutionalism to the study of the courts.[[1473]](#footnote-1473) Therefore, future research should seek to present a more important contribution to our understandings about political dimensions of modern constitutions, through focusing on important political institutions such as the executive.

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Political constitutionalism is valuable because it can provide public law with an important conceptual model for making sense of the often complex and fraught political dimensions of our modern constitutional orders. In particular, because of its distinctive focus on the legislature, political constitutionalism can and should be used to explain and analyse the constitutional significances of legislative institutions. This thesis has provided an important contribution to knowledge by interrogating and enhancing political constitutionalism’s understandings of legislative institutions and legislative design. In effect, it has sought to make political constitutionalism more ‘institutional’ in its understandings of legislatures. It has posited that political constitutionalism must recognise and emphasise that legislatures are constitutionally significant because for better or for worse, legislative institutions act as a material constraint upon the exercise of political power. Legislative institutions are not and can never be black boxes within the ordinary political process; they are institutions that organise political life. As a result, through their institutional design, they can organise political life towards certain ends. Consequently, their design is of great constitutional importance because the design of our legislative institutions shape and channel our opportunities to engage in the ordinary political process and manage disagreements within our political communities.

Designing and reforming legislatures requires making choices between often incommensurable options and values, which will affect the ways in which political action is shaped and channelled by the legislature. This thesis has demonstrated that legislative design involves confronting constitutionally important choices regarding the legislature’s role within the political process, the distribution of legislative resources, the nature of inter-cameral relationships, and how political accountability is secured. The ways in which political actors respond to these choices has important implications for how political action is channelled through the legislature. Political constitutionalism has the potential to help political actors and public lawyers reflect upon often hidden or under-appreciated values at stake when designing a legislative institution, and to respond to them in ways which respect the circumstances of politics. Although there is no unity of thought of within political constitutionalism about the legislature, the liberal, republican and democratic socialist strands of political constitutionalism each present their own distinctive understandings of the legislative design, which could be used to help political actors engaged in debates about legislative design and reform.

This thesis considered these design issues in abstraction, but it is important to recognise that in practice, at some point in time political actors will have to confront these questions. Although legislative institutions will often change gradually over time, inevitably there will be times when external and internal pressures create the possibility for radical change. The normative values and logics that underpin our legislative institutions will be at their most vulnerable during these periods of intense political upheaval. In these periods, the way that our political actors and public lawyers reflect upon and respond to these issues of legislative design will be crucial as any change to our legislative institutions might fundamentally alter the constitution’s political dimensions. It is imperative that political constitutionalism stands ready to help political actors and public lawyers make sense of their legislative institutions and the constitutional significance of their design.

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9. Waldron, *Political Political Theory* (n 3) 7. [↑](#footnote-ref-9)
10. (n 6) 738. [↑](#footnote-ref-10)
11. Bellamy (n 3) 174. [↑](#footnote-ref-11)
12. See for a list of the design issues considered in this thesis, see Section 4 below. [↑](#footnote-ref-12)
13. See Chapter Two, Section Two. [↑](#footnote-ref-13)
14. M Loughlin, *The Idea of Public Law* (Oxford University Press, Oxford 2003)5-31. [↑](#footnote-ref-14)
15. Ibid 30. [↑](#footnote-ref-15)
16. M Foley, *The Politics of the British Constitution* (Manchester University Press, Manchester 1999) 1. [↑](#footnote-ref-16)
17. Gee, Webber, (n 1) 291. [↑](#footnote-ref-17)
18. C Roederer,‘Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory’ (2003) 27 Seattle U. L Rev. 385, 403-406, G Gee, G C.N Webber (n 1) 291. [↑](#footnote-ref-18)
19. Gee, Webber, (n 1) 291. [↑](#footnote-ref-19)
20. (n 18) 406. [↑](#footnote-ref-20)
21. B H. Bix, *Jurisprudence: Theory and Context* (7 edn, Sweet & Maxwell, London 2015) 15. [↑](#footnote-ref-21)
22. (n 14) 37. [↑](#footnote-ref-22)
23. (n 18) 407-408. [↑](#footnote-ref-23)
24. (n 21) 19. [↑](#footnote-ref-24)
25. J Rosenberg, *The Practice of Philosophy* (2nd Prentice Hall, Englewood Cliffs N.J 1984) 8, (n 21) 15,

    (n 18) 423. [↑](#footnote-ref-25)
26. Bix (n 21) 20. [↑](#footnote-ref-26)
27. Ibid 20. [↑](#footnote-ref-27)
28. C Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, Cambridge 1985) 94-95. [↑](#footnote-ref-28)
29. Ibid 94. [↑](#footnote-ref-29)
30. Alternatively, it may be argued all constitutions are ‘political’ but differ in the extent to which they designate their main site of political struggle and the extent to which they remain open to reformulation. See Ewing (n 3) 2120, 2124. [↑](#footnote-ref-30)
31. Bellamy (n 3) 5. [↑](#footnote-ref-31)
32. Gee, Webber (n 1) 291. [↑](#footnote-ref-32)
33. For an example of using the political model for these purposes, see Gee, Webber (n 1) and M Goldoni, C McCorkindale, ‘The Three Waves of Political Constitutionalism’ (2019) 30 (1) King’s Law Journal 74-96. [↑](#footnote-ref-33)
34. I will explain this purpose in more detail below. [↑](#footnote-ref-34)
35. J.S Mill and E Alexander (ed) *On Liberty* (Broadview Literary Text, Canada 1999) 46-47. [↑](#footnote-ref-35)
36. Bellamy (n 3) 232-239. [↑](#footnote-ref-36)
37. Waldron, *Political Political Theory* (n 3) 246-273. [↑](#footnote-ref-37)
38. Gee, Webber (n 1) 291. [↑](#footnote-ref-38)
39. See Goldoni, McCorkindale, ‘The Three Waves of Political Constitutionalism’ (n 33) 74-96. [↑](#footnote-ref-39)
40. Tomkins (n 3) 38-40. [↑](#footnote-ref-40)
41. See N.W Barber, ‘Constitutionalism: Negative and Positive’ (2015) 38 Dublin U. L.J. 249-264, also see M Loughlin, ‘What is Constitutionalism’ in P Dobner, M Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press, Oxford 2010) 55, 61. [↑](#footnote-ref-41)
42. See Barber (n 41) 264. [↑](#footnote-ref-42)
43. Loughlin, ‘What is Constitutionalism’ (n 41) 55, Barber, (n 41) 249-252, Waldron, *Political Political Theory* (n 3) 29-34. [↑](#footnote-ref-43)
44. Barber (n 41) 249-251, G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853, 855. [↑](#footnote-ref-44)
45. Waldron, *Political Political Theory* (n 3) 30. [↑](#footnote-ref-45)
46. Sartori, (n 44) 855. [↑](#footnote-ref-46)
47. M.J.C Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Indianapolis, Liberty Fund 1998) 6.  [↑](#footnote-ref-47)
48. AW Bradley, K S Ziegler, D Baranger, ‘Constitutionalism and the Role of Parliaments’ in K S Ziegler, D Baranger, AW Bradley (eds) *Constitutionalism and the Role of Parliaments* (Hart, Oxford 2007) 2. [↑](#footnote-ref-48)
49. This point is explored in chapter 3. [↑](#footnote-ref-49)
50. (n 48) 2. [↑](#footnote-ref-50)
51. W Bagehot, *The English Constitution* [1867] (M Taylor ed, Oxford University Press, Oxford 2001) 11. [↑](#footnote-ref-51)
52. See D Oliver, ‘Democracy, Parliament and constitutional watchdogs’ [2000] P.L. 553-555. [↑](#footnote-ref-52)
53. (n 48) 2. [↑](#footnote-ref-53)
54. R M. Unger, *What Should Legal Analysis Become?* (Verso, London 1996) 72. [↑](#footnote-ref-54)
55. For an argument on why legislatures are critical to securing rights, see G Webber, P Yowell, R Ekins, M Köpcke, B W Miller, F J. Urbina, *Legislated Rights: Securing Human Rights through Legislation,* (Cambridge University Press, Cambridge 2018). [↑](#footnote-ref-55)
56. M Flinders, A Kelso, ‘Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis’ (2011) 13 BJPIR 249, 249. [↑](#footnote-ref-56)
57. J Bryce, *Modern Democracies Vol 2* (The Macmillan Company, New York 1921) 335-357. [↑](#footnote-ref-57)
58. ibid 335. [↑](#footnote-ref-58)
59. ibid 338-346. [↑](#footnote-ref-59)
60. ibid 338. [↑](#footnote-ref-60)
61. For example, Bryce contends, “the intellectual level of legislative assemblies has been sinking, it is clear that nowhere does enough of that which is best in the character and talent of the nation finds its way into those assemblies.” Ibid 340. [↑](#footnote-ref-61)
62. H Berrington, ‘Partisanship and dissidence in the nineteenth century House of Commons’ (1968) 21 (2) Parliamentary Affairs, 338, 395. [↑](#footnote-ref-62)
63. (n 56) 258. [↑](#footnote-ref-63)
64. Tomkins (n 3) 10-31, T Poole, ‘Back to the future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 (2) OJLS 435-454, M Loughlin, *Public Law and Political Theory* (Oxford University Press, Oxford 1992) 206-229. It should be noted that Jeff King has suggested legal constitutionalism was actually a label invented by political constitutionalists for their intellectual enemies and that political constitutionalists tend to produce a straw man interpretation of legal constitutionalism. Throughout this thesis, I neither condone nor condemn the way in which political constitutionalists present legal constitutionalism. See J King, ‘Rights and Rule of Law in Third Way Constitutionalism’ (2015) 30 Constitutional Commentary 101, 114. [↑](#footnote-ref-64)
65. A McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71 (6) MLR 853, 877. [↑](#footnote-ref-65)
66. Gee, Webber, (n 1) 273. [↑](#footnote-ref-66)
67. Griffith (n 3) 1-21, J.A.G. Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 (2) MLR 159-176, J.A.G Griffith, ‘The common law and the political constitution’ (2001) 117 LQR 42-67, Waldron, *Law and Disagreement* (n 3); A Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 (1) OJLS 157-175; Tomkins (n 3; Bellamy (n 3); D Nicol, *The Constitutional Protection of Capitalism* (Hart, Oxford 2010), Gee, Webber (n 1) 273, Ewing (n 3) 2111-2136. [↑](#footnote-ref-67)
68. Goldoni, McCorkindale, ‘The Three Waves of Political Constitutionalism’ (n 33) 74-96. [↑](#footnote-ref-68)
69. The lecture was republished a year later in the Modern Law Review as J.A.G. Griffith, ‘The Political Constitution’ (n 3) [↑](#footnote-ref-69)
70. Loughlin, *Public Law and Political Theory* (n 64) 105-133. [↑](#footnote-ref-70)
71. M Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 U Toronto L.J 361**,** 374. [↑](#footnote-ref-71)
72. Loughlin, *Public Law and Political Theory* (n 64) 111; Loughlin, ‘The Functionalist Style in Public Law’ (n 71) 363. [↑](#footnote-ref-72)
73. Loughlin, *Public Law and Political Theory* (n 64) 121-122, 134; Loughlin, ‘The Functionalist Style in Public Law’ (n 71) 363. [↑](#footnote-ref-73)
74. Loughlin, *Public Law and Political Theory* (n 64) 105. Loughlin, ‘The Functionalist Style in Public Law’ (n 71) 361. [↑](#footnote-ref-74)
75. Loughlin, ‘The Functionalist Style in Public Law’ (n 71) 361, 401. [↑](#footnote-ref-75)
76. Ibid 364-368. [↑](#footnote-ref-76)
77. See Loughlin, *Public Law and Political Theory* (n 64) 138-206. [↑](#footnote-ref-77)
78. A.V Dicey, *Introduction to the Study of the Law of the Constitution: With an Introduction by E.C.S Wade*

    10th edn, Palgrave Macmillan, London 1959) 23-24. [↑](#footnote-ref-78)
79. Ibid 31. [↑](#footnote-ref-79)
80. Ibid 15-21. [↑](#footnote-ref-80)
81. Note, this should not be confused with our modern notions about proponents of legal constitutionalism. Nevertheless, it shares an important similarity with modern legal constitutionalists, in that both are focused on the law and courts, at the expense of considering political institutions and political actors. See Ibid 15. [↑](#footnote-ref-81)
82. W.I Jennings, *The Law and The Constitution* (3rd edn, The University of London Press, London 1943) 70. [↑](#footnote-ref-82)
83. Ibid 69-71. [↑](#footnote-ref-83)
84. Ibid 77. [↑](#footnote-ref-84)
85. Ibid 74-78. [↑](#footnote-ref-85)
86. Ibid 73. [↑](#footnote-ref-86)
87. Griffith, ‘The Political Constitution’ (n 3), 2-3, 2. [↑](#footnote-ref-87)
88. Ibid, 2-3, 17. [↑](#footnote-ref-88)
89. Ibid, 2-3, 17. [↑](#footnote-ref-89)
90. G Gee, ‘The political constitutionalism of JAG Griffith’ (2008) 28 (1) LS 20, 23-24. [↑](#footnote-ref-90)
91. Griffith, ‘The Political Constitution’ (n 3) 2-3, 20. [↑](#footnote-ref-91)
92. Ibid, 15. [↑](#footnote-ref-92)
93. See R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge MA 1977); Q Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (Collins, London 1978); L Scarman, *English Law: The New Dimension* (Stevens & Sons Ltd, London 1975). [↑](#footnote-ref-93)
94. Griffith, ‘The Political Constitution’ (n 3) 7. [↑](#footnote-ref-94)
95. Ibid 15. [↑](#footnote-ref-95)
96. Ibid 13-14. [↑](#footnote-ref-96)
97. Ibid 12-13. [↑](#footnote-ref-97)
98. Ibid 14-16. [↑](#footnote-ref-98)
99. Ibid 16. [↑](#footnote-ref-99)
100. Ibid 16-17. [↑](#footnote-ref-100)
101. Ibid 17-18. [↑](#footnote-ref-101)
102. Ibid 12, 17. [↑](#footnote-ref-102)
103. Ibid 19. [↑](#footnote-ref-103)
104. Ibid 12. [↑](#footnote-ref-104)
105. Ibid 12-17. [↑](#footnote-ref-105)
106. See both J.A.G. Griffith, ‘The Place of Parliament in the Legislative Process: Part I’ (1951) 14 MLR 279, 279 and J.A.G. Griffith, ‘The Place of Parliament in the Legislative Process: Part II’ (1951) 14 MLR 425, 436. [↑](#footnote-ref-106)
107. See the difference in opinion between Graham Gee and Grégoire Webber’s claim that Griffith presented ‘a novel account of Britain's constitutional arrangements’ and Martin Loughlin’s recent assertion that ‘the lecture contains no new political, philosophical or methodological insights’ and that Griffith is not ‘the originator’ of such insights. See G Gee, G C.N Webber, ‘What is a Political Constitution?’ (n 1) 277 and M Loughlin, ‘The Political Constitution Revisited’ 30 (1) King’s Law Journal 5, 8-10. [↑](#footnote-ref-107)
108. Goldoni, McCorkindale, ‘The Three Waves of Political Constitutionalism’ (n 33) 78-82, Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2104. [↑](#footnote-ref-108)
109. Waldron, *Law and Disagreement* (n 3); J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 YLJ 1346-1406; Tomkins, *Our Republican Constitution* (n 3); and Bellamy (3). [↑](#footnote-ref-109)
110. Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2103-2104. [↑](#footnote-ref-110)
111. A Tomkins, *Public Law* (Oxford University Press, Oxford, 2003) 18-19, 23; Tomkins, *Our Republican Constitution* (n 3) 40. [↑](#footnote-ref-111)
112. Goldoni, McCorkindale, ‘The Three Waves of Political Constitutionalism’ (n 33), 82 [↑](#footnote-ref-112)
113. Ibid, 82 [↑](#footnote-ref-113)
114. Ibid 82, also see Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2103-2109. [↑](#footnote-ref-114)
115. Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2109. [↑](#footnote-ref-115)
116. G Gee, G C.N Webber, ‘A Grammar of Public Law’ (2013) 14 (12) German L.J. 2138- 2155. [↑](#footnote-ref-116)
117. M Goldoni, ‘Political Constitutionalism and the Question of Constitution-making’ (2014) 27 (3) Ratio Juris, 387-408. [↑](#footnote-ref-117)
118. A Glencross, ‘The Absence of Political Constitutionalism in the European Union’ (2013) 21 Journal of European Public Policy 1163-1180, M Wilkinson ‘Political Constitutionalism and the European Union’ (2012) 76 MLR 191-222. [↑](#footnote-ref-118)
119. S Tierney, ‘Whose Political Constitution? Citizens and Referendums’ (2013) 14 (12) German L.J. 2185-2196. [↑](#footnote-ref-119)
120. Goldoni, McCorkindale, ‘The Three Waves of Political Constitutionalism’ (n 33) 78-79. [↑](#footnote-ref-120)
121. (n 119) 2186. [↑](#footnote-ref-121)
122. Gee, Webber, ‘What Is a Political Constitution?’ (n 1) 293, Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2104, (n 119) 2186; A Tomkins, ‘What’s Left of the Political Constitution?’ (2013) 14 (12) German L.J. 2275-2292; A Kavanagh, 'Recasting the Political Constitution: From Roles to Relationships' (2019) 30 (1) King’s Law Journal 43, 57-63; Loughlin, ‘The Political Constitution Revisited’ (n 107) 12-19. [↑](#footnote-ref-122)
123. Tomkins, ‘In Defence of the Political Constitution’ (n 67) 157-175, and Tomkins, *Our Republican Constitution* (n 3) [↑](#footnote-ref-123)
124. Tomkins, ‘What’s Left of the Political Constitution?’ (n 122) 2275-2276. [↑](#footnote-ref-124)
125. Ibid 2276, 2292. [↑](#footnote-ref-125)
126. Loughlin, ‘The Political Constitution Revisited’ (n 107) 13-15, also see M Loughlin, ‘Towards a Republican Revival?’ (2006) 26 (2) OJLS 425, 435. [↑](#footnote-ref-126)
127. Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2103-2104. [↑](#footnote-ref-127)
128. Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2107, M Goldoni, C McCorkindale, ‘Why We (Still) Need a Revolution’ (2013) 14 (12) German L.J. 2197, 2207. [↑](#footnote-ref-128)
129. Goldoni, McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (n 2) 2107-2108. [↑](#footnote-ref-129)
130. Ibid 2107-2108. [↑](#footnote-ref-130)
131. Ibid 2108. [↑](#footnote-ref-131)
132. See Waldron, *Political Political Theory* (n 3) 20; S Martin, T Saalfeld, K Strøm, ‘Introduction’ in S Martin, T Saalfeld, K Strøm (eds) *The Oxford Handbook of Legislative Studies* (Oxford University Press, Oxford 2014) 6-9, P Norton, ‘Introduction’ in P Norton (ed) *Legislatures* (Oxford University Press, Oxford 1990) 3-5, 9-10. [↑](#footnote-ref-132)
133. Waldron, *Political Political Theory* (n 3) 3. [↑](#footnote-ref-133)
134. Ibid 3-5. [↑](#footnote-ref-134)
135. Ibid 20. [↑](#footnote-ref-135)
136. Ibid 6. [↑](#footnote-ref-136)
137. March, Olsen, ‘The New Institutionalism: Organizational Factors in Political Life’ (n 6)747. [↑](#footnote-ref-137)
138. March, Olsen, ‘Elaborating the New Institutionalism’ (n 5) 8. [↑](#footnote-ref-138)
139. See R. A. W. Rhodes, ‘Old Institutionalisms’ in S A. Binder, R. A. W. Rhodes, and B A. Rockman (eds) *The Oxford Handbook of Political Institutions* (Oxford University Press, Oxford, 2008) 90-108. [↑](#footnote-ref-139)
140. See March, Olsen, ‘The New Institutionalism: Organizational Factors in Political Life’ (n 6) 734-749, March, Olsen, ‘Elaborating the New Institutionalism’ (n 5) 3-20; P A. Hall, R C.R. Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44 (5) Political Studies 936-957. [↑](#footnote-ref-140)
141. Waldron, *Political Political Theory* (n 3) 7. [↑](#footnote-ref-141)
142. Ibid 8. [↑](#footnote-ref-142)
143. Ibid 8-9, 13-15. [↑](#footnote-ref-143)
144. G Stoker, ‘Blockages on the road to relevance: why has political science failed to deliver?’ (2010) 9. European Political Science, S72-84, M Flinders, A Meakin and L McCarthy Cotter, ‘The double-design dilemma: political science, parliamentary crisis and disciplinary justifications’ (2019) 25 (2) The Journal of Legislative Studies 250-277. [↑](#footnote-ref-144)
145. Stoker S80. [↑](#footnote-ref-145)
146. Ibid S81. [↑](#footnote-ref-146)
147. J.A.G. Griffith, M Ryle, M.A.J Wheeler-Booth, *Parliament: functions, practices and procedures* (Sweet & Maxwell, London 1989). [↑](#footnote-ref-147)
148. J.A.G. Griffith, *Parliamentary Scrutiny of Government bills* (Allen and Unwin, London 1974). [↑](#footnote-ref-148)
149. J.A.G. Griffith, ‘Delegated legislation - some recent developments’ (1949) 12 (3) MLR 297-318, J.A.G. Griffith, ‘The constitutional significance of delegated legislation in England’ (1950) 48 (8) Michigan Law Review 1079-1120. [↑](#footnote-ref-149)
150. J.A.G. Griffith, ‘The changing shape of local government’ (1958) 31 (1) Adult Education 167-186, J.A.G. Griffith, ‘Statutes: The Local Government Act’ (1958) 22 (3) MLR 297-301, W.I. Jennings, J.A.G. Griffith, *Principles of Local Government Law* (4th edn, University of London Press, London 1960) J.A.G. Griffith, *Local Authorities and Central Control* (Barry Rose, London 1974)*.* [↑](#footnote-ref-150)
151. J.A.G. Griffith, ‘The Study of Law of Politics’ (1995) 1 (1) The Journal of Legislative Studies 3, 3. [↑](#footnote-ref-151)
152. For example, Aileen Kavanagh considers Jeremy Waldron to be a leading figure in the political constitutionalist movement, even though he has never described himself as a political constitutionalist. See A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge 2009) 371. [↑](#footnote-ref-152)
153. See T.R.S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, Oxford 2013), P Craig, ‘Political constitutionalism and the judicial role: A response’ (2011) 9 (1) ICON 112-131, A Harel, T Kahana, ‘The Easy Case For Judicial Review’ (2010) 2 (1) Journal Of Legal Analysis 227-256, T R. Hickman, ‘In Defence of the Legal Constitution’ (2005) 55 (4) UTLJ 981-1022. [↑](#footnote-ref-153)
154. J Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press, Oxford 2011) 9, J Raz, *Practical Reason and Norms* (Hutchinson & Co. Ltd London 1975) 150. [↑](#footnote-ref-154)
155. Waldron, *Political Political Theory* (n3) 125-144. Nevertheless, this thesis argues legislatures perform additional functions, in addition to this function see Chapter 3. [↑](#footnote-ref-155)
156. Nevertheless, it should be noted, that in practice there is a particularly strong connection between political constitutionalism and constitutional practices of the United Kingdom and New Zealand. Both states have largely uncodified constitutions, they both lack of strong form judicial review and they rely heavily upon political conventions to regulate the behaviour of their constitutional actors. [↑](#footnote-ref-156)
157. See W Downs, ‘Sub-National Legislatures’ in S Martin, T Saalfeld, K W. Strøm (eds) *The Oxford Handbook of legislative Studies* (Oxford University Press, Oxford 2014) 609-627. [↑](#footnote-ref-157)
158. See G Sartori, *Comparative Constitutional Engineering: An Inquiry into structures, incentives and outcomes* (2nd edn, Palgrave Macmillan, Basingstoke 1997). [↑](#footnote-ref-158)
159. P A. Hall, R C.R. Taylor, (n 140) 944-945. [↑](#footnote-ref-159)
160. Ibid 939. [↑](#footnote-ref-160)
161. (n 58) ix. [↑](#footnote-ref-161)
162. M Weber,‘Parlament und Regierung im neugeordneten Deutschland‘ [1918] in

     *Max Weber Political Writings* (P Lassman, R Spiers eds, Cambridge University Press, Cambridge 1994) 176-177, N. W Polsby, ‘Legislatures’ in F I. Greenstein, N W. Polsby (eds) *Handbook of Political Science Vol 5: Governmental Institutions and Processes* (Addison-Wesley, Boston MA 1975) 257-319, A Kreppel, ‘Typologies and Classifications’ in S Martin, T Saalfeld, K W. Strøm (eds) *The Oxford Handbook of Legislative Studies* (Oxford University Press, Oxford 2014) 82-100. [↑](#footnote-ref-162)
163. N. W Polsby, ‘Legislatures’ (n 162) 277. [↑](#footnote-ref-163)
164. See G W. Cox, ‘The Organization of Democratic Legislatures’ in B Weingast, D Wittman (eds) *The Oxford Handbook of Political Economy* (Oxford University Press, Oxford 2006) 141-161. [↑](#footnote-ref-164)
165. See A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd edn, Yale University Press 2012) 192-193. [↑](#footnote-ref-165)
166. M S. Ogul, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision* (University of Pittsburgh Press, Pittsburgh Pa 1976) 11. [↑](#footnote-ref-166)
167. M D McCubbins, T Schwartz, ‘Congressional Oversight Overlooked: Police Patrols vs Fire Alarms’ (1984) 28 American Journal of Political Science 165-179, A Lupia, M D McCubbins, ‘Learning from Oversight: Fire Alarms and Police Patrols Reconstructed’ (1994) 10 (1) Journal of Law, Economics, and Organization 96-125. [↑](#footnote-ref-167)
168. J Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press, Oxford 2011) 9. [↑](#footnote-ref-168)
169. J Raz, *Practical Reason and Norms* (Hutchinson & Co. Ltd, London 1975) 150. [↑](#footnote-ref-169)
170. Ibid 150. [↑](#footnote-ref-170)
171. N Barber, *The Constitutional State* (Oxford University Press, Oxford 2010) 8. [↑](#footnote-ref-171)
172. J.A.G. Griffith, ‘The Political Constitution’ (1979) 41 (1) MLR 1, 3. [↑](#footnote-ref-172)
173. B Crick, *In Defence of Politics* (5th edn, Continuum London 2005) 10. [↑](#footnote-ref-173)
174. Ibid 10-11, C Schmitt, ‘The Concept of the Political’ [1932]in C Schmitt, *The Concept of the Political: The Expanded Edition* (G Schwab tr, The University of Chicago Press, Chicago 2007) 35-36. [↑](#footnote-ref-174)
175. (n 6) 3. [↑](#footnote-ref-175)
176. Ibid 10. [↑](#footnote-ref-176)
177. Ibid 11. [↑](#footnote-ref-177)
178. (n 7) 26. [↑](#footnote-ref-178)
179. Ibid 26, [↑](#footnote-ref-179)
180. Ibid 28. [↑](#footnote-ref-180)
181. L Strauss, ‘Notes on The Concept of the Political’ in C Schmitt, *The Concept of the Political: The Expanded Edition* (G Schwab tr, The University of Chicago Press, Chicago 2007) 103; M Loughlin, *The Idea of Public Law* (Oxford University Press, Oxford 2003) 34. [↑](#footnote-ref-181)
182. (n 7) 32; E Bockenforde*,* ‘The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory’ in D Dyzenhaus (ed) *Law as Politics, Carl Schmitt's Critique of Liberalism* (Duke University Press, Durham 1998) 38. [↑](#footnote-ref-182)
183. Bockenforde (n 16) 39. [↑](#footnote-ref-183)
184. Loughlin (n 14) 36. [↑](#footnote-ref-184)
185. G Gee, ‘The Political Constitutionalism of JAG Griffith’ (2008) 28 (1) LS, 20, 23-26. [↑](#footnote-ref-185)
186. J Waldron, *Law and Disagreement* (Oxford University Press, Oxford 1999) 102, R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge 2008) 5. [↑](#footnote-ref-186)
187. Waldron, *Law and Disagreement* (n 19) 101-102. [↑](#footnote-ref-187)
188. Bellamy (n 19) 164. [↑](#footnote-ref-188)
189. (n 5) 20; (n 18) 25; G.C.N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, Cambridge 2009) 39. [↑](#footnote-ref-189)
190. M Goldoni, ‘Two Internal Critiques of Political Constitutionalism’ (2012) 10 (4) ICON, 926, 928. [↑](#footnote-ref-190)
191. Bellamy (n 19) 214. [↑](#footnote-ref-191)
192. Ibid 96, 212-214. [↑](#footnote-ref-192)
193. Ibid 149. [↑](#footnote-ref-193)
194. Ibid 153. [↑](#footnote-ref-194)
195. (n 5), 13-14; K.D Ewing, ‘The Resilience of the Political Constitution’ (2013) 14 German Law Journal 2111, 2120. [↑](#footnote-ref-195)
196. (n 5) 20. [↑](#footnote-ref-196)
197. Bellamy (n 19) 164. [↑](#footnote-ref-197)
198. See G Gee, G C.N Webber, ‘What is a Political Constitution?’ (2010) 30 (2) OJLS 273, 287-290. [↑](#footnote-ref-198)
199. (n 23) 929. [↑](#footnote-ref-199)
200. Bellamy (n 19) 163-171, 178 -191, J Waldron, *Political Political Theory* (Harvard University Press, Harvard 2016) 215. [↑](#footnote-ref-200)
201. Waldron, *Political Political Theory* (n 33) 214. [↑](#footnote-ref-201)
202. Waldron, *Law and Disagreement* (n 19) 73-75. [↑](#footnote-ref-202)
203. J Knight, J Johnson, ‘What Sort of Equality Does Deliberative Democracy Require?’ in J Bohman

     and W Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 280. [↑](#footnote-ref-203)
204. See Waldron, *Law and Disagreement* (n 19) 232-254. [↑](#footnote-ref-204)
205. Bellamy (n 19) 223. [↑](#footnote-ref-205)
206. Waldron, *Law and Disagreement* (n 19) 114. [↑](#footnote-ref-206)
207. Waldron, *Political Political Theory* (n 33) 227. [↑](#footnote-ref-207)
208. Bellamy, (n 19) 226. [↑](#footnote-ref-208)
209. Waldron, *Law and Disagreement* (n 19) 108. [↑](#footnote-ref-209)
210. Ibid 114; Bellamy, (n 19)226. [↑](#footnote-ref-210)
211. Bellamy (n 19) 42. [↑](#footnote-ref-211)
212. Waldron, *Law and Disagreement* (n 19) 270-281. [↑](#footnote-ref-212)
213. Ibid 270-271, 274. [↑](#footnote-ref-213)
214. Ibid 274. [↑](#footnote-ref-214)
215. M Goldoni, ‘Political Constitutionalism and the Question of Constitution-Making’ (2014) 27 (3) Ratio Juris, 387, 389. [↑](#footnote-ref-215)
216. This is contra to John Rawls’ claims that the US Supreme court is an exemplar of public reasoning. See J Rawls, *Political Liberalism* (Columbia University Press, New York 1993) 231-240. Rawls’ claim has also influenced legal constitutionalism faith in the courts. see T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001), for a critique, see T Poole, Dogmatic Liberalism? T. R. S. Allan and the Common Law Constitution (2002) 65 (2) MLR, 463-475 and T Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 (3) OJLS 435-454. [↑](#footnote-ref-216)
217. Waldron, *Political Political Theory* (n 33) 220-221. [↑](#footnote-ref-217)
218. Waldron, *Political Political Theory* (n 33) 225. [↑](#footnote-ref-218)
219. Waldron, *Law and Disagreement* (n 19) 290. [↑](#footnote-ref-219)
220. Waldron, *Political Political Theory* (n 33) 223. Also see E Daly, ‘Transparency as Justification for Legislative Supremacy’ (2018) Critical Review of International Social and Political Philosophy 1-24. [↑](#footnote-ref-220)
221. Waldron, *Political Political Theory* (n 33) 231-233 [↑](#footnote-ref-221)
222. Ibid 199. It should be noted in many states constitutional judges are appointed by legislative institution. However, once in office, it is difficult to remove these judges. [↑](#footnote-ref-222)
223. Ibid 231; Bellamy*,* (n 19) 243-246; (n 5) 16. [↑](#footnote-ref-223)
224. S Tierney, ‘Whose Political Constitution? Citizens and Referendums’ (2013) 14 (12) German Law Journal 2185, 2187. [↑](#footnote-ref-224)
225. Waldron, *Law and Disagreement* (n 19) 49-55. [↑](#footnote-ref-225)
226. Bellamy, (n 19) 223. [↑](#footnote-ref-226)
227. Waldron, *Law and Disagreement* (n 19) 232-254. [↑](#footnote-ref-227)
228. M Benton, ‘The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen

     Population’ (2010) 16 Res Publica 397, 407-411, M Goldoni, ‘Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy’ (2013) 4 German L.J. 1053, 1066-1070. For a potential response to this problem see Chapter Six. [↑](#footnote-ref-228)
229. Waldron, *Law and Disagreement* (n 19) 108-110. [↑](#footnote-ref-229)
230. (n 5) 16; Waldron, Political *Political Theory* (n 33) 126; A Tomkins, *Our Republican Constitution* (Hart, Oxford, 2005) 1-6, 64-65. [↑](#footnote-ref-230)
231. This issue is considered in greater detail in Chapter Six. [↑](#footnote-ref-231)
232. (n 48) 392. [↑](#footnote-ref-232)
233. Bellamy (n 19) 241. [↑](#footnote-ref-233)
234. Waldron, *Law and Disagreement* (n 19) 101, 108. [↑](#footnote-ref-234)
235. Bellamy (n 19) 5. [↑](#footnote-ref-235)
236. Ibid 5. [↑](#footnote-ref-236)
237. Nevertheless, reflective political constitutionalist Marco Goldoni is critical of political constitutionalism traditional rejection of constitutional politics. For Goldoni, most political constitutionalists have overlooked how constructing and maintaining a higher constitutional order can be an important expression of constituent power. Goldoni also suggests a rejection of constitutional politics ignores the redemptive properties of constitution entrenchment for political community, as constructing a new constitution is often an important means for community to draw a line under their past (e.g. abolishing slavery). As a result, constitutional politics has the potential for promoting the progressive politics. See (n 23) 945-948; (n 48) 387-408. [↑](#footnote-ref-237)
238. Webber (n 22) 30. [↑](#footnote-ref-238)
239. Waldron, *Law and Disagreement* (n 19) 221. [↑](#footnote-ref-239)
240. L Alexander ‘Is Judicial Review Democratic? A Comment on Harel’ (2003) 22 (3/4) Law and Philosophy 277, 278. [↑](#footnote-ref-240)
241. Waldron, *Law and Disagreement* (n 19) 101-118. [↑](#footnote-ref-241)
242. Bellamy, (n 19) 174. [↑](#footnote-ref-242)
243. (n 22) 936; (n 48) 390-391. [↑](#footnote-ref-243)
244. Ewing (n 28) 2118, M Gordon, ‘Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit’ (2019) 30 (1) King's Law Journal, 125-147. [↑](#footnote-ref-244)
245. M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2nd edn, Hart, Oxford 2017) 5. [↑](#footnote-ref-245)
246. HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994) 106. [↑](#footnote-ref-246)
247. (n 78) 13. [↑](#footnote-ref-247)
248. Ibid 23. [↑](#footnote-ref-248)
249. Ibid 13. [↑](#footnote-ref-249)
250. Ibid 24, Ewing, (n 28) 2118. [↑](#footnote-ref-250)
251. However, as chapter six argues, the legislatures ability to hold the executive is conditional on the existence of appropriate accountability mechanisms. [↑](#footnote-ref-251)
252. (n 78) 24; Ewing (n 28) 2118; also see A Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 U Toronto LJ 1-22. [↑](#footnote-ref-252)
253. (n 78) 24; R Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9 (1) ICON 86, 103-104. [↑](#footnote-ref-253)
254. HR Gray, ‘The Sovereignty of Parliament Today’ (1953) 10 University of Toronto Law Journal 54, 54. [↑](#footnote-ref-254)
255. A.V Dicey, *Introduction to the Study of the Law of the Constitution: With an Introduction by E.C.S Wade*

     10th edn, Palgrave Macmillan, London 1959) 68; this understanding of sovereignty was accepted in *Ellen Street Estates v Minister of Health* [1934] 1 K.B. 590. [↑](#footnote-ref-255)
256. (n 78) 58-59. [↑](#footnote-ref-256)
257. G.W Keaton, *The Passing of Parliament* (Benn, London 1952) 6; H.W.R Wade, *Constitutional Fundamentals* (Stevens & Sons, London 1980) 1. [↑](#footnote-ref-257)
258. AV Dicey, ‘Lecture III: Democracy and Legislation’ in *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* [1917] (R VandeWetering ed, Liberty Fund, Indianapolis 2008)42. M Loughlin, *Public Law and Political Theory* (Oxford University Press, Oxford 1990) 142-4, WI Jennings, ‘In praise of Dicey 1885-1935’ (1935) 13 Public Administration 123, 128. [↑](#footnote-ref-258)
259. Jennings, ‘In praise of Dicey 1885-1935’ (n 91) 132. [↑](#footnote-ref-259)
260. Indeed, by 1915Dicey’s faith in Parliament had declined to the point where he preached the Parliamentary Decline Thesis discussed in Chapter One. see AV Dicey, *Introduction to the Study of the Constitution* (8th edn, Macmillan, London 1915) p. xcii. [↑](#footnote-ref-260)
261. An obvious example of this is the dysfunctional state of intra-cameral relations within Westminster Parliament preceding the enactment of the *Parliament Act 1911*, see Chapter 5. [↑](#footnote-ref-261)
262. W.I Jennings, *The Law and The Constitution* (3rd edn, The University of London Press, London 1943) 138. [↑](#footnote-ref-262)
263. Ibid 140. [↑](#footnote-ref-263)
264. Ibid 143. [↑](#footnote-ref-264)
265. (n 78) 289; K.D Ewing, ‘The Law and the Constitution: Manifesto of the Progressive party’ (2004) 67 (5) MLR, 734, 742. [↑](#footnote-ref-265)
266. (n 95) 145. [↑](#footnote-ref-266)
267. (n 78) 299-301. [↑](#footnote-ref-267)
268. Ibid 305-307. [↑](#footnote-ref-268)
269. Ibid 307. [↑](#footnote-ref-269)
270. J Jaconelli, ‘Do Constitutionnel Conventions Bind?’ (2005) 64 CJL 149, 171. [↑](#footnote-ref-270)
271. (n 78) 308. [↑](#footnote-ref-271)
272. Ibid 314-316. M Goldoni, C McCorkindale, ‘Why We (Still) Need a Revolution’ (2013) 14 German L.J. 2197-2227. [↑](#footnote-ref-272)
273. Of course, for the purposes of this thesis, I am inevitably drawing clearer distinction than may actually exist in practice. [↑](#footnote-ref-273)
274. Bellamy (n 19) 5, 165. [↑](#footnote-ref-274)
275. D Held, *Models of Democracy* (3rd edn, Polity Press, Cambridge 2006) 1. [↑](#footnote-ref-275)
276. see more generally Ibid. [↑](#footnote-ref-276)
277. As Anthony Wright points out, the intellectual development of socialism in Britain was unique, compared to its development on the continent of Europe. As he points out, “In Britain… socialist traditions had developed since the 1880s that were non-Marxist and therefore quite distinct from the perspective of European socialism as a whole.” See A Wright, *Socialisms: Old and New* (Routledge, London 2006) 7. [↑](#footnote-ref-277)
278. Ewing (n 28) 2117. However, not all on the political left share this view. An important critique comes from the Marxist academic Ralph Miliband’s attack on democratic socialism’s embrace of the UK’s political model. For Miliband, the UK’s political constitution institutionalised a capitalist democracy; a tool for preservation of capitalism. By embracing political constitutionalism, democratic socialism, and its parliamentary vehicle the Labour Party, had been assimilated and manipulated by capitalist interests to contain conflicts about capitalism. Through sanctioning or supressing left-wing critics and dissenters, in exchange for possibility winning an election, democratic socialists were blunting the workers’ ability to overthrow capitalism. See R Miliband, *Capitalist Democracy in Britain* (Oxford University Press, Oxford 1984). [↑](#footnote-ref-278)
279. K.D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart, Oxford 2007) 37. However, since the mid-1990s it is debatable whether the Labour Party still functions as a vehicle for socialism. As Ewing remarks, “The problem for the Blair/Brown era is that New Labour had largely abandoned democratic socialism with its embrace of ‘third way’ politics and globalisation while also embracing free enterprise

     and transforming itself into a liberal government with a social democratic base.” See K.D Ewing, ‘Jeremy Corbyn and the Law of Democracy’ (2017) 28 (2) King's Law Journal, 343, 346. For an account of “the third way” see A Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, Cambridge 1998). [↑](#footnote-ref-279)
280. P Dorey, *The Labour Party and Constitutional Reform: A History of Constitutional Conservatism* (Palgrave Macmillan, Basingstoke 2008) 4; M Evans, *Constitution-Making and the Labour Party* (Palgrave Macmillan, Basingstoke 2003) 15-39; V Bogdanor, *Power and the People: A Guide to Constitutional Reform* (Weindenfeld and Nicolson, London 1997) 112. [↑](#footnote-ref-280)
281. C Harlow, ‘John Aneurin Grey Griffith 1918–2010’ in R Johnston (ed) *Biographical Memoirs of Fellows of the British Academy XI* (Oxford University Press, Oxford 2012) 332. [↑](#footnote-ref-281)
282. J.A.G. Griffith, ‘The Place of Parliament in the Legislative Process: Part I’ (1951) 14 MLR 279 279; & J.A.G. Griffith, ‘The Place of Parliament in the Legislative Process: Part II’ (1951) 14 MLR 425; 436.M Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 U Toronto L.J 361, 374. [↑](#footnote-ref-282)
283. M Loughlin, ‘The Political Constitution Revisited’ 30 (1) King’s Law Journal 5, 8-10. [↑](#footnote-ref-283)
284. (n 5) 7. [↑](#footnote-ref-284)
285. J.A.G. Griffith, ‘The Right Stuff’ (1993) 29 Socialist Register 106-124. [↑](#footnote-ref-285)
286. Ibid 106. [↑](#footnote-ref-286)
287. Ewing, (n 28) 2136. [↑](#footnote-ref-287)
288. Ibid 2111-2113. [↑](#footnote-ref-288)
289. Ibid 2124, 2127. [↑](#footnote-ref-289)
290. Ibid 2120. [↑](#footnote-ref-290)
291. Ibid 2117. [↑](#footnote-ref-291)
292. Ibid 2127. [↑](#footnote-ref-292)
293. Ibid 2117-2135, also see (n 98) 734-752. [↑](#footnote-ref-293)
294. M Beech, *‘*A Social Democratic Narrative of Democracy of British Democracy’ (2012) 33(2) Policy Studies 133, 135. [↑](#footnote-ref-294)
295. (n 110) 24-26. R Leach, *British Political Ideologies* (1st edn, Prentice Hall, Hertfordshire 1996) 136-137; H Gaitskell, ‘Public ownership and Equality [1955]’ reprinted in in F Bealey (ed) *The Social and Political Thought of the British Labour Party* (Littlehampton Book Services Ltd, Lomdon 1970) 189. See generally, R. H. Tawney, *Equality* (4th edn, George Allan and Unwin, London 1938). B Shaw, ‘What Socialism Is’ (1890) The Fabian Tract 13. [↑](#footnote-ref-295)
296. (n 110) 25; Gaitskell, ‘Public ownership and Equality’ (n 128) 189. [↑](#footnote-ref-296)
297. Tawney, *Equality* (n 128) 182. It should be noted that Loughlin has contended that Tawney’s beliefs on equality can operate as surrogate for Griffith’s beliefs on equality. See M Loughlin, ‘What would John Griffith have made of Jonathan Sumption’s Reith Lectures?’ (2019) 90 (4) The Political Quarterly, 785, 786-788. [↑](#footnote-ref-297)
298. C Atlee quoted in (n 110) 25. [↑](#footnote-ref-298)
299. (n 110) 17-19. [↑](#footnote-ref-299)
300. S Webb, *Socialism in England* (Swan Sonnenschein & Co, London 1890) 26-27. [↑](#footnote-ref-300)
301. Ibid 9. [↑](#footnote-ref-301)
302. Ibid 10. [↑](#footnote-ref-302)
303. (n 110) 17. [↑](#footnote-ref-303)
304. Leach, (n 128) 139. [↑](#footnote-ref-304)
305. (n 110) 42, Leach (n 128) 139. [↑](#footnote-ref-305)
306. Leach, (n 128) 139. [↑](#footnote-ref-306)
307. (n 110) 43. [↑](#footnote-ref-307)
308. G Foote, *The Labour Party’s Political Thought: A History* (3rd ed, Macmillan Basingstoke 1997) 21, Leach, (n 128)139-140. [↑](#footnote-ref-308)
309. Although Marx did accept it was possible, in certain circumstances, for a peaceful transition towards socialism, see Foote (n 141) 24. [↑](#footnote-ref-309)
310. Dorey (n 133) 3-4, 349-352. Foote, (n 1411) 29. [↑](#footnote-ref-310)
311. E Bernstein, *The Preconditions of Socialism* [1899](Cambridge University Press, Cambridge 1993) 145. [↑](#footnote-ref-311)
312. Shaw (n 128); (n 110) 50. [↑](#footnote-ref-312)
313. (n 144) 140. [↑](#footnote-ref-313)
314. Ibid 142. [↑](#footnote-ref-314)
315. Ibid 143. [↑](#footnote-ref-315)
316. Ibid 143-144. [↑](#footnote-ref-316)
317. E Durbin, *The Political of Democratic Socialism: An Essay on Social Policy* (George Routledge & Son Ltd London 1940) 271, (n 127) 133. [↑](#footnote-ref-317)
318. Durbin, (n 150) 238-241. [↑](#footnote-ref-318)
319. Foote (n 141) 30. [↑](#footnote-ref-319)
320. Quoted in Dorey (n 113) 18. [↑](#footnote-ref-320)
321. One notable exception is the Webbs’ unusual proposal for a radical overhaul of the British parliamentary system. The Webbs advanced that there should be two parliaments; a “social parliament” and a “political parliament.” see S Webb and B Webb, *A Constitution for the Socialist Commonwealth of Great Britain* (Longmans, Green and co, London 1920) 110-131. However, the norm was that British socialists advocated minor modification.See more generallyDorey (n 113); Evans (n 133) 15-39; Foote, (n 141) 29, (n 110) 50, A Wright, ‘British Socialists and The British Constitution’(1990) 43 (3) Parliamentary Affairs, 322, 324.  [↑](#footnote-ref-321)
322. (n 133) 118-119. [↑](#footnote-ref-322)
323. A Bevan, *In Place of Fear* (Quartet Books, London 1978) 29. [↑](#footnote-ref-323)
324. C.R Attlee, *The Labour Party in Perspective* (Victor Gollancz, London 1937) 113. [↑](#footnote-ref-324)
325. (n 156) 25. [↑](#footnote-ref-325)
326. E Bernstein, *Evolutionary socialism: a criticism and affirmation* (Schocken Books New York 1961) 166. [↑](#footnote-ref-326)
327. Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (n 112) 27-28. [↑](#footnote-ref-327)
328. Dorey (n 113) 52, 98, 359. [↑](#footnote-ref-328)
329. Dorey (n 113) 14, 26, 358; D Nicol, ‘Professor Tomkins' House of Mavericks’ [2006] P.L. 2006 467, 470-472. [↑](#footnote-ref-329)
330. Dorey (n 113) 4-5. [↑](#footnote-ref-330)
331. D Judge, *Political Institutions in the United Kingdom* (Oxford University Press, Oxford 2005) 24-25. Importantly, the model’s value stems from its ability to capture how the left believe the state should operate, rather than how the state itself actually operates. D Richards, M J Smiths, *Governance and Public Policy in Britain* (Oxford University Press, Oxford 2003) 48. [↑](#footnote-ref-331)
332. Dorey (n 113) 4-5. [↑](#footnote-ref-332)
333. (n 98) 735. [↑](#footnote-ref-333)
334. (n 118) 106; (n 5) 15. [↑](#footnote-ref-334)
335. Classically expressed in the French Jurist Edouard Lambert’s *Le Gouvernement des juges et la lutte contre la legislation sociale aux Etats-Unis* [The Government of Judges and the Fight Against Social Legislation in the United States] (1921). English translations of the book are increasingly rare; however, the article’s mains claims are summarised by Michael H. Davis in M H. Davis, ‘A Government of Judges: An Historical Re-View’ (1987) 35 (3) The American Journal of Comparative Law 559-580. [↑](#footnote-ref-335)
336. See C Harlow, ‘Judicial Power, the left and the LSE Tradition’ in R Ekins, G Gee (eds) *Judicial Power and the Left* (*Policy Exchange, London* 2017) 20-25. [↑](#footnote-ref-336)
337. K.D Ewing, ‘The Unbalanced Constitution’ in T Campbell, K Ewing, A Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford 2001) 105. [↑](#footnote-ref-337)
338. J.A.G. Griffith, *The Politics of the Judiciary* (5th edn Fortuna Press, London 1997) 328 [↑](#footnote-ref-338)
339. Ibid 342. [↑](#footnote-ref-339)
340. Ibid 338. [↑](#footnote-ref-340)
341. *Roberts v Hopwood* *[1925] AC 578*. [↑](#footnote-ref-341)
342. For a list of other judgments that the left is critical of seeJ.A.G. Griffith, *the Politics of the Judiciary* (5th edn Fortuna Press, London 1997) ch 3-7. K Ewing, C Geaty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (Oxford University Press, Oxford 2000), K Ewing, C Geaty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford University Press, Oxford 1990). [↑](#footnote-ref-342)
343. P Fennell, ‘*Roberts v Hopwood: The Rule against Socialism’* (1986) 13 (3) Journal of Law and Society 401, 402. [↑](#footnote-ref-343)
344. *R v Roberts, Ex Parte Scurr and Others* *[1924] 2 KB 695*. [↑](#footnote-ref-344)
345. (n 174) at *594*. [↑](#footnote-ref-345)
346. A notable and somewhat surprising exception is Harold Laski’s support for a written constitution that could only be amended by a two-thirds majority within the legislature. See H Laski, *A Grammar of Politics* [1925] in D Reisman (ed) *Democratic Socialism in Britain: Classic Texts in Economic and Political Thoughts 1825-1952 Vol.6* (Pickering & Chatto London, 1996) 304-308. [↑](#footnote-ref-346)
347. (n 170) 107. [↑](#footnote-ref-347)
348. R.S Cripps, ‘Can Socialism Come by Constitutional Methods?’ in C Addison, C.R. Attlee, H.N Brailsford, H.R Clay, G.D.H. Cole, R.S Cripps, J.F Horrabin, W. Mellor, C Trevelyan, E.F Wise, *Problems of A Socialist Government* (Victor Gollancz Ltd, London 1933) 49. [↑](#footnote-ref-348)
349. Dorey (n 113) 15. [↑](#footnote-ref-349)
350. H J Laski, *Studies in Law and Politics* (George Allen & Unwin LTD, 1932) 106. [↑](#footnote-ref-350)
351. See D Nicol, *The Constitutional Protection of Capitalism* (Hart, Oxford 2010). [↑](#footnote-ref-351)
352. Ibid19-21 152-153. [↑](#footnote-ref-352)
353. Ibid32. [↑](#footnote-ref-353)
354. Ibid31. [↑](#footnote-ref-354)
355. K.D Ewing, ‘Democratic Socialism and Labour Law’ (1995)24 (2) Industrial Law Journal 103-132; (n 170) 111-115. [↑](#footnote-ref-355)
356. (n 170) 116. [↑](#footnote-ref-356)
357. Dorey (113) 50-52. K.D Ewing, ‘Jeremy Corbyn and the Law of Democracy’ (n 112) 343, 345. [↑](#footnote-ref-357)
358. H Laski, *Reflections on the Constitution* (Manchester University Press, Manchester 1951) 58. To similar effect, Jennings advances “The function of the Government is to govern; that of its supporters is too support it; and that of its opponents is to criticise it” in I Jennings, *Parliament* (1st edn, Cambridge University Press, Cambridge 1939) 7-8*.*  [↑](#footnote-ref-358)
359. (n 181) 48, A Bevan, *In Place of Fear* (Quartet Books, London 1978) ch2. [↑](#footnote-ref-359)
360. A Kelso, *Parliamentary Reform at Westminster* (Manchester University Press, Manchester 2009) 4.  [↑](#footnote-ref-360)
361. Dorey (n 113) 50. [↑](#footnote-ref-361)
362. (n 193) 5.  [↑](#footnote-ref-362)
363. Dorey (n 113) 51. [↑](#footnote-ref-363)
364. (n 181) 35-66. [↑](#footnote-ref-364)
365. Ibid 38. [↑](#footnote-ref-365)
366. Ibid 43. [↑](#footnote-ref-366)
367. Ibid 44. [↑](#footnote-ref-367)
368. Ibid 46. [↑](#footnote-ref-368)
369. Consider its similarities with the anti-institutional tendencies found within modern right-leaning authoritarian populism, see G Halmai, ‘Populism, authoritarianism and constitutionalism’ (2019) 20 German Law Journal 20, 296-313, B Bugaric, ‘Could Populism Be Good for Constitutional Democracy?’ (2019) 15 Annual Review of Law and Social Science 41-58, M Tushnet, 'Varieties of Populism' (2019) 20 German LJ 382-389. [↑](#footnote-ref-369)
370. A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge 2009) 371. [↑](#footnote-ref-370)
371. J Gray, *Liberalism* (2nd edn, Open University Press, Buckingham 1995) xii. [↑](#footnote-ref-371)
372. J Waldron, ‘Theoretical Foundations of Liberalism’ (1987) 37 (147) 127, 134. [↑](#footnote-ref-372)
373. Ibid 128. [↑](#footnote-ref-373)
374. Ibid 128. [↑](#footnote-ref-374)
375. Ibid 129, also see Waldron, *Law and Disagreement* (n 19) 221-223. [↑](#footnote-ref-375)
376. I Berlin, ‘Two concepts of liberty’ in I Berlin, *Liberty* (H Hardy ed, Oxford University Press, Oxford 2002) 169, 178. [↑](#footnote-ref-376)
377. (n 205) 130. [↑](#footnote-ref-377)
378. Ibid 131. [↑](#footnote-ref-378)
379. Ibid 133. [↑](#footnote-ref-379)
380. Ibid 133-4. [↑](#footnote-ref-380)
381. Ibid 134-135. [↑](#footnote-ref-381)
382. Ibid 134. [↑](#footnote-ref-382)
383. Ibid 135-136. [↑](#footnote-ref-383)
384. See Waldron, *Law and Disagreement* (n 19) Ch 11. [↑](#footnote-ref-384)
385. Ibid 309. [↑](#footnote-ref-385)
386. See F.A Hayek, *The Constitution of Liberty: The Definitive Edition* [1960](University of Chicago Press, Chicago 2011) Ch 11-14, J Rawls, *A Theory of Justice* (Oxford University Press, Oxford 1999), R Dworkin, *Taking Rights Seriously* (Duckworth, London 1977). [↑](#footnote-ref-386)
387. Waldron, *Law and Disagreement* (n 19) Ch 10. [↑](#footnote-ref-387)
388. Ibid 221-222. [↑](#footnote-ref-388)
389. Ibid 272-275. [↑](#footnote-ref-389)
390. Ibid 292, 303. [↑](#footnote-ref-390)
391. J Waldron, *Political Political Theory* (n 33) 229-233. [↑](#footnote-ref-391)
392. J Waldron, *Law and Disagreement* (n 19) 223. [↑](#footnote-ref-392)
393. K Whittington, ‘In Defense of Legislature’ (2000) 28 (5) Political Theory 690, 693, 696. [↑](#footnote-ref-393)
394. Ibid 697. [↑](#footnote-ref-394)
395. See Waldron, *Political Political Theory* (n 33) 6. [↑](#footnote-ref-395)
396. Ibid 202-203. [↑](#footnote-ref-396)
397. Ibid 203-212. [↑](#footnote-ref-397)
398. Ibid 204-205. [↑](#footnote-ref-398)
399. Ibid 149. [↑](#footnote-ref-399)
400. Ibid 126, 154. [↑](#footnote-ref-400)
401. Ibid 126, 154. [↑](#footnote-ref-401)
402. Ibid 128-129. [↑](#footnote-ref-402)
403. Ibid 155. [↑](#footnote-ref-403)
404. Ibid 150, 155-156. [↑](#footnote-ref-404)
405. Ibid 155. [↑](#footnote-ref-405)
406. Ibid 157. [↑](#footnote-ref-406)
407. Ibid 156. [↑](#footnote-ref-407)
408. Ibid 158. [↑](#footnote-ref-408)
409. Ibid 159. [↑](#footnote-ref-409)
410. Ibid 159. [↑](#footnote-ref-410)
411. Ibid 96-97, 100. [↑](#footnote-ref-411)
412. Ibid 104, 159. [↑](#footnote-ref-412)
413. Ibid 160-161; also see, J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (W Regh tr, MIT Press, Cambridge MA 1996) 305-306. [↑](#footnote-ref-413)
414. Waldron, *Political Political Theory* (n 33) 162-163. [↑](#footnote-ref-414)
415. Ibid 164-165. [↑](#footnote-ref-415)
416. Ibid 45-46, 70-71. [↑](#footnote-ref-416)
417. (n 78)188. [↑](#footnote-ref-417)
418. Waldron, *Political Political Theory* (n 33) 57. [↑](#footnote-ref-418)
419. Ibid 63. [↑](#footnote-ref-419)
420. Ibid 65. [↑](#footnote-ref-420)
421. Ibid 65, 136. [↑](#footnote-ref-421)
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423. Waldron, *Political Political Theory* (n 33) 67. [↑](#footnote-ref-423)
424. Ibid 63. [↑](#footnote-ref-424)
425. Ibid 76. [↑](#footnote-ref-425)
426. Ibid 76. [↑](#footnote-ref-426)
427. Ibid 78. [↑](#footnote-ref-427)
428. Ibid 81-85. [↑](#footnote-ref-428)
429. J Waldron, *Parliamentary Recklessness: Why We Need to Legislate More Carefully* (Maxim Institution, New Zealand 2008). [↑](#footnote-ref-429)
430. For a counter assessment and critique of Waldron’s claims see J Allen and A Geddis, ‘Waldron and opposing judicial review - Except, sort of, in New Zealand’ (2006) 2 New Zealand Law Journal 94-97. [↑](#footnote-ref-430)
431. Bellamy (n 19), Tomkins (n 63) [↑](#footnote-ref-431)
432. See C Sunstein, ‘Beyond Republican Revival (1988) 97 Yale Law Journal 1539, P Pettit*, Republicanism: A Theory of Freedom and Government*(Oxford University Press, Oxford1997)ch. 6, I Honohan, ‘Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?’ in S Besson, J.L Marti (eds) *Legal Republicanism: National and International Perspectives* (Oxford University Press, Oxford 2009) 83. [↑](#footnote-ref-432)
433. C Laborde J Mayor, ‘The Republican Contribution to Contemporary Political Theory’ in C Laborde, J Maynor (eds) *Republicanism and Political* Theory (Blackwell Publishing, Oxford 2008) 1; S Besson, L.J Marti, ‘Law and Republicanism, Mapping the Issues’ in S Besson, J.L Marti (eds) *Legal Republicanism: National and International Perspectives* (Oxford University Press, Oxford 2009) 3, 9. [↑](#footnote-ref-433)
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435. Pettit, *Republicanism* (n 265) 21-22. [↑](#footnote-ref-435)
436. Ibid 66. [↑](#footnote-ref-436)
437. Ibid 52. [↑](#footnote-ref-437)
438. Ibid 52-53. [↑](#footnote-ref-438)
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440. Ibid 54. [↑](#footnote-ref-440)
441. Ibid 55. [↑](#footnote-ref-441)
442. Ibid 55. [↑](#footnote-ref-442)
443. Ibid 55. [↑](#footnote-ref-443)
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445. Ibid 58. [↑](#footnote-ref-445)
446. Ibid 63-64. [↑](#footnote-ref-446)
447. Ibid 63. [↑](#footnote-ref-447)
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453. Ibid 55-56. [↑](#footnote-ref-453)
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457. Ibid 164. [↑](#footnote-ref-457)
458. Ibid 151. [↑](#footnote-ref-458)
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462. Ibid 5, 165. [↑](#footnote-ref-462)
463. Ibid 223. [↑](#footnote-ref-463)
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471. Ibid 241. [↑](#footnote-ref-471)
472. Ibid 204, 232. [↑](#footnote-ref-472)
473. Ibid 232. [↑](#footnote-ref-473)
474. Ibid 207. [↑](#footnote-ref-474)
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476. Ibid 239, 254-255. [↑](#footnote-ref-476)
477. Ibid 242. [↑](#footnote-ref-477)
478. Ibid 202-203. [↑](#footnote-ref-478)
479. Ibid 202-203. [↑](#footnote-ref-479)
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481. Ibid 239-240. [↑](#footnote-ref-481)
482. Tomkins, *Our Republican Constitution* (n 63) 38-39. [↑](#footnote-ref-482)
483. Ibid 3. [↑](#footnote-ref-483)
484. (n 5), 16. [↑](#footnote-ref-484)
485. Tomkins, *Our Republican Constitution* (n 63) 10-31. [↑](#footnote-ref-485)
486. Ibid 64. [↑](#footnote-ref-486)
487. Ibid 51. [↑](#footnote-ref-487)
488. Ibid 2, 51. [↑](#footnote-ref-488)
489. Ibid 25. [↑](#footnote-ref-489)
490. A Tomkins, ‘What is Parliament for’ in N Bamford, *Public law in a multi-layered constitution* (Hart, Oxford 2003) 76. [↑](#footnote-ref-490)
491. Tomkins, *Our Republican Constitution* (n 63) 65. [↑](#footnote-ref-491)
492. Ibid 4-5. [↑](#footnote-ref-492)
493. Ibid 2. It should be noted that Tomkins’ hypothesis has since been empirically proven correct. see M Russell, D Gover, *Legislation at Westminster: Parliamentary actors and influence in the making of British law* (Oxford University Press, Oxford 2017) [↑](#footnote-ref-493)
494. Tomkins, ‘What is the executive for’ (n 323) 58-74; Tomkins, *Our Republican Constitution* (n 63) 124-131. [↑](#footnote-ref-494)
495. Tomkins, *Our Republican Constitution* (n 63) 137-138, A Tomkins, ‘Professor Tomkins’ House of Mavericks: A Reply’ [2007] PL 33-39. Ironically, Tomkins has since joined and become a prominent member of the Scottish Conservative Party and has been elected to the Scottish Parliament. [↑](#footnote-ref-495)
496. For a critique of Tomkins position on parties from a Democratic Socialist perspective see D Nicol, ‘Professor Tomkins' House of Mavericks’ [2006] P.L. 2006 467-475. [↑](#footnote-ref-496)
497. Tomkins, *Our Republican Constitution* (n 63) 136-137. [↑](#footnote-ref-497)
498. A Tomkins, ‘Professor Tomkins’ House of Mavericks: A Reply’ [2007] PL 33, 34. [↑](#footnote-ref-498)
499. Tomkins, *Our Republican Constitution* (n 63) 138. [↑](#footnote-ref-499)
500. A Tomkins, *Public Law* (Oxford University Press, Oxford 2003) 168. [↑](#footnote-ref-500)
501. Tomkins, *Our Republican Constitution* (n 63) 138. [↑](#footnote-ref-501)
502. As Tony Wright points out, by design “all the essential features of the House of Commons are structured by the realities of parties.” See T Wright, *The British Political Process* (Routledge London 2000) 108. [↑](#footnote-ref-502)
503. M Goldoni, C McCorkindale, ‘The Three Waves of Political Constitutionalism’ (2019) 30 (1) King’s Law Journal 74, 82-85. Also see M Goldoni and C McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (2013) 14 (12) German L.J. 2103-2109. [↑](#footnote-ref-503)
504. Goldoni, McCorkindale ‘The Three Waves of Political Constitutionalism’ (n 336) 82. [↑](#footnote-ref-504)
505. Ibid 82. [↑](#footnote-ref-505)
506. Ibid 83. [↑](#footnote-ref-506)
507. (n 116) 2112 1227; Loughlin, ‘The Political Constitution Revisited’ (n 116) 18-19. [↑](#footnote-ref-507)
508. Loughlin, ‘The Political Constitution Revisited’ (n 116) 18-19. [↑](#footnote-ref-508)
509. (n 28) 2124-2125 [↑](#footnote-ref-509)
510. A Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’ (2019) 30 (1) King’s Law Journal 43, 48. [↑](#footnote-ref-510)
511. B Jackson, ‘Commentary: Whatever Happened to the Conservative Party?’ (2019) 90 (1) The Political Quarterly 3, 3. [↑](#footnote-ref-511)
512. Ibid 4. [↑](#footnote-ref-512)
513. (n 18) 20-45. [↑](#footnote-ref-513)
514. G Gee, ‘The Political Constitution and the Political Right’ (2019) 30 (1) King’s Law Journal 148, 150. [↑](#footnote-ref-514)
515. Ibid 156-162. [↑](#footnote-ref-515)
516. Ibid 166-169, also see The Judicial Power Project, ‘About Us’ (judicialpowerproject.org)

     <<https://judicialpowerproject.org.uk/about/>> accessed 18/09/2019. [↑](#footnote-ref-516)
517. In this author's opinion, although Gee presents a carefully detailed case for a conservative reading of the political model, he presents an unconvincing rebuttal towards Loughlin’s accusation that the Conservatives are only now concerned with judicial power out of political expediency. Although, he suggests that although the right has historically been silent on and was quite happy to allow judicial power to frustrate the left, the conservative scepticism of judicial power is long held. Despite this, Gee does not explain why the right failed to criticise instances of the courts acting beyond their traditional role to frustrate Labour and Liberal administrations. In effect, Gee appears to be pleading that the Conservatives are guilty of a naïve ignorance towards judicial power because they failed to recognise how the cumulative consequences. Moreover, it remains to be seen if the Judicial Power Project and the Conservative Party's scepticism of judicial power can survive if the Conservative party falls from office. Once the party is in opposition, the traditional logics of appropriateness for the opposition parties should encourage the celebration of the judiciary when it frustrates the governing party's goals. In essence, it is highly likely that the Conservatives will once again turn a blind eye to the cumulative build-up of judicial power. See Ibid 167-169. [↑](#footnote-ref-517)
518. (n 31) 287. [↑](#footnote-ref-518)
519. Ibid 290. [↑](#footnote-ref-519)
520. Ibid 289. [↑](#footnote-ref-520)
521. Bellamy (n 19) 174. [↑](#footnote-ref-521)
522. See Waldron, *Law and Disagreement* (n 19); J Waldron*, Political Political Theory* (n 33) 125-144, 205; and Bellamy (n 19). [↑](#footnote-ref-522)
523. See D Easton, *The Political System: An Inquiry into the State of Political Science* (Knopf, New York 1953) [↑](#footnote-ref-523)
524. B G. Peters, *Institutional Theory in Political Science: The ‘New Institutionalism’* (Pinter, London 1999) 26. [↑](#footnote-ref-524)
525. Ibid 14. [↑](#footnote-ref-525)
526. Bellamy (n 19) 174. [↑](#footnote-ref-526)
527. J G. March, J P. Olsen, ‘The New Institutionalism: Organizational Factors in Political Life’ (1984) 78 (3) The American Political Science Review 734, 747. [↑](#footnote-ref-527)
528. J G March, J P. Olsen, ‘Elaborating the New Institutionalism’ in S A. Binder, R. A. W. Rhodes, B A. Rockman (eds) *The Oxford Handbook of Political Institutions* (Oxford University Press, Oxford 2008) 3. [↑](#footnote-ref-528)
529. J G March, J P. Olsen, ‘The logic of appropriateness’ in R E. Goodin, M Moran, and M Rein (eds) *The Oxford Handbook of Public Policy* (Oxford University Press, Oxford 2008) 690. [↑](#footnote-ref-529)
530. Ibid, 691; (n 361) 7; (n 357) 30. [↑](#footnote-ref-530)
531. (n 357) 29-30. [↑](#footnote-ref-531)
532. Ibid 29. [↑](#footnote-ref-532)
533. See Chapter Seven, Section Three. [↑](#footnote-ref-533)
534. (n 361) 8. [↑](#footnote-ref-534)
535. P Scott, ‘(Political) Constitutions and (Political) Constitutionalism’ (2013) 14 German Law Journal 2157, 2172. [↑](#footnote-ref-535)
536. Ibid. [↑](#footnote-ref-536)
537. See G Sartori, *Comparative Constitutional Engineering: An Inquiry into structures, incentives and outcomes* (2nd edn, Palgrave Macmillan 1997) ix. [↑](#footnote-ref-537)
538. Ibid. [↑](#footnote-ref-538)
539. Ibid; M Qvortrup, ‘The Logic of Constitutional Engineering: Institutional Design and Counterterrorism from Aristotle to Arend Lijphart’ (2018) 41 (1) Studies in Conflict & Terrorism, 96, 96; G Stoker, ‘Designing Politics: A Neglected Justification for Political Science’ (2013) 11, Political Studies Review 174, 176. [↑](#footnote-ref-539)
540. See G Gee, G C.N Webber, ‘What is a Political Constitution?’ (2010) 30 (2) OJLS 273, 287.

     Of course, as was observed in Chapter Two that some political constitutionalists who embrace the ‘exceptionalist’ approach to legislative design do not share this concern. [↑](#footnote-ref-540)
541. See J Waldron, *Political Political Theory* (Harvard University Press, Harvard 2016) 203-205; (n4) 287-290. [↑](#footnote-ref-541)
542. N. W Polsby ‘Legislatures’ in F I. Greenstein, N W. Polsby (eds) *Handbook of Political Science Vol 5: Governmental Institutions and Processes* (Addison-Wesley, Boston MA 1975) 257-319. [↑](#footnote-ref-542)
543. C Montesquieu, 'Book XI Laws that Comprise Political Liberty: Their Relation to the Constitution, Chapter VI: The English Constitution' in The Political Theory of Montesquieu (M Richter tr, Cambridge University Press, Cambridge 1977) 245. [↑](#footnote-ref-543)
544. G Webber, P Yowell, R Ekins, M Köpcke, B W. Miller, F J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, Cambridge 2018) 3. [↑](#footnote-ref-544)
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     A Tomkins, ‘What is Parliament for? in N Bamford (ed) *Public law in a Multi-layered Constitution* (Hart, Oxford 2003); A Tomkins, ‘Professor Tomkins’ House of Mavericks: A Reply’ [2007] PL 33-39; D Oliver, ‘Democracy, Parliament and constitutional watchdogs’ [2000] PL 553-555; D Oliver, ‘The Reform of the United Kingdom Parliament’ in J Jowell, D Oliver (eds) The Changing Constitution (4th edn, Oxford University Press, Oxford 2000) 261-291; S Laws, ‘What is the Parliamentary Scrutiny of Legislation for?’ in A Horne, A Le Sueur (eds) *Parliament: Legislation and Accountability* (Hart, Oxford 2016) 15-37. [↑](#footnote-ref-547)
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549. (n 9) 85, 88, 90, 116, (n 8) 112. [↑](#footnote-ref-549)
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551. Tomkins, ‘Professor Tomkins’ House of Mavericks: A Reply’ (n 11) 33. [↑](#footnote-ref-551)
552. See D Nicol, ‘Professor Tomkins' House of Mavericks’ [2006] P.L. 2006 467-475. [↑](#footnote-ref-552)
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562. See B Rottinghaus, ‘Exercising Unilateral Discretion: Presidential Justifications of Unilateral Powers in a Shared Powers System’ (2019) 47 (1) American Politics Research 3-28, K R Mayer, ‘Executive Orders and Presidential Power (1999) 61 (2) Journal of Politics, 445-466. [↑](#footnote-ref-562)
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579. (n 29) 115. [↑](#footnote-ref-579)
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608. Ibid 90. [↑](#footnote-ref-608)
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613. (n 66) 90. [↑](#footnote-ref-613)
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622. A Sannerstedt, ‘Negotiations in the Riksdag’ in L Stenelo and M Jerneck (eds) *The Bargaining Democracy*

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623. (n 6) 277. [↑](#footnote-ref-623)
624. See M.L Mezey, *Comparative Legislatures,* (Duke University Press, Durham NC 1979) 21-44.

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625. See N.W Polsby, ‘The Institutionalization of the U.S. House of Representatives’ (1968) 62 (1) American Political Science Review 144-168. [↑](#footnote-ref-625)
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630. (n 6) 280. [↑](#footnote-ref-630)
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633. Ibid 277. [↑](#footnote-ref-633)
634. Ibid 284. [↑](#footnote-ref-634)
635. Ibid 284. [↑](#footnote-ref-635)
636. Ibid 284. [↑](#footnote-ref-636)
637. (n 78) 89. [↑](#footnote-ref-637)
638. (n 6) 278. [↑](#footnote-ref-638)
639. Ibid 278-279. [↑](#footnote-ref-639)
640. Ibid 281. [↑](#footnote-ref-640)
641. (n 78) 89. [↑](#footnote-ref-641)
642. (n 6) 291-292. [↑](#footnote-ref-642)
643. (n 78) 94. [↑](#footnote-ref-643)
644. Ibid 89. [↑](#footnote-ref-644)
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648. J K. Johnson, ‘The Role of Parliament in Government’ (The World Bank 2005) 5, available online via <<http://siteresources.worldbank.org/PSGLP/Resources/RoleofParliamentinGovernment.pdf>>

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649. (n 6) 277. [↑](#footnote-ref-649)
650. Although they could also include the Military or Aristocratic elements. See Ibid 278, 283, 291. [↑](#footnote-ref-650)
651. Ibid 278. [↑](#footnote-ref-651)
652. It should be noted, Polsby peculiarly does not address whether the dominance of political parties is also a product of the electoral system. It may be the case that Polsby’s claims are premised on belief that legislative parties exist prior their external-facing political parties and therefore determined the electoral system from within the legislature via producing the necessary legislative framework for electoral system develop within. [↑](#footnote-ref-652)
653. (n 6) 283. [↑](#footnote-ref-653)
654. Ibid 283. [↑](#footnote-ref-654)
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662. A King, ‘Modes of Executive-Legislative Relations: Great Britain, France, and West Germany’ (1976) 1 (1) 11-36. [↑](#footnote-ref-662)
663. Although King does not reference Polsby’s typology in the article, King would in subsequent works use Polsby’s typology arguing, “the British House of Commons is now, and has been for a very long time, the archetypal arena assembly. It is simply not equipped to function as a transformative legislature” in A King, *The British Constitution* (Oxford University Press, Oxford 2007) 332. [↑](#footnote-ref-663)
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749. These are broadly interpreted from J Mansbridge *et al*’s discussion of *central/peripheral arenas* of deliberation; see Ibid 9. [↑](#footnote-ref-749)
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753. See Chapter Two. [↑](#footnote-ref-753)
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809. Ibid 74. [↑](#footnote-ref-809)
810. Lowenberg, Patterson, (n 9) 117. [↑](#footnote-ref-810)
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812. G W. Cox, ‘The Organization of Democratic Legislatures’ in B Weingast, D Wittman (eds) *The Oxford Handbook of Political Economy* (Oxford University Press, Oxford 2006) 141. [↑](#footnote-ref-812)
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1020. See M Loughlin, ‘The silences of constitutions’ (2018) 16 (3) ICON 922–935, [↑](#footnote-ref-1020)
1021. See Parliament Act 1911 and Parliament Act 1949.Whether it is appropriate to describe these Acts as ‘ordinary’ in terms of their purpose and their status within the UK’s Constitutional Order is debatable. In several constitutionally significant case the United Kingdom, the courts have characterised these Act as ‘Constitutional Statutes’ which cannot be implicitly repealed by subsequent legislation. See *Thoburn v Sunderland City Council [2003] Q.B. 151, para 62 – 64, R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3, para 78-79, 207-208, R (Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 para 67.*  [↑](#footnote-ref-1021)
1022. (n 14) 19. [↑](#footnote-ref-1022)
1023. Ibid 26-27. [↑](#footnote-ref-1023)
1024. The Parliament Act 1911, Preamble [↑](#footnote-ref-1024)
1025. The Parliament Act 1911 s.2 (1); It should be noted that s.2 (1) also established the Parliament Act cannot be used to extend the maximum duration of a Parliament beyond five years. Additionally, obita comments in the Jackson case suggest the Parliament Acts cannot not be used to abolish the House of Lords, judicial review or the ordinary role of the courts. In the event they were used in such a way the Supreme Court might refuse to recognise such an Acts as law. See *R (Jackson) v Attorney General* [2005] UKHL 56, per Lord Steyn 100-102. [↑](#footnote-ref-1025)
1026. Parliament Act 1949 s.1 (b) [↑](#footnote-ref-1026)
1027. P. A. Bromhead, *The House of Lords and Contemporary Politics* 1911–1957 (Routledge & Kegan Paul, London 1958) 265; P Dorey, *The Labour Party and Constitutional Reform: A History of Constitutional Conservatism* (Palgrave Macmillan, New York 2008) 105-106; I Jennings, *Parliament Must Be Reformed: A Programme for Democratic Government* (Kegan Paul, Trench, Trubner & Co LTD, London 1941) 49-56; [↑](#footnote-ref-1027)
1028. N Barber, *The Constitutional State* (Oxford University Press, Oxford 2012) 81; K.C Wheare, *Modern Constitution* (Oxford University Press, Oxford 1966) 122. [↑](#footnote-ref-1028)
1029. G Marshall, G.C Moodie, *Some Problems of the Constitution,* (5th edn, Hutchinson, London 1971) 25. [↑](#footnote-ref-1029)
1030. E A Freeman, *The growth of the English constitution from the earliest times* (3rd edn, Macmillan, London 1876) 114. [↑](#footnote-ref-1030)
1031. G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, Oxford 1984) 17. [↑](#footnote-ref-1031)
1032. J G. March, J P. Olsen, ‘The Logic of Appropriateness’ in R E. Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press, Oxford 2011) 478-497. This is also implicit in Aileen McHarg’s description of conventions as a form of ‘role morality’, see A McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention and Soft Law’ (2008) 71 (6) MLR 853, 860-861. [↑](#footnote-ref-1032)
1033. (n 14) 25. Also see C Coleman, ‘The Salisbury-Addison Convention’ (2015) LIF 2015/0002. [↑](#footnote-ref-1033)
1034. (n 14) 30. [↑](#footnote-ref-1034)
1035. (n 31) 192-193. [↑](#footnote-ref-1035)
1036. (n 31) 192-193. [↑](#footnote-ref-1036)
1037. (n 5) 21-26; M Russell, *Reforming the House of Lords Lessons for Overseas* (Oxford University Press, Oxford 2000) 19-20; (n 14) 42-44. [↑](#footnote-ref-1037)
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1039. See J Coakley,‘The Strange Rival of Bicameralism’ (2014) 20 (4) The Journal of Legislative Studies 542, 550-557; (n 62) 50-52, J Coakley, M Laver, ‘Appendix II, Options for the Future of Seanad Éireann’ in The All Party Oireachtas Committee on the Constitution (eds) *Second Progress Report Seanad Éireann* (Government of Ireland 1997) 38-45. [↑](#footnote-ref-1039)
1040. See Section Three below. [↑](#footnote-ref-1040)
1041. (n 35) 371. [↑](#footnote-ref-1041)
1042. J Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (D A Curtis tr, Cambridge University Press, Cambridge 2004) 10. [↑](#footnote-ref-1042)
1043. (n 35) 376. [↑](#footnote-ref-1043)
1044. (n 31) 193. [↑](#footnote-ref-1044)
1045. P Rosanvallon, *Democratic Legitimacy: Impartiality, Reflectivity and Proximity* (A Goldhammer tr, Princeton University Press, Princeton NJ 2011) 3-4. [↑](#footnote-ref-1045)
1046. Norton (n 11) 4. [↑](#footnote-ref-1046)
1047. (n 35) 376. [↑](#footnote-ref-1047)
1048. (n 15) 93-124. [↑](#footnote-ref-1048)
1049. M Goldoni, ‘Political Constitutionalism and the Question of Constitution-Making’ (2014) 27 (3) Ratio Juris, 387-408. [↑](#footnote-ref-1049)
1050. J Waldron, *Law and Disagreement* (Oxford University Press, Oxford 1999) 221, R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge 2007) 147-154. [↑](#footnote-ref-1050)
1051. (n 74) 388. [↑](#footnote-ref-1051)
1052. H Ardent, *On Revolution* (1st edn, Penguin Publishing, London, 1990) 141-8; (n 74) 397. [↑](#footnote-ref-1052)
1053. i.e. entrenchment is seen as a means of protecting certain things from change to hoard power. [↑](#footnote-ref-1053)
1054. (n 74) 403. [↑](#footnote-ref-1054)
1055. Ibid 403. [↑](#footnote-ref-1055)
1056. Bellamy (N 75) 5; G Gee, G C.N Webber, ‘What is a Political Constitution’ (2010) 30 (2) O.J.L.S 273,288. [↑](#footnote-ref-1056)
1057. As was the case in the UK when after the second election of 1910, the electorate gave their consent to Parliament Act 1911. [↑](#footnote-ref-1057)
1058. G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, Oxford 1984) 8.

      A McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention and Soft Law’ (2008) 71 (6) MLR 853, 857. [↑](#footnote-ref-1058)
1059. (n 56) 9; McHarg (n 57) 856, 861-863. [↑](#footnote-ref-1059)
1060. McHarg, (n 57) 861-862. [↑](#footnote-ref-1060)
1061. N Aroney, ‘Law and Conventions’ in B Gilligan, S Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge 2015) 28. [↑](#footnote-ref-1061)
1062. R B Taylor, ‘Foundational and Regulatory Conventions: exploring the constitutional conventional significance of Britain’s dependency upon conventions’ [2015] P.L. 614, 616, 621-622. [↑](#footnote-ref-1062)
1063. A.V Dicey, *Introduction to the Study of the Law of the Constitution: With an Introduction by E.C.S Wade* (10th edn, Palgrave Macmillan, London 1959) 439-442. [↑](#footnote-ref-1063)
1064. (n 87) 616. [↑](#footnote-ref-1064)
1065. (n 87) 620. [↑](#footnote-ref-1065)
1066. Barber (n 53) 90; (n 56) 12-17. [↑](#footnote-ref-1066)
1067. See notable examples *British Coal Corporation v The King* [1935] AC 500; *Copyright Owners Reproduction Society v EMI (Australia) Limited* (1958) 100 CLR 597; *Liversidge v Anderson* [1942] AC 206; *Attorney General v Jonathan Cape Ltd* [1976] QB 752; *Re Resolution to amend the Constitution* [1981] 1 S.C.R. 753; *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. [↑](#footnote-ref-1067)
1068. *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, 774-775, 853, 882-883; slso see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; (n 87) 621. [↑](#footnote-ref-1068)
1069. *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 146. [↑](#footnote-ref-1069)
1070. (n 87) 621-622. [↑](#footnote-ref-1070)
1071. In *Evans v Information Commissioner* [2012] UKUT 313, the Upper Tribunal did in practice rule on the scope and operation of *‘the Education Convention’* in the course of their decision. However, the precedent that courts do not enforce conventions was strictly expressed more recently by the UK Supreme Court in *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at para 146, the Supreme Court did not however expressly overrule the *Evans* decision. [↑](#footnote-ref-1071)
1072. See T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*

      (Oxford University Press, Oxford 1993) 244; M Elliot, ‘Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention’ (2002) 22 (3) L.S, 340-475. [↑](#footnote-ref-1072)
1073. For example, Tomkins describes the convention of ministerial responsibility as central to his republican reading of the UK Constitution. See A Tomkins, *Our Republican Constitution* (Hart, Oxford 2005) 1-4, 39. [↑](#footnote-ref-1073)
1074. For example, see The Scotland Act 2016 s.2which recognises the existence of ‘*the Sewel Convention*’ but does not convert it into a legal rule. See R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 148-149 and for a discussion on the consequences of UKSC’s treatment of s.2 see K.D Ewing, ‘Brexit and Parliamentary Sovereignty’ (2017) 80 (4) MLR 711, 721-723 and J E.K. Murkens, ‘Mixed Messages in Bottles: the European Union: Devolution, and the Future of the Constitution’

      (2017) 80 (4) MLR 685, 690-694. [↑](#footnote-ref-1074)
1075. See M Russell, ‘The Terroritial Role of Second Chambers’ (2001) 7 (1) The Journal of Legislative Studies 105-118. [↑](#footnote-ref-1075)
1076. The classic example of this approach is seen in the German Bundesrat, which is comprised of an indirectly elected Länder Ministers, rather than being directly elected voters within the Länders. See (n 100), 108, 114-115. [↑](#footnote-ref-1076)
1077. (n 15) 231; Bellamy (n 75) 243-246; J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 16. [↑](#footnote-ref-1077)
1078. Ibid. [↑](#footnote-ref-1078)
1079. Griffith (n 102) 16. [↑](#footnote-ref-1079)
1080. However, the electoral system and constituency boundaries might undermine this to some degree. [↑](#footnote-ref-1080)
1081. A rare example considering the implication of federalism with political constitutionalism is presented by Richard Bellamy who briefly cautions against federalism representation in a second chamber in his final chapter. See Bellamy (n 75) 240. [↑](#footnote-ref-1081)
1082. W Riker, *Federalism: Origin, Operation, Significance* (Little, Brown and Company, Boston MA 1964) 11. [↑](#footnote-ref-1082)
1083. See R L Watts, *Comparing Federal Systems in the 1990’s* (Institute of Intergovernmental Relations 1997) 7; (n 22) 680; also see B Galligan, ‘Comparative Federalism’ in S A Binder, R A W. Rhodes, B A Rockman (eds) *The Oxford Handbook of Political Institutions* (Oxford University Press, Oxford 2006) 267. [↑](#footnote-ref-1083)
1084. (n 10712-14. [↑](#footnote-ref-1084)
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1086. A Stepan, ‘Federalism and Democracy: Beyond the U.S. Model’ (1999) 10 (4) Journal of Democracy 19, 22; and K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 (2) The American Journal of Comparative Law 205, 206. [↑](#footnote-ref-1086)
1087. Ibid. [↑](#footnote-ref-1087)
1088. In practice, this does not occur in the US, as both houses are considered equally legitimate regardless of their constituency bases. [↑](#footnote-ref-1088)
1089. (n 75) 205. [↑](#footnote-ref-1089)
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1091. Russell, *Reform the House of Lords: Lessons from Oversee* (n 62) 61-64. [↑](#footnote-ref-1091)
1092. Ibid 59-61. [↑](#footnote-ref-1092)
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1094. (n 20) 555. [↑](#footnote-ref-1094)
1095. Ibid 555. [↑](#footnote-ref-1095)
1096. Cited in *the Commission on Vocational Organisation* 1943, 8. [↑](#footnote-ref-1096)
1097. Coakley, Laver, ‘Appendix II, Options for the Future of Seanad Éireann’ (n 64) 56. [↑](#footnote-ref-1097)
1098. Ibid 58. [↑](#footnote-ref-1098)
1099. Russell, *Reform the House of Lords: Lessons from Overseas* (n 62) 73. [↑](#footnote-ref-1099)
1100. Ibid 70-71. [↑](#footnote-ref-1100)
1101. Coakley, Laver, ‘Appendix II, Options for the Future of Seanad Éireann’ (n 64) 58. [↑](#footnote-ref-1101)
1102. Ibid 59. Russell, *Reform the House of Lords: Lessons from Overseas* (n 62) 72. [↑](#footnote-ref-1102)
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1104. J Casey, *Constitutional Law in Ireland* (2nd edn, Sweet and Maxwell, London 1992) 99-100. [↑](#footnote-ref-1104)
1105. M Russell, *Reform the House of Lords: Lessons from Overseas* (Oxford University Press, Oxford 2000) 70. [↑](#footnote-ref-1105)
1106. (n 5) 46. [↑](#footnote-ref-1106)
1107. (n 115) 24; (n 20) 555. [↑](#footnote-ref-1107)
1108. (n 20) 555-556. [↑](#footnote-ref-1108)
1109. N. W Polsby, ‘Legislatures’ in F I. Greenstein, N W. Polsby (eds) *Handbook of Political Science Vol 5: Governmental Institutions and Processes* (Addison-Wesley, Boston MA 1975) 277. [↑](#footnote-ref-1109)
1110. R Bellamy (n 75) 254-255, D Nicol, ‘Professor Tomkins' House of Mavericks’ [2006] P.L. 467, 471, Dorey (n 52) 50-52. [↑](#footnote-ref-1110)
1111. Similar models developed by Michael Mezey, which achieve the same effect as Polsby’s also do not account for bicameralism. [↑](#footnote-ref-1111)
1112. The only reference that Polsby makes about bicameralism is briefly given in relation to the impact of committees in both houses of the Italian Parliament affecting the party control. See (n 134) 292-296. [↑](#footnote-ref-1112)
1113. See (n 5) 1; Tsebelis and Money criticise the influential essays on legislatures which are republished Philip Norton’s (ed) *Legislatures* (Oxford University Press, Oxford 1990) for their failure to sufficiently consider bicameralism and Polsby’s typology is one the essays included with this collection. Similar complaints are echoed by Mughan and Patterson, see (n 3) 335. [↑](#footnote-ref-1113)
1114. (n 15) 146-166. For a summary of these principles see Chapter Two, Section Two. [↑](#footnote-ref-1114)
1115. Ibid 63. [↑](#footnote-ref-1115)
1116. Ibid 76. [↑](#footnote-ref-1116)
1117. Ibid 78. [↑](#footnote-ref-1117)
1118. J Steiner, A Bächtiger, M Spörndli, M R. Steenbergen, *Deliberative Politics in Action: Analysing Parliamentary Discourse* (Cambridge University Press, Cambridge 2005) 43-137. [↑](#footnote-ref-1118)
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1123. Ibid 128. [↑](#footnote-ref-1123)
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1125. A Wright, ‘British socialists and the British constitution’ (1990) 43(3) Parliamentary Affairs 322, 324. [↑](#footnote-ref-1125)
1126. Dorey (n 52 )100. [↑](#footnote-ref-1126)
1127. Laski, *Studies in Law and Politics* (n 9) 106; Laski, ‘The Problem of a Second Chamber’ No. 213; (n 10 589-590. [↑](#footnote-ref-1127)
1128. Jennings (n 52) 51. [↑](#footnote-ref-1128)
1129. (n 14) 27. [↑](#footnote-ref-1129)
1130. W.I Jennings, *Parliament* (1st edn Cambridge University Press, Cambridge 1939) 419. [↑](#footnote-ref-1130)
1131. R S. Cripps, ‘Can Socialism Come by Constitutional Methods?’ in C Addison, C.R. Attlee, H.N Brailsford, H.R Clay, G.D.H. Cole, R Cripps, J.F Horrabin, W. Mellor, C Trevelyan, E.F Wise, Problems of A Socialist Government (Victor Gollancz Ltd, London 1933) 44, 49. [↑](#footnote-ref-1131)
1132. W.I Jennings, *Parliament Must Be Reformed: A Programme for Democratic Government* (Kegan Paul, Trench, Trubner & Co Ltd, London, 1941) 49-51. [↑](#footnote-ref-1132)
1133. Jennings (n 52) 52. [↑](#footnote-ref-1133)
1134. Dorey (n 52) 102-104. [↑](#footnote-ref-1134)
1135. Jennings (n 52) 53-55. [↑](#footnote-ref-1135)
1136. Ibid 55-56. [↑](#footnote-ref-1136)
1137. (n 156) 44, 49-50. [↑](#footnote-ref-1137)
1138. (n 156) 44-45. [↑](#footnote-ref-1138)
1139. Dorey (n 52) 105-106. [↑](#footnote-ref-1139)
1140. The Parliament Act 1949. [↑](#footnote-ref-1140)
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1142. Ibid100-140. [↑](#footnote-ref-1142)
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1144. Bellamy (n 75) 262. [↑](#footnote-ref-1144)
1145. (n 22) 674. [↑](#footnote-ref-1145)
1146. Ibid 674, 685. [↑](#footnote-ref-1146)
1147. Ibid, 673-680. [↑](#footnote-ref-1147)
1148. Ibid 673; It should be noted, Ackerman does not consider this be a desirable option, as he instead favours

      ‘Constrained Parliamentarianism’ over the presidential system. See Ibid 643-664. [↑](#footnote-ref-1148)
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1150. (n 22) 685 [↑](#footnote-ref-1150)
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1153. Ibid 676, 680-683. [↑](#footnote-ref-1153)
1154. Ibid, in particular see Ackerman’s footnote (n 96) on 676. [↑](#footnote-ref-1154)
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1156. Ibid 122. [↑](#footnote-ref-1156)
1157. Ibid 125. [↑](#footnote-ref-1157)
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1160. See Chapter Four. [↑](#footnote-ref-1160)
1161. (n 35) 376. [↑](#footnote-ref-1161)
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1170. M S. Ogul, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision* (University of Pittsburgh Press, Pittsburgh Pa 1976) 11. [↑](#footnote-ref-1170)
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1173. Bovens (n 5) 450; Mulgan (n 5) 9, M Philps, ‘Delimiting Democratic Accountability’ (2009) 75 Political Studies, 28, 32; M Flinders, *The Politics of Accountability in the Modern State* (Ashgate, Aldershot 2001) 13; A Lawton, *Organisation and Management in The Public Sector* (Pitman, London 1991) 19. [↑](#footnote-ref-1173)
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1209. Ibid 181. [↑](#footnote-ref-1209)
1210. Ibid 181. [↑](#footnote-ref-1210)
1211. Ibid 181. [↑](#footnote-ref-1211)
1212. Ibid 183. [↑](#footnote-ref-1212)
1213. Ibid 171-172, 181-182, 190. [↑](#footnote-ref-1213)
1214. Ibid 181-182. [↑](#footnote-ref-1214)
1215. Ibid 182. [↑](#footnote-ref-1215)
1216. Ibid 190. [↑](#footnote-ref-1216)
1217. Ibid 189. [↑](#footnote-ref-1217)
1218. Ibid 190. [↑](#footnote-ref-1218)
1219. P Pettit, *Republicanism: A Theory of Freedom of Government* (Clarendon Press Oxford 1991) 63, 171. [↑](#footnote-ref-1219)
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1222. Ibid 1. [↑](#footnote-ref-1222)
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1224. Ibid 2. [↑](#footnote-ref-1224)
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1226. Tomkins (n 59) 77. [↑](#footnote-ref-1226)
1227. Ibid 76. [↑](#footnote-ref-1227)
1228. Tomkins, *Our Republican Constitution* (n 54) 91. [↑](#footnote-ref-1228)
1229. Ibid 136. [↑](#footnote-ref-1229)
1230. Tomkins (n 59) 78. [↑](#footnote-ref-1230)
1231. Ibid 78. [↑](#footnote-ref-1231)
1232. Tomkins, *Our Republican Constitution* (n 54) 138. [↑](#footnote-ref-1232)
1233. Ibid 136-138. [↑](#footnote-ref-1233)
1234. Ibid 137. [↑](#footnote-ref-1234)
1235. (n 59) 75. [↑](#footnote-ref-1235)
1236. R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge 2007) 174. [↑](#footnote-ref-1236)
1237. Ibid200. [↑](#footnote-ref-1237)
1238. Ibid 230-239. [↑](#footnote-ref-1238)
1239. Ibid 232. [↑](#footnote-ref-1239)
1240. Ibid 239. [↑](#footnote-ref-1240)
1241. M Evans, *Constitution Making and the Labour Party* (Palgrave Macmillan, Basingstoke 2003) 20-23; K.D. Ewing, ‘Jeremy Corbyn and the Law of Democracy’ (2017) 28(2) King's Law Journal, 343, 344, 350; K.D. Ewing, ‘The Resilience of the Political Constitution’ (2013) 14 (12) German Law Journal 2111, 211; K.D. Ewing, ‘The Law and the Constitution: Manifesto of the Progressive Party’ (2004) 67(5) MLR 734, 735. [↑](#footnote-ref-1241)
1242. R.S Cripps, ‘Can Socialism Come by Constitutional Means’ in C Addison et al *Problems of Socialist Government* (2nd ed, Victor Gollancz Ltd, London, 1933) 48. [↑](#footnote-ref-1242)
1243. See Ibid; W.I Jennings, *Parliamentary Reform* (Victor Gollancz Ltd, London, 1934); R.S Cripps, *Democracy Up-To-Date* (George Allen & Unwin Ltd, London 1939). [↑](#footnote-ref-1243)
1244. Ewing, ‘Jeremy Corbyn and the Law of Democracy’ (n 75) 344, 351. [↑](#footnote-ref-1244)
1245. Ibid 344, 352; Ewing ‘The Resilience of the Political Constitution’ (n 75) 2117. [↑](#footnote-ref-1245)
1246. D Nicol, *Constitutional Protection of Capitalism* (Hart Oxford, 2010) 34. [↑](#footnote-ref-1246)
1247. A Hacker, ’Original Sin vs. Utopia in British Socialism’ (1956) 18 (2) The Review of Politics, 184, 186-194. [↑](#footnote-ref-1247)
1248. Ewing, ‘The Law and the Constitution: Manifesto of the Progressive Party’ (n 75) 735. [↑](#footnote-ref-1248)
1249. Mulgan (n 5) 1. [↑](#footnote-ref-1249)
1250. Ibid 2. [↑](#footnote-ref-1250)
1251. For the UK see the Suez Crisis, for the US see the Vietnam War. [↑](#footnote-ref-1251)
1252. See in general K.D Ewing, C Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, Oxford 1990) in particular 4-16, 255-259. D Nicol, ‘Professor Tomkins’ House of Mavericks’ [2006] P.L 467-475. [↑](#footnote-ref-1252)
1253. Ewing, Gearty(n 86) 275. [↑](#footnote-ref-1253)
1254. (n 3) 16; Ewing, Gearty (n 86) 267-269 [↑](#footnote-ref-1254)
1255. B Hindes, *Parliamentary Democracy and Socialist Politics* (Routledge & Kegan Paul, London 1983) 51. [↑](#footnote-ref-1255)
1256. For a modern example, see Danny Nicol’s defence of party whips in Nicol (n 86) 471. For an earlier example, see Cripps, *Democracy Up-To-Date* (n 77) 66. [↑](#footnote-ref-1256)
1257. See Cripps, ‘Can Socialism Come by Constitutional Means’ (n 77) 41 [↑](#footnote-ref-1257)
1258. See W.I Jennings, *Parliamentary Reform* (Victor Gollancz Ltd, London, 1934) 140-160; Cripps, *Democracy Up-To-Date* (n 77) 75-87; Importantly, Bernard Crick would later successfully advance the same idea see B Crick, *The Reform of Parliament* (2nd ed, Weidenfeld and Nicolson, London 1970). A permanent select committee system was ultimately implemented at Westminster in 1979. [↑](#footnote-ref-1258)
1259. See Crick (n 92). [↑](#footnote-ref-1259)
1260. Ewing, Gearty (n 86) 257-259. [↑](#footnote-ref-1260)
1261. Cripps, *Democracy Up-To-Date* (n 77) 74-76. [↑](#footnote-ref-1261)
1262. See Chapter Two. [↑](#footnote-ref-1262)
1263. (n 3) 16. [↑](#footnote-ref-1263)
1264. M Goldoni, ‘Two Internal Critiques of Political Constitutionalism’ (2012) 10 (4) ICON 926, 940 [↑](#footnote-ref-1264)
1265. Ibid 940. [↑](#footnote-ref-1265)
1266. Ibid 941. [↑](#footnote-ref-1266)
1267. Ibid 941. [↑](#footnote-ref-1267)
1268. Tomkins, *Our Republican Constitution* (n 54) 137. [↑](#footnote-ref-1268)
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1271. For example, this approach can be seen in Tomkins’ ‘what is parliament for.’ See Tomkins (59) 55-78; D M. Olson, ‘Oversight and Budgets: Constraints, Means, and Executives’ in R Stapenhurst, R Pelizzo, D M. Olson, L.V Trapp (eds) *Legislative and Budgeting Oversight: A World Perspective* (Washington DC, World Bank Institute 2008) 324. [↑](#footnote-ref-1271)
1272. There are some policy decisions which historically tend not to directly involve the legislature. For example, some policies, such as inter-government relations, negotiating treaties or military strategies may be pursued through the executive’s prerogatives under the constitution. [↑](#footnote-ref-1272)
1273. Olson (n 105) 323 [↑](#footnote-ref-1273)
1274. R Stapenhurst, R Pelizzo, *Parliamentary Oversight Tools: A Comparative Analysis* (Routledge 2012) 15; Olson, (n 105) 323, D M. Olson, M L. Mezey, ‘Parliaments and public policy’ in D M. Olson, M L. Mezey (eds) *Legislatures in the Policy Process: The dilemmas of economic policy* (Cambridge University Press 1991) 17-18. [↑](#footnote-ref-1274)
1275. D Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (Oxford University Press, Oxford 1994) 28. [↑](#footnote-ref-1275)
1276. Ibid 28; Flinders (n 7) 12. [↑](#footnote-ref-1276)
1277. Woodhouse (n 109) 29, Flinders (n 7) 12. [↑](#footnote-ref-1277)
1278. Woodhouse (n 109) 30, Flinders (n 7) 12. [↑](#footnote-ref-1278)
1279. Woodhouse (n 109) 31, Flinders (n 7) 12. [↑](#footnote-ref-1279)
1280. Woodhouse (n 109) 31-33. [↑](#footnote-ref-1280)
1281. Woodhouse (n 109) 33-34; Flinders (n 7) 12-13. [↑](#footnote-ref-1281)
1282. Mulgan (n 5) 219. [↑](#footnote-ref-1282)
1283. This ‘Rope’ analogy is inspired by a commonly recognised practice in the Criminal Evidence, expressed in the case of *R v Exall and Others (1866) 176 ER 850* at *853*. [↑](#footnote-ref-1283)
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1285. M D McCubbins, T Schwartz, ‘Congressional Oversight Overlooked: Police Patrols vs Fire Alarms’ (1984) 28 American Journal of Political Science 165-179; A Lupia, M D McCubbins, ‘Learning from Oversight: Fire Alarms and Police Patrols Reconstructed’ (1994) 10 (1) Journal of Law, Economics, and Organization 96-125; Lupia, McCubbins (n 22) 291-307; W.F West ‘Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms”’ in M Lodge, E C. Page, and S J. Balla (eds) *The Oxford Handbook of Classics in Public Policy and Administration* (Oxford University Press, Oxford 2015) 437-438. [↑](#footnote-ref-1285)
1286. See for example T Saalfeld ‘Members of Parliament and Governments in Western Europe: Agency Relations and Problems of oversight’ (2000) 37 European Journal of Political Research 353-376. [↑](#footnote-ref-1286)
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1296. Ibid 168; Lupia, McCubbins, ‘Learning from Oversight: Fire Alarms and Police Patrols Reconstructed’ (n 119) 98. [↑](#footnote-ref-1296)
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1362. See J Waldron, *Political Political Theory* (Harvard University Press, Harvard 2016); (n 10); (n 7); J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1-21. [↑](#footnote-ref-1362)
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1369. See (n 7); Tomkins (n 5). [↑](#footnote-ref-1369)
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1371. Gee, Webber (n 17) 287-290. [↑](#footnote-ref-1371)
1372. This approach was best exemplified in the work of Waldron, *Law and Disagreement* (n 10) and Waldron *Political Political Theory* (n 12) and by Bellamy (n 7) [↑](#footnote-ref-1372)
1373. This approach was best exemplified in the work of Adam Tomkins (n 5). [↑](#footnote-ref-1373)
1374. Lowndes, Roberts (n 9) 4-5; (n 8) 3. [↑](#footnote-ref-1374)
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1376. Waldron (n 10) 223. [↑](#footnote-ref-1376)
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1379. See N. W Polsby ‘Legislatures’ in F I. Greenstein, N W. Polsby (eds) Handbook of Political Science Vol 5: Governmental Institutions and Processes (Addison-Wesley, Boston MA 1975) 277. [↑](#footnote-ref-1379)
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