

Constitutional Limitations on British Parliamentary Sovereignty: Rule of Recognition

Perspective

Introduction

What this article seeks to analyse is the current constitutional scholarly movement in the United Kingdom towards a non-traditional way of interpreting its Constitution which closely resembles the methods implemented in the United States. Part A explains the old positivist doctrine underlying the British Constitution, and explores the arguments for having a quasi-written constitution by incorporating written principles that restrain Parliament through judicial review. Part B of this paper will then go on to demonstrate how the new lens through which we view the British constitutional system complies and fits in with traditional jurisprudence and legal theory, albeit via slightly amending and stretching its current boundaries. Part C provides a contrasting perspective as it addresses the present debates in the U.S. by American common law constitutional interpreters pertaining to the US having an unwritten constitution whereby constitutional principles are derived from case-law and precedent. The written nature of America's Constitution has been traditionally regarded as a constitutional virtue, and more recently dismissed as an irrelevancy of form. However, the concept of 'writtenness' itself, in the constitutional context, remains vague and undefined. This too shall be explored. Finally, Part D of the paper will identify the present cumulative dissatisfaction with the U.K.'s traditional method of interpreting its constitution and provide a reasonable resolution to this dilemma in the form of a compromise, namely that similar to the Canadian method of

constitutional interpretation – a mixture of both fundamental written and unwritten sources of constitutional doctrine.

A. From Unwritten to Written: Transformation in the British Common Law Constitution towards the Constitutionalization of Written Texts

The Unwritten British Constitution

An unwritten constitution reconciles two characteristics that appear contradictory: on one hand, its rules tend to have the weight of long-established acceptance behind them¹; on the other hand, those rules are continually changing in response to social developments. This combination of characteristics results in an inherently evolutionary constitutional framework that is compatible with fundamental rule-of-law values. Core parts of the unwritten constitution are rooted in custom, tradition, and precedent. Conventions, which have a much more significant role to play in an unwritten constitution, are predicated upon obedience and obligation - qualities that only become apparent over time and with consistent application of the convention in question². Custom and precedent also exert a greater influence upon the common law aspects of an unwritten constitution because judges do not make their constitutional decisions under

¹ Adam Tomkins has pointed to this contradiction in support of his arguments that the written/unwritten distinction is of little consequence. See Tomkins, *supra* note 5, at 9-14 (arguing that unwritten constitutions are no more flexible than written constitutions because conventions are traditions--“a force for conservatism, for doing the same thing as was done in the past, not a force for change”)

² Constitutional practice as constitutional law is reflected in the centrality of constitutional conventions to the U.K. constitution. Broadly speaking, constitutional conventions are nonlegal rules that impose obligations and confer rights upon constitutional actors. Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* 7 (1984). They are not judicially enforceable, although courts may take notice of them to help clarify what the existing law is. *Id.* at 15. Since conventions are identified as rules that “are generally obeyed and generally thought to be obligatory,” *id.* at 6, they are a prime example of how U.K. constitutional law is determined by how political actors conduct themselves in practice.

the shadow of an authoritative text with a “right” meaning but instead hew to their traditional role of drawing forth general rules “from the precedents which guide [them to] be applied to new cases.”³

The accepted characterization of the United Kingdom's constitution as “unwritten” suggests that although the bulk of the constitution is composed of Acts of Parliament and judicial decisions, it does not take the form of a distinct document stating the rules and principles that establish a legal order, unlike in the United States. Rather, what counts as constitutional law in the United Kingdom is what ultimately emerges from practice i.e. the rules that the branches of government actually follow in exercising their powers, carrying out their duties, and interacting with one another. An unwritten constitution is in one sense a common law constitution, since courts develop constitutional rules and principles over time⁴. For example, the United Kingdom's foundational principle of parliamentary sovereignty is regarded as a common law doctrine. This fact may make the UK courts appear more dangerous than or indeed just as powerful as those of the US. However, the nature of the UK constitution prevents this, for the lack of an authoritative text for judges to interpret means that whatever the courts say on constitutional issues is merely common law decision making and can hence be openly overruled by the legislature⁵.

³ F.A. Hayek, *Law, Legislation and Liberty: Rules and Order* 86 (1983).

⁴ See Eric Barendt, *An Introduction to Constitutional Law* 6 (1998), at 33 (drawing connection between U.K. constitution's being uncodified and its description as common law constitution).

⁵ *Id.*, at 33 (noting that common law constitutional principles may be “reformulated by statutes”). Any objection that this sounds, in the analogous American legal context, as if political branches are disregarding constitutional rules laid down by the courts fails to recognize that an unwritten constitution is politics, in the sense that the content of the constitution is determined by ongoing political practices and developments. Thus, in effect, what the legislature does in such situations is announce a new constitutional rule that is controlling until amended or repealed. Of course, legislative constitutional change may also be stymied by politics, for instance where public disapproval of proposed reforms causes the government to back down.

As constitutions may accommodate written and unwritten elements of law, as well as various means of enforcement and change, it is posited that constitutions are defined by how strongly they reflect underlying legal norms. With a shift in the rule of recognition endorsing judicial review, this expressive function of constitutions democratically legitimizes constitutional texts as positivist expressions of popular will that bind Parliament. Therefore, courts may constitutionalize statutes or treaties coming over time to represent shifting norms through common law adjudication.

The 'Old Paradigm': Positivist Doctrine underlying the Unwritten Constitution

The doctrine of parliamentary sovereignty represents a form of positivism as set forth by John Austin. Austin's version of positivism, upon which more sophisticated theories remain based, has three basic propositions⁶:

1. First, there must be an identifiable sovereign, whose command is authoritative⁷.
2. Second, these commands impose general, sanctionable obligations upon the populace or certain of its segments and receive habitual obedience from them⁸.
3. Finally, there is no necessary connection between promulgated law and moral standards or content⁹.

Orthodox British legal theory rests on Austin's ideas because the Crown in Parliament is the supreme legal sovereign whose will, as expressed in law, is binding throughout the

⁶ Austin himself drew upon the ideas of other thinkers, particularly Jeremy Bentham. See W.L. MORISON, JOHN AUSTIN 66-67 (1982); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV., 2054, 2061-62 (1995).

⁷ JOHN AUSTIN, THE PROVINCE OF LEGISLATION DETERMINED 5 (2d ed. 1861)

⁸ AUSTIN, *supra* note 7, at 8-11; Sebok, *supra* note 6, at 2064-65

⁹ AUSTIN, *supra* note 7, at 113; Sebok, *supra* note 6, at 2063-64

realm. The law is unquestionable because of the presence of a higher law-making entity, which does not exist, or its compatibility with accepted morals or values.

Although Blackstone, a famous British constitutional scholar, recognized that Parliament's will must ultimately prevail, his theory differed from modern positivism as he recognized natural law as a source of moral legal norms that he struggled to reconcile with omnipotent legislative power¹⁰. Also, these natural law standards were abstract and required discovery through the reasoning process in the courts or Parliament. The positivist notion of law as the command of the sovereign rejected Blackstone's approach, rather than emphasizing the morally independent will of the legislature¹¹. That was the British conception of the constitution that most influenced Dicey and now underlies modern orthodox theory.

The 'Written' British Constitution

What this section achieves to show is an examination of the transformation process by identifying significant British constitutional documents. It will be argued that the British judiciary has already effectively relied upon some of those texts to limit Parliament and has begun gradually constitutionalizing them.

While the British Constitution has traditionally been regarded as unwritten, it is wrong to conclude that it contains no written elements. The evolution of the U.K.'s constitution provides an example of how the legal or political nature of the constitution can be tied to its 'writtenness'.

¹⁰ 1 BLACKSTONE, *supra* note 16, at *160-61; Frederick Schauer, *Legal Positivism and the Contingent Autonomy of Law*, in JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM 215, 217 (Tom Campbell & Jeffrey Goldsworthy eds., 2000).

¹¹ See R. George Wright, *Does Positivism Matter?*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 57, 65 (Robert P. George ed., 1996)

There have historically been certain documents that have fundamentally influenced Britain's constitutional development and reflected critical shifts in political norms. Early documents include the Magna Carta, the 1689 Bill of Rights, the Act of Settlement, the Acts of Union between England and Scotland, and the Reform Act of 1832. While none of these instruments legally restrains Parliament, courts have traditionally used them as interpretive tools, presuming that it intends to legislate consistently with their provisions. In this Century, Parliament began the abdication of its imperial authority with the Statute of Westminster in 1931. It also consolidated its democratic accountability by greatly limiting the power of the House of Lords through the Parliament Acts of 1911 and 1949, and abolishing the ancient right of hereditary peers to sit in the upper chamber by the House of Lords Act 1999.

In recent years, the British Constitution has undergone remarkable changes due to further integration into the European Union, the passage of the Human Rights Act 1998, and devolution¹². Since the 1970s, and especially since 1990, the United Kingdom has moved toward legal constitutionalism as the judiciary has come to play a greater constitutional role¹³. In parallel to this movement toward legalism, the U.K. constitution has undergone increasing codification, beginning with the country's entry into the European Union in 1973, which created a need for it to harmonize its domestic legislation

¹² See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter TREATY OF ROME]. The Treaty of Rome created the European Economic Community in 1957 and has since been amended several times. The United Kingdom was not a founding member, but joined later and through the European Communities Act, 1972, c. 68 (Eng.), gave Community law domestic effect. See O. HOOD PHILLIPS ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW 110-11 (8th ed. 2001); Human Rights Act, 1998, c. 42 (Eng.). The devolution of law-making authority to regional assemblies within the United Kingdom results from the Scotland Act, 1998, c. 46 (Eng.), the Northern Ireland Act, 1998, c. 47 (Eng.), and the Government of Wales Act, 1998, c. 38 (Eng.) [hereinafter Wales Act].

¹³ Adam Tomkins, Public Law 9 (2003) at 21, 23-24.

with the European Convention on Human Rights as well as with other aspects of E.U. law. This codification process accelerated beginning in 1997, when the Labour Party and Prime Minister Tony Blair came into power with a strong commitment to constitutional change and an apparent mandate to engage in reform through constitutional codification¹⁴. The movement toward codification appears likely to continue under current Prime Minister Gordon Brown¹⁵. These developments have affected the constitutional order of the United Kingdom by demanding that Parliament conform to substantive limitations on its exercise of legislative authority. For example, the Human Rights Act protects certain fundamental individual rights from government infringement by implementing the European Convention on Human Rights into domestic law¹⁶. European integration and devolution also create other sources of law in the United Kingdom, thus potentially threatening the unitary state. While this constitutional reform has occurred through treaty or domestic legislation, which theoretically remains subordinate to Parliament, the written instruments mentioned above have special status and significance in the British Constitution. Those documents reflect changing notions about the proper extent of parliamentary authority and the institutional role of the judiciary in enforcing accepted norms. The written instruments, along with unwritten principles, are developing into a quasi-written constitution that restrains Parliament and is enforceable by the judiciary.

¹⁴ The U.K. Chief Justice, Lord Woolf, has described the constitutional changes undertaken by the administration under Prime Minister Tony Blair as a “torrent,” which included “the removal of the hereditary peers from the House of Lords, devolution, the incorporation into domestic law of the European Convention on Human Rights and the creation of a unified courts administration.” Lord Woolf, *The Lord Chief Justice of England & Wales, Squire Centenary Lecture: The Rule of Law and a Change in the Constitution* (Mar. 3, 2004), available at <http://www.law.cam.ac.uk/docs/view.php?doc=1415>

¹⁵ In March 2008, Brown announced a draft Constitution Renewal Bill containing proposals to, inter alia, strengthen Parliament and restrict the role of the attorney general. *Easy Does It*, *Economist*, Mar. 29, 2008, at 42 (noting Brown's “long-standing enthusiasm” for reform while suggesting that his proposals appeared “timid”).

¹⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221, 5 [hereinafter *European Convention*].

Constitutional change is not a break from British legal tradition, but instead represents a transition to an alternative, albeit previously rejected, path of constitutional development. The incorporation of written texts into this framework is compatible with an alternative constitutional model and can take place through a gradual process of common-law adjudication¹⁷.

A constitution's existence depends upon its normative force in the system rather than its means of judicial enforceability or mode of change. Furthermore, texts can express some fundamental principles in writing, leading to a mix of written and unwritten norms. These written norms have a positivist aspect as reflecting the will of the popular sovereign. Moreover, in a democratic system, this popular will has supreme authority over the subordinate legislature. The judiciary can also exercise dual sovereignty with Parliament in representing the electorate. Written constitutional texts are just a manner of expressing the popular will, and judicial review exists as a democratically endorsed means to enforce it against government encroachment. The democratic role of the judiciary also means that courts can assess the normative value of certain documents within the community. As certain statutes or treaties increasingly represent foundational assumptions about good governance, courts can constitutionalize them as legally enforceable limitations upon Parliament. Courts can do this through a gradual process of common-law adjudication sensitive to Parliament's legislative functions and broader political assumptions within the community. That process can result in varying degrees of entrenchment and judicial enforceability. Such constitutional change is already occurring in the United Kingdom, as illustrated already by judicial treatment of the Human Rights Act 1998 and the European Communities Act 1972. That kind of change represents a transition to an alternative

¹⁷ 'British Common-Law Constitution' p 837 et al, David Jenkins, 2003

common-law, quasi written constitution that effectively limits Parliament's exercise of, if not formal claim to, sovereignty.

Hence, it has been asserted that there is a limit to the extent to which Parliament can prescribe the tenets of interpretation used by the courts. House of Lords dicta has been that the bill of rights should be offered a "generous interpretation". The European principle of legality has become increasingly referred to and applied by the House of Lords¹⁸ in the United Kingdom, during this new colonial period of the United Kingdom's constitution becoming more "written" as it becomes more entrenched in a collectivizing European legal order¹⁹.

Such an approach has significant implications for the relative power between court and legislature, especially if used to invalidate the British doctrine of implied repeal. In that case all legislation would effectively be subject to those statutes, if not also common law and conventions that are deemed by a court to be "constitutional." Another implication of this doctrine is that instruments or principles which are considered by the courts to be "constitutional" may not be the subject of implied repeal without very explicit legislative language to the contrary. Therefore, one can say that the US Supreme Court's United

¹⁸ Regina -v- Secretary of State for The Home Department Ex Parte Simms, Secretary of State For The Home Department Ex Parte O'Brien [1999] UKHL 33; [2000] 2 AC 115; [1999] 3 All ER 400; [1999] 3 WLR 328, per Lord Hoffman, "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights . . . The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document*".

¹⁹ USING CONSTITUTIONAL REALISM TO IDENTIFY THE COMPLETE CONSTITUTION: LESSONS FROM AN UNWRITTEN CONSTITUTION, Matthew S. R. Palmer, American Journal of Comparative Law, Summer 2006

Kingdom counterparts are beginning to show an interest in the question of what is constitutional and what is not. Lord Justice Laws in Thoburn v. Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151 addressed this question and felt compelled to offer a two-limbed criterion for answering it. However, it can still be said that through the willingness of the House of Lords to endorse the European principle of Legality, the nation would simply achieve over a period of some years, in the U.K.'s still largely unwritten constitution, less than what the U.S. Supreme Court accomplished in one stroke in Marbury v. Madison 5 U.S. 137 (1803)²⁰.

While the devolution acts have not yet produced significant case law, the Human Rights Act and European Communities Act provide good examples of how the judiciary is constitutionalizing these, and potentially other, texts. We shall now go on to analyse a few U.K. cases dealing with the Human Rights Act and the European Communities Act. These cases show how courts can elevate regular statutes to a higher constitutional status, and then interpret and apply them in various ways effectively to control both Parliament and the Crown. They further illustrate the dynamic relationship between the judicial and legislative branches in shaping the Constitution, and suggest that in the future courts may more boldly claim authority directly to set aside primary legislation²¹. All in all, what the following cases will ultimately portray is a motion in Britain towards a U.S.-style constitutional interpretation regime.

²⁰ Id

²¹ Supra n.17

1. The Human Rights Act 1998

This piece of legislation incorporated most sections of the European Convention into domestic U.K. law, subject to any reservations or derogations made by the United Kingdom. Sections 3 and 4 of the Human Rights Act establish the courts' powers in giving effect to the rights guaranteed in the European Court of Human Rights. Section 3(1) states that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Courts, as a matter of practice, have generally applied this rule of interpretation some time before the passage of the Human Rights Act, just as they have with common-law rules. The significance of this Section is that Parliament now requires this interpretive approach and encourages the courts to push their interpretation of legislation to a farther degree in seeking compliance with the European Convention than they otherwise might have under a judicial canon of construction. Section 3(1) is thus an interpretive clause incorporating European rights jurisprudence into domestic U.K. law. Section 3(2) makes it clear, however, that whenever courts have no choice but to find an act of Parliament incompatible with European Convention rights, the will of Parliament prevails and the contested statute remains valid. This Section prevents courts from claiming under the Act a power to strike down primary legislation. Although section 4 re-emphasizes that courts may not invalidate an act of Parliament, it does authorize them to issue a declaration of incompatibility with the European Convention. Lord Hope, in R. v. Lambert 3 All E.R. 577 (H.L. 2001), mentioned that courts now have statutory authority to go beyond the formalistic search for parliamentary intent and instead read primary legislation more consistently with the self-standing principles in the European

Convention. His Lordship made three points about the Human Rights Act that could apply with equal force to any other constitutionally-significant statute. First, courts must interpret primary legislation according to broad principles. This method of adjudication departs from traditional formalism, as courts are expounding a constitutional jurisprudence rather than only looking to apply the will of Parliament. This means that courts will continue substantively to evaluate the meaning of statutory language in a way that is compatible with those principles. Second, in interpreting statutes in this manner, courts can be creative and bold. As Lord Hope put it, courts can ‘read in’ or ‘read down’ necessary language that is already there in order to tailor the statute’s meaning to the European Convention. Both interpretive measures can easily apply by extension to any other constitutional principles, written or otherwise.

Lord Hope’s third suggestion is that, although courts may go far in their interpretive endeavors, they cannot amend the statute. Instead, courts can only make a declaration of incompatibility and must apply the will of Parliament. It is unclear how far courts will be willing to go before finding the line between mandated interpretation and impermissible amendment. It is also uncertain just how clearly Parliament must state its intent to violate the European Convention, as courts may come to require something akin to the ‘notwithstanding’ declaration in Canadian law.

Lord Hoffman made it clear in *ex parte Simms* that the override of fundamental rights requires express language or necessary implication²². Actual deference to parliamentary sovereignty might, therefore, become very constrained and result in a more even balance between legislative power and judicial enforcement of rights or other constitutional

²² R. v. Sec’y of State for the Home Dep’t, *ex parte Simms & another*, 2 A.C.115, 131 (H.L. 2001).

principles. As Lord Hoffman recognized, political pressures on Parliament along with its need to use express language means that ‘the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document’²³, such as that of the U.S.

Under another view, one can readily assume that the Human Rights Acts’ preservation of parliamentary sovereignty constitutes merely an attempted legislative bulwark or protestation against further erosion of its powers at the expense of the judicial branch. Therefore, the Human Rights Act’s allowing a declaration of incompatibility may be interpreted as Parliament’s limited recognition of shifting norms in the United Kingdom away from the doctrine of parliamentary sovereignty in favor of judicial review of primary legislation. Moreover, the Human Rights Act encourages a cooperative role between the judiciary and legislature, even if expressly reserving the final say to Parliament²⁴.

2. The European Communities Act 1972 and European Community Law

*R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)*²⁵ presents another illustration of how courts limit Parliament by effectively abrogating primary

²³ Id

²⁴ Parliament’s apprehension that, without an explicit reservation of sovereignty, the judiciary would use Section 3(1) of the Human Rights Act to override an incompatible statute would be reasonable considering the earlier case of *Factortame (No. 2)*, *infra n.25*. In that case, discussed below, the House of Lords relied upon similar clauses of the European Communities Act, *supra* note 1, §§ 2(1), 2(4), to disapply an act of Parliament violating Community law. See H.W.R. Wade, *What has Happened to the Sovereignty of Parliament?*, 107 LAW Q. REV. 1, 4 (1991) [hereinafter *Sovereignty of Parliament*]; Michael J. Beloff, *Towards a Supreme Court? The British Experience*, 33 IRISH JURIST 1, 22-24 (1998).

²⁵ *R. v. Sec.y of State for Transp., ex parte Factortame Ltd. (No. 2)*, 1 A.C. 603

legislation in violation of European Community law. After acceding to the Treaty of Rome, Parliament enacted the European Communities Act 1972. Section 2(1) of this act gave all European Community laws effect within the United Kingdom and declared them legally enforceable. In addition, § 2(4) mandated that courts construe all secondary legislation as compatible with it. Within this interpretive context, the House of Lords in *R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 1)* heard a challenge to a U.K. law instituting new standards for the registration of ships, including restrictions on ownership by non-British nationals. The Court of Justice held that it was a violation. In *Factortame (No. 2)*, the House of Lords accepted the Court of Justice's ruling and no longer applied the law in question by enjoining the Crown from enforcing it.

The decision in *Factortame (No. 2)* raised concerns about the nature of sovereignty in the United Kingdom and the constitutional role of the judiciary. The House of Lords, by rendering an act of Parliament inoperative, seemed to suggest that Parliament had indeed restricted its own sovereignty by the European Communities Act contrary to orthodox theory preventing such substantive limitation.

Lord Bridge made a statement whereby it is asserted that three assumptions about the constitutional status of Community law lie. First, he made it clear that Parliament joined the European Community voluntarily and was fully aware of the implications arising from incorporating European law through the European Communities Act²⁶. Second, there was nothing in any way novel in regarding Community law as supreme, and the

(H.L. 1991); P.P. Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 11 Y.B. EUR. L. 221, 221 (1991) [hereinafter *After Factortame*] (describing this case as the culmination of case-law development concerning the issues of parliamentary sovereignty and British membership in the European Economic Community).

²⁶ *Factortame (No. 2)*, 1 A.C. at 658-59, para 14-16

authority of courts to override incompatible domestic law was always clear under the Act. Third, Lord Bridge referred to the fact that, from U.K. accession to the time of the case, Parliament had consistently obeyed decisions of the European Court of Justice that found domestic law to violate that of the Community²⁷. Therefore, the supremacy of Community Law was not only a judicial doctrine, but a political one as well. Lord Bridge stopped just short of attempting to define to what degree Parliament had limited its claim to sovereignty, but makes it clear that *de facto* restrictions had arisen²⁸. What this shows is Parliament's passage of the European Communities Act, and its habitual obedience to its own voluntary obligations, partially caused the judiciary's recognition of Community Law supremacy and its overriding powers. An additional fact that Lord Bridge failed to mention was that Parliament had previously held a referendum in 1975 on continuing the U.K.'s Community membership, the results which dictated a positive response. This larger context indicates that the higher constitutional position of Community law results, not from any one legislative or judicial act, but from a pattern of behavior and understanding about the normative force of Community law in the United Kingdom as it stands today.

It is therefore arguable that the rule of recognition in the United Kingdom is shifting away from parliamentary sovereignty in favor of a limited legislature subject to judicial review. The resulting Constitution is comprised of unwritten common-law principles, the written provisions of the European Communities Act and, through it, the

²⁷ Id

²⁸ Id para 25

Treaty of Rome. Eventually, it may similarly incorporate other written texts²⁹ and cause even greater similarities to that of the American written Constitution.

B. The ‘New Paradigm’: Altering the U.K.’s Embrace of the Positivism Model and a Shift in the Traditional Rule of Recognition (hereinafter “RoR”)

Within this alternative British constitution set forth above, paramount principles cannot only exist in ‘unwritten’ form, but they may find expression in ‘written’ texts as well. This entrenchment of documents can be said to be compatible with the U.K.’s embrace of legal positivism, despite the fact that this school of thought underlies the doctrine of parliamentary sovereignty³⁰, as was explained before in this paper. Hence what this section of the paper will strive to demonstrate is how this new ‘written’ constitutional perspective of the British Constitution can be justified and is workable by contemporary notions and ideals of jurisprudence and legal theory. David Jenkins has expounded that this new perspective of the British Constitution can fit the legal theory notion of positivism as it can incorporate written documents based upon three positivist premises³¹:

1. First, there must be a reorientation in the locus of sovereignty, so that the politically sovereign electorate becomes superior to the legally sovereign Parliament in setting restrictions on government action. In this manner, the constitutional order comes to rest upon popular, not legislative, sovereignty. This approach favors acceptance of Hart’s rule of recognition over Austin’s simpler conception of one sovereign, law-making authority.

²⁹ Supra n.17

³⁰ Id.

³¹ Id

2. Second, the government's exercise of powers then results from the electorate's delegation of sovereign authority to them; such delegation divides between the legislative and the judicial branches. The judicial enforcement of constitutional provisions becomes a legal manifestation of external electoral restraints upon legislative action, translating popularly sovereign will into a form of enforceable state action upon Parliament.

3. Finally, written constitutional documents have a function similar to legislative statutes. They express the will of the popular sovereign in clear terms that command or prohibit action by Parliament. It is their expression, not of substantive principles and values as such, but of the popular sovereign's force of will that gives them moral authority.

Henceforth, limited government can also rest upon positivist foundations that legitimize written constitutional documents as commands of another, but popular, sovereign³². The central point for this constitutional change in the United Kingdom, as laid out above, and the reliance upon written documents, is a rejection of Austin's basic model (as referred to before in this paper) in favor of one like that of H. L. A. Harts'. Hart's positivist theory does better than Austin's by describing more complex constitutional systems that incorporate ideas such as judicial review or the lack of one supreme, law-making sovereign as in federalism³³. At the center of Hart's theory is his distinction between primary and secondary rules³⁴. Primary rules consist of the rights and duties between individuals, and secondary rules describe the means by which primary

³² See 'The People Themselves: Popular Constitutionalism & Judicial Review', LARRY KRAMER.

³³ See H.L.A. HART, THE CONCEPT OF LAW 78-79, 103 (1961). The distinctions between Austin and Hart are many, and the reasoning of both is careful and full of nuance. Additionally, many other prominent thinkers and commentators have contributed to the understanding, criticisms, and further development of their ideas. However, a thorough analysis of the jurisprudential debate on positivism is far beyond the scope and purposes of this thesis. This work is concerned with constructing a straightforward, workable, and acceptable theoretical basis upon which the British constitution can more easily shift to incorporate written documents in limiting government power.

³⁴ *Id.* at 90.

rules come into being, change, or are extinguished³⁵. Certain types of secondary rules, however, do not owe their existence or validity to any other higher, defining rules³⁶. Such a rule of recognition is the ultimate rule of the legal system from which all others derive validity³⁷. This fundamental rule cannot be validated on its merits and exists as a political or social fact based upon its acceptance by judges, government officials, and members of the community³⁸.

The rule displaces Austin's more basic notion of law as the command of a single sovereign³⁹. Accordingly, the law is more than a simple command enforceable by the power of its issuing sovereign⁴⁰. Rather, the authority of law derives its validity from the people's perception⁴¹. Also, such authority results from two other sources: (1) peoples' obedience to the law after its promulgation according to secondary rules; and (2) on the most fundamental level, the rule of recognition⁴². The rule of recognition itself, while existing as a fact, may rest upon complex normative values about the nature of government⁴³. It must not necessarily be a blind and substantively unconsidered assumption⁴⁴. On the contrary, it may take various forms that reflect considerable normative content. For instance, the rule of recognition might simply remain the unwritten doctrine of parliamentary sovereignty. Alternatively, it might place limits on legislative authority, grant review powers to the judiciary, and recognize a written text as

³⁵ *Id.* at 91-92.

³⁶ *Id.*

³⁷ *Id.* at 97, 102, 105-06.

³⁸ *Id.* at 98-99

³⁹ *Id.* at 64-67, 92, 97, 102

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 75

⁴³ *Id.*

⁴⁴ *Id.*

the expressive instrument of popular will⁴⁵. The legal competencies of all government institutions and the constitutional status of a written text, therefore, receive their authority as foundational sources of law from ongoing endorsement by the political community at large. Although the rule of recognition is a social fact that intrinsically has no normative content, it is nevertheless a descriptive concept to which normative values may attach by virtue of their acceptance among officials and the electorate.

Hart's rule of recognition offers an avenue of escape from parliamentary sovereignty as that doctrine's continuing legitimacy must depend upon its ongoing acceptance throughout the community, according to the corresponding theory. Such change must not occur in a relatively sudden or formal manner, but may be a slow process over time as attitudes and practices among officials and the people combine and reinforce each other. The constitution might evolve, resulting in a weakening of the doctrine of parliamentary sovereignty, due to a gradual shift in the rule of recognition. The new rule may in turn reflect, though not necessarily so, emerging normative assumptions about government. This form of organic endorsement by the popular sovereign, as well as by officials, permits an evolutionary change in the constitution at a fundamental level beneath the theory of parliamentary sovereignty. Developing social and political practices, and the norms that drive them, can therefore suggest a new rule of recognition that limits government power and accepts its control through some form of judicial review and/or written forms of constitutional doctrine. Change in the rule of recognition might become evident through increasing criticisms of parliamentary sovereignty or the acknowledgement by officials of limitations upon government authority. Other signs might include popular or judicial support for the rule of law,

⁴⁵ Id at 69, 70-71, 103

human rights, and acceptance of competing sources of law such as that of the European Community or regional assemblies. Although formal theory might resist these pressures for some time, constitutional practice must in fact respond to a shift in the rule of recognition to retain its legitimacy and prevent disintegration of the legal system.

Judicial review as a means of enforcing popular sovereignty might result, as in the United States, from direct popular ratification of a written constitutional document⁴⁶.

Such a document might explicitly recognize judicial review over legislative and executive acts⁴⁷. Otherwise, it could imply it as an enforcement mechanism.

The U.S. Constitution, for example, has no explicit mention of judicial review, despite its long history with it. Chief Justice Marshall first implied the power in Marbury v. Madison, although the doctrine was not new in U.S. constitutional thought⁴⁸.

Consequently from the aforementioned discussion, we can reasonably infer that courts can consider certain texts as being expressions of fundamental law. The judiciary can develop constitutional jurisprudence by referring to constitutional texts and treating them in traditional common-law fashion⁴⁹. It can weave written texts into constitutional jurisprudence alongside other unwritten principles restraining Parliament. Courts can do this by gradually recognizing certain statutes or treaties, such as the Human Rights Act and the Treaty of Rome, as being paramount, common-law constitutional principles because they represent norms of the popular sovereign. Those texts fill in the gaps of the

⁴⁶ Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 474-75 (1991).

⁴⁷ Canada's Charter of Rights, for example, gives courts jurisdiction over Charter claims and authorizes their granting a remedy, while the Constitution Act, 1982 states that any law inconsistent with the constitution has no effect

⁴⁸ See *Marbury v. Madison*, 5 U.S. 137

⁴⁹ For examples of such a workable model, See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996)

unwritten common-law constitution. They are also the products of an on-going, deliberative interaction between the legislature and judiciary in shaping a constitution that evolves with the popular sovereign's shifting normative assumptions. Although legal positivism has struggled to reconcile statutes with the common law and legislative process is deemed different from judicial process, history has shown us that statutes have declared, refined or indeed otherwise developed the common law. Unless Parliament has made its intention clear to change the common law, courts have always deferred to it and interpreted statutes as compatible with its principles. Just as statutes may not only declare and modify the common law in areas such as contract or tort, they may also reflect common-law principles founded on the constitution.

Under this framework, the judiciary possesses much leeway in how it interprets and applies, or even rejects, statutory law. Thus, courts can follow a flexible adjudicative approach in developing a constitutional jurisprudence that maintains a balance between common law and statutory law.

Indeed, this proposed construct is very much in line with David Strauss' description of current constitutional interpretation as common law interpretation⁵⁰, even though the latter has been the receiver of an abundance of criticism under American Jurisprudence⁵¹. Strauss suggests that constitutional law has binding authority not because it is the command of its founders, but because constitutional law, as it has evolved, represents the accumulated wisdom of many generations and has been tested over time. On this account, constitutional change is not the product of shifts in political will, but instead occurs as judges enforce constitutional commitments in changing circumstances. As we have

⁵⁰ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996).

⁵¹ See e.g. Gary Lawson, "The Constitutional Case against Precedent" and Randy Barnett, "Trumping Precedent with Original Meaning".

witnessed, modern British society shares little in common with 17th Century British society, for common law adjudication has instigated a paramount of constitutional change in the U.K. since the ages of the Magna Carta. The central idea is that common law constitutional doctrine should be followed because its provisions reflect judgments that have been accepted by generations of lawyers and judges in a variety of circumstances (the ‘traditionalist’ component), and that constitutional provisions reduce unproductive controversy by specifying solutions to problems that would otherwise be too costly to resolve (the ‘conventionalist’ component)⁵². This helps explain the importance of interpretational flexibility in the judiciary, and also can be said to coincide with the new shift in Hart’s Rule of Recognition theory already explained above. The most significant changes to the British Constitution have come not through formal amendments or changes to any statutory text (‘old’ RoR), but via judicial decision-making i.e. judicial review, and deeper changes in society as well as in politics (‘new’ RoR).

Nonetheless, problems with this thesis can be said to arise. The relationship between statutory law and common law becomes more complex when a statute purports to change constitutional principles⁵³. Courts must then give special consideration when attempting to reconcile a particular statute with binding common law or subsequent contradictory statutes. A court, for example, may find that such a statute possesses enough normative strength to become entrenched in the constitution and limit Parliament in the same way as paramount common-law principles. Even without the adoption of a comprehensively written and popularly ratified constitutional document like in the U.S, texts under this model graft onto the underlying common-law framework and become

⁵² *Supra* n.50

⁵³ *See* Eskridge & Ferejohn, *supra* n.50, at 1266

normative in their own right as ‘positivist expressions of popular will’. Texts in this sense do not trump or indeed stand apart from the common-law constitution, but become intertwined with it. Such fusion of common law and statutory law has occurred on a minute level, for example, with the Statute of Uses and Statute of Frauds, which both changed the common law and became objects of evolution and judicial elaboration⁵⁴.

These statutes reflect how closely text can intertwine with common law. This example of melding statute and common law delineates how well a text can become embedded in the over-arching unwritten tradition. The integration of statutory law into the common law at this level, however, goes beyond the legislature’s power, for it depends upon its judicial treatment over time. The result is a permanent transformation of the common law, which absorbs the statute and promotes it as a constituent principle. Consequently, the incorporation of texts into the common-law framework is an on-going, evolutionary process that is organic in the sense that it is responsive to deeper normative legal understandings within the community, and occurs through common-law adjudication.

Incorporation can conceivably occur on a more fundamental level, where a regularly enacted statute affects the constitutional system in a deep-rooted, lasting way so that courts treat it the same way as paramount common-law principles. As a regular statute, preliminarily it might not legally limit Parliament and may itself be constrained by higher constitutional laws. Its status can eventually change depending upon its reception by the judiciary, other government actors, and the community, thereby ascending to constitutional status. William Eskridge and John Ferejohn term written laws of this sort ‘super-statutes’ because they successfully penetrate public normative and

⁵⁴ At least in the context of U.S. jurisprudence, these two statutes are taught in law schools and developed in practice no differently from any other principle at common law. *See* Statute of Uses, 1535, 27 Hen. 8, c.10 (Eng.); Statute of Frauds, 1677, 29 Car. 2, c. 3 (Eng.)

institutional culture in a deep way⁵⁵. As examples of such laws, they identify the U.S. Sherman Antitrust Act; the Civil Rights Act; and the Food, Drug, and Cosmetic Act; as well as, potentially, the British Human Rights Act⁵⁶.

Therefore, this concept provides a model by which certain statutes or even treaties can become constitutional documents through an evolutionary and judicial process. The first part is normatively dependent upon a statute's intent to alter constitutional boundaries, its durability, and its broad systemic effects. The second part is methodological because courts recognize the super-statute's normative value, adjudicate it according to a common-law constitutional jurisprudence, and give it priority over lesser laws. Its normativity rests in a notion of popular sovereignty, while institutionally it operates as a 'hybrid' of legislative enactment and judicial development, as it were⁵⁷. Eskridge and Ferejohn describe these exceptional statutes as 'quasi-constitutional' in status⁵⁸. As they write within the context of U.S. law, however, those statutes remain subordinate to the U.S. Constitution. In the alternative British model, super-statutes would instead become the paramount laws themselves, in conjunction with fundamental common-law principles

⁵⁵ Eskridge and Ferejohn identify three main characteristics that characterize these and other super-statutes, 'A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does stick in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law including an effect beyond the four corners of the statute. . . .

*Super-statutes are applied in accord with a pragmatic methodology that is a hybrid of standard precepts of statutory, common law, and constitutional interpretation. Although the courts do not have to consider the super-statute beyond the four corners of its plain meaning, they will often do so because the super-statute is one of the baselines against which other sources of law sometimes including the Constitution itself are read. Ordinary rules of construction are often suspended or modified when such statutes are interpreted. Super-statutes tend to trump ordinary legislation when there are clashes or inconsistencies. . . .', See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267-68 (2001), at 1216*

⁵⁶ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-2 (1994)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1994) (codified as amended in scattered Sections of 5, 28, and 42 of the U.S. Code); Food, Drug, and Cosmetic Act of 1938, 75 Pub. L. No. 717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 (1994)). Another super-statute would be the British Human Rights Act 1998.

⁵⁷ 'British Common-Law Constitution' p 837 et al, David Jenkins, 2003 at 1216-17, 1229-30, 1266-67, 1273-74

⁵⁸ *Id.* at 1216-17, 1266-67

limiting Parliament, and enforceable through judicial review⁵⁹. Through this process, Parliament and the courts play a tandem role in developing the Constitution. Courts interpret and apply regular legislation in a manner consistent with both written and unwritten constitutional principles, and Parliament then pass a super-statute and therefore play a part in the amending process. Common-law adjudication thereafter constitutionalizes the statute through an evolutionary process reacting to shifting norms⁶⁰. Ways that super-statutes and unwritten constitutional principles are enforceable and changeable by Parliament, can vary depending on political developments, and their treatment by a judiciary with considerable leeway in how it interprets and applies them. As a result, the common-law constitution may contain written and unwritten principles sharing the basic effect of restraining Parliament, but in different manners and degrees. When it comes to judicial interpretation of these super-statutes, it is advised that courts should construe them ‘liberally and in a common law way, but in light of the statutory purpose and principles as well as compromises suggested by statutory texts.’⁶¹ Thus it can be confidently expressed that these constitutional texts are freed from parliamentary intent, in contrast with their enactment stage. For these reasons, courts’ interpretive

⁵⁹ *See id.* at 1265 (characterizing both the Canadian Bill of Rights and the British Human Rights Act as super-statutes, but noting that they do not have the trumping power that a constitution does). However, *R. v. Drybones*, [1970] S.C.R. 282, shows to the contrary that such a statute can have binding effect upon the legislature. A super-stature can operate in this manner in British public law ordered under this alternative common-law constitutional interpretive model

⁶⁰ *See* Eskridge & Ferejohn, at 1268-71 (emphasizing that the judiciary cannot constitutionalize texts on the basis of its own substantiating authority. The judicial role in this process is to show deference to the elected Parliament in contested areas, and carefully reflect upon actions and perceived attitudes of government actors and the electorate. While courts of course exercise their own judgment in this regard and its own attitudes affect its determinations, the constitutionalization of text results from shifting political normativity within the political community at-large; common-law adjudication is instrumental to this process, and not the originating authority). As Eskridge and Ferejohn write, ‘Typically super-statutes are extensively relied upon by the people, and are repeatedly visited and endorsed by legislative, administrative, and judicial institutions in response to the actions taken by private as well as public actors’ *Id.*, Eskridge & Ferejohn at 1273.

⁶¹ *Id.* at 1247

approach to such constitutional texts is likely to be more purpose-searching than formalistic⁶². Thus, judicial interpretation and application should be more forward-looking and considerate of results consistent with both the text's underlying principles and broader notions of systemic integrity⁶³. Furthermore, because courts can look beyond the four corners of the text in question, they can consider the impact of other relevant but regular, constitutionally statutory schemes that are not entrenched. Because courts display a broader principled and systemic consciousness, Parliament thereby has an indirect further influence in the development of constitutional jurisprudence⁶⁴.

C. From Written to Unwritten: Transformation in the American Written Constitution towards the Constitutionalization of the Common-Law?

Though this is not the focus of the paper, a brief section will be written here regarding the commentaries of the common law constitutional interpreters. Their theories shall be discussed and specifically objected to, and by the end of this chapter we shall understand why this distinct methodical approach cannot survive in the U.S. constitutional context, hence why it is better suited for the realms of the British constitution. Indeed, if there is any movement currently occurring, it is more accurate to suggest that it is that of the UK's constitutional interpretive methods becoming more aligned with that of the U.Ss, rather than vice-versa.

To state shortly, these scholars firmly believe that US constitutional principles can be derived from the American case-law and precedent jurisprudence, and that theoretically the US Constitution itself can be said to be 'unwritten', much like that of Britain.

⁶² Supra n.17

⁶³ Id

⁶⁴ Id

Describing current constitutional interpretation as common law interpretation

acknowledges the fact that the method does not obey all the dictates of the Framers of the Constitution, in part, because modern society shares little in common with 18th century US society. The common law approach is deemed to be much more intellectually honest than originalist or textualist approaches. It is not the written constitution itself which we engage with constantly, but rather the competing judicial viewpoints and interpretations of that document. The text matters very little; public debate invokes notions derived from precedents' debates over the equal protection clause's invocation of words of supposed principles of Brown v Board of Education 347 U.S. 483 (1954) not of the written Constitution. What these requisite writers also argue is that there is no real need for reliance upon a written constitution in a nation which has had a long-standing historically established tradition, such as Great Britain or the U.S. Indeed, the written constitution of the US today seems to have more in common with the unwritten constitution of the UK than the written constitutions of Eastern EU Member States. One can argue that written constitutions only serve a useful purpose in newly established non-liberal nations, such as for instance Iraq or Afghanistan, because there is a tendency of distrust amongst political officials and even judges at the start of any democracy, and overall the country lacks stability, security and the requisite long-standing history and tradition upon which 'the people' or indeed courts can rely upon in cases of disagreement. In these countries, for example, the constitutional text is something which all the people can agree upon, something which justifies the actions of politicians, judges and lawyers, which ultimately dissuades the same from engaging in creative interpretations and linguistic gymnastics. Hence the need for a written 'supreme law' of the land is much less in countries like

Britain or the US where it can be seen that there are conventions, precedents, statutes, laws and rules already in place, that are backed up by long standing periods of history and contemporary standards of tradition. The longer a constitutional regime has endured the more it develops its constitutional traditions and so the more stable the patterns of cooperation are within the confinements of society.

Additionally, common law constitutional interpreters tend to make an argument that for example, Article 2 of the Constitution is positively misleading as to the process of Presidential election; its substance is filled in by the custom that has evolved of how the Electoral College works. Perhaps this custom has crystallized into constitutional convention. A persuasive case could also be made for the existence of a constitutional convention that judges are not impeached for partisan reasons. This emerged from the Samuel Chase affair and has since been adhered to in practice and normatively affirmed. Most fundamentally, consider the understanding in the United States that the judiciary is empowered to strike down legislation that it considers is inconsistent with the Constitution - the power of judicial review, thought to be founded in Marbury v. Madison. The rules and practices which the Supreme Court adopts in interpreting the Constitution must themselves be “constitutional” in the realist sense - but what of the constitutional status of the rule itself? Consistent with understandings of the role of the common law at the time, Marbury as well as Cooper v. Aaron⁶⁵ could be considered to derive from the common law role of the judiciary. The judicial review power of the U.S. judiciary henceforth transcends its origins in the common law task of interpretation. The

⁶⁵ “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.”

constitutional convention of judicial review has been confirmed by subsequent and consistent practice, by popular belief and by its reason. It has become a meta-norm with a constitutional status that is worthy of recognition as such⁶⁶.

However, the fact that originalism leads to inappropriate ‘hero worship of founding generations’⁶⁷, and imposes the values of 18th/19th century dead Caucasian men on the very diverse and vibrant society in which we live today, also can be said to arise in a common law system of constitutional development. The theory thus seems to contradict itself almost entirely. This is because the common law interpretation method is one that also relies on reasoned elaboration of existing traditions and precedents. Certainly precedents of the past are also inflected with the attitudes and values of the times long gone. Another criticism is that the common law method by itself cannot be said to explain the binding nature of the ‘hardwired’ features of the Constitution i.e. the fact that there are two Houses of Congress, or the term-limit of a President. On the other hand, originalism and textualist discourse can explain such and be justified, in that it argues that the written text of the Constitution itself contains rules, conventions, standards and principles. All of them are directly binding upon us in the present moment, although the latter two, because they are standards and principles, require implementation and application via doctrine and case-law before they can be wholly put to effect.

⁶⁶ *Infra* n.67

⁶⁷ David Strauss, ‘Common Law Constitutionals Interpretation’ *University of Chicago Law Review*, Vol. 63, No. 3, 877-935. Summer, 1996

Ronald Dworkin has argued indignantly that there was nothing unwritten or unenumerated about *Roe*'s right of privacy⁶⁸. The right of privacy, he argued, is arrived at through a standard process of textual interpretation, in which a general clause in the Constitution—there the Due Process Clause—is read to yield a more specific principle⁶⁹. The right of privacy is, he concluded, no more unwritten than the freedom of symbolic expression, which is similarly arrived at by interpreting the First Amendment⁷⁰. Dworkin discovered further that the true “textual home” for *Roe*'s right was in the Religion Clauses, not the Due Process Clauses. Dworkin's post-hoc discovery of *Roe*'s true textual home may be doubtful to these scholars.

On this, the common law folks may contest that Dworkin was quite right to confuse the distinction between written and unwritten law, and that the lesson to be learned from this mishap is that some putative interpretations of the constitutional text - including the effort to locate the right of privacy in the Due Process Clause or, for that matter, the Religion Clauses - are so strained that they have to be regarded as excursions into unwritten constitutional law⁷¹. To this dispute, the author of this paper concedes.

Nevertheless, the argument that the Court is utilizing a new kind of ‘unwritten constitutionalism’⁷² is contended to be a fallacy, for this overestimates the significance of the court's most recent decisions and proves far too much. It is a fact that historically the court spends most of its time oscillating within a fairly narrow band in the middle of the

⁶⁸ Dworkin, ‘Law's Empire’

⁶⁹ See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 381, 386–91 (1992) (arguing that the entire “distinction between enumerated and unenumerated rights . . . is bogus”).

⁷⁰ Id at 388-91.

⁷¹ Infra n.72

⁷² Jeb Rubenfeld, ‘The New Unwritten Constitution’, Duke Law Review

continuum, and there are institutional mechanisms that explain why it does and will continue to do so. It is hardly original to note that there are implicit political constraints that bind the Court within a certain range of departure from the written text. Text serves as a focal point for the resolution of pure coordination problems, and it allows the Court to point to something other than judge-made precedent or contentious political theory to justify its decisions. The first effect is a constraint, rather than simply a benefit, because the Court usually will gain little by disrupting a settled consensus around a coordinating text even if it later comes to believe that coordinating on some other rule would have been superior *ex ante*. The second effect is a constraint in the sense that if the Court points to the text when and only when it supports the Justices' attitudes, the Court's audience will correctly perceive that the text lacks any causal force in the Justices' decision-making. So the Justices must sometimes invest in credibility by doing what the text says, rather than what they want to do.⁷³

Over the long term, the range may drift toward the unwritten end of the continuum; the interpretive life cycle of any written constitution, at least one as difficult to amend as ours, might display decreasing textualism, as precedents accumulate and social problems change. But this process is probably too slow to be important. Certainly we cannot infer from the *Printz* opinion⁷⁴, the *Boy Scouts*⁷⁵ and the *Adarand*⁷⁶ opinions, that the Court has become increasingly nontextualist. Rubinfeld, one such common law constitutional

⁷³ Adrian Vermeule, 'The Facts about Unwritten Constitutionalism: A Response to Professor Rubinfeld', *Duke Law Journal*

⁷⁴ *Printz v. United States*, 521 U.S. 898, 899 (1997) (holding that federal legislation may not constitutionally commandeer states to administer a federal regulatory program).

⁷⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that a state law requiring the Boy Scouts to admit homosexual scout masters violated the right of expressive association)

⁷⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995) (stating that all governmental racial classifications are subject to strict judicial scrutiny)

interpretational advocate, knows precisely this and therefore is at odds with his own reasoning, because he points toward other recent decisions that appear to take text very seriously⁷⁷ in tension with his initial claim that the Court is using a “new kind of unwritten constitutionalism.”⁷⁸

Further, common law constitutional interpretation arguments in the U.S. miss entirely the fact of a ‘complete constitution’.⁷⁹ The US constitution can be said to be more than just the written Constitutional text and its derivative relevant case-law. Firstly, statutes and other formal instruments can be said to be one major source of the American constitution; for instance, there are statutes of the U.S. Congress that are constitutional in the realist sense. The P.A.T.R.I.O.T. Act is a recent example of a statute which has significant effect on the nature and extent of the exercise of government power in the United States. Why should this Act not be regarded as constitutional in nature? Another important example is the Administrative Procedures Act (U.S.C. Title 5) and associated procedures of administrative decision-making. The voluminous U.S. literature in law and political science, about the significance of the structures and processes established under this Act, testifies to its importance for the reality of government decision-making⁸⁰.

Apart from statutes, and putting aside the effect of state statutes, there may also be other formal instruments of a constitutional nature. For example, the Executive Orders by

⁷⁷ See Rubinfeld, *supra* note 72, at 292 (citing *Lopez v. United States*, U.S. (reviving Commerce Clause review by appealing to textual “first principles”).

⁷⁸ *Id.*

⁷⁹ USING CONSTITUTIONAL REALISM TO IDENTIFY THE COMPLETE CONSTITUTION: LESSONS FROM AN UNWRITTEN CONSTITUTION, Matthew Palmer, *American Journal of Comparative Law*, Summer 2006

⁸⁰ *Id.*

which President Reagan established the regulatory reporting and cost-benefit analysis regime of the Office of Management and Budget in the 1980s could arguably be conceived as having a significant effect on the way in which federal powers are exercised. Other formal instruments also have constitutional effect, such as the important procedural rules of the U.S. Senate or House of Representatives, for example in the composition of committees or their powers.⁸¹

Finally, it is unlikely that an academic identification and recognition of a U.S. common law constitutional interpretation doctrine would make much difference to the behaviour of the U.S. judiciary, nor does it explain the behaviour at present. The Court has assumed the role of guardian of the Constitution. No Justice currently shows any sign of interest in the notion that something outside the Constitution should be a source of striking down legislation or other action - which is, after all, the most significant effect of that status. The most likely conceivable evolution in this direction which one might foresee is the possibility that, at some point, international law will come to be regarded by U.S. courts as having binding domestic legal authority over U.S. legislation. At present this seems unlikely to happen soon. There is, however, a possibility that a generally accepted change in U.S. constitutional language to embrace elements outside the document of the Constitution might have some effect on the behaviour of other branches of government. This would constitute a huge symbolic change; more importantly, for a realist, there is political value associated with 'constitutional' terminology in the United States. Political value has a tendency to be taken seriously by politicians in Congress and in the White House. If some aspects of the operation of U.S.

⁸¹ Id.

government were, gradually, to acquire a constitutional, or even quasi-constitutional, label then there would likely be changes to political behaviour in relation to those aspects. So it is with this thought and idea that we proceed to the final part of this paper's analysis.

D. The Move towards a Canadian Compromise

As discussed above, the unwritten nature of the British Constitution does not necessarily preclude judicial review of primary legislation. The common law can impose legally enforceable limits upon both Parliament and the Crown, based upon the rule of law and the democratic foundations of government. A subsequently adopted, written constitutional document such as in the US is, therefore, not an originating source of either parliamentary/congressional limits or judicial review power. Rather, it is a means for expressing those principles of limited government. Constitutional texts can be said to graft onto the underlying, alternative common-law framework. A constitutional document facilitates judicial review if that enforcement mechanism already exists in some form. A text neither guarantees the normative value of judicial review, nor is its adoption a necessary result of the existence of judicial review. Constitutional systems may accordingly vary both in the extent to which they rely upon judicial or political methods of enforcement, and combine a mixture of both written and unwritten elements.

The British Constitution, much more so than the U.S, has traditionally been paradigmatic in that there is no formal mechanism that can limit Parliament's legislative power.

Constitutional principles are nonjusticiable and dependent solely upon political checks.

There appear to be only two legal rules that absolutely restrain Parliament under orthodox

theory and that one might term definitive of the constitutional order. The first is the doctrine of parliamentary supremacy itself, the inverse proposition of which is that Parliament cannot limit its own substantive powers; Parliament can always undo the actions of its predecessors⁸². The second constitutional mandate is that an Act of Parliament is only that which passes through the Houses of Commons and Lords and receives the Royal Assent. Other than these two primary rules, Parliament may act freely, subject only to Diceyan internal and external limitations⁸³. Still, while courts cannot substantively review parliamentary acts and have traditionally followed a formalistic style of adjudication, they nevertheless exercise considerable control over government. Courts directly restrain executive action through the *ultra vires* doctrine, and how courts indirectly control Parliament by interpreting legislation, sometimes quite creatively, in conformity with constitutional principles. The English judiciary has asserted such controls even in the face of clauses through which Parliament has attempted to disallow any judicial review of secondary legislation made under an enabling statute. This principle is illustrated in Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147 (H.L.) a case that challenged the Commission's decision to reject the claimed compensation. In delegating authority to the Commission, Parliament had added a clause declaring that no decisions of that body were to be reviewed in court. Nonetheless, the House of Lords found that the Commission's decision was *ultra vires* and interpreted the ouster clause as not preventing review of administrative action that was a nullity from the outset. The Anisminic case shows, for practical purposes the distinction between application and interpretation of statutes is in a sense a matter of degree: there is

⁸² BRADLEY & EWING at 58-59, 66.

⁸³ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1965).

necessarily an uncertain border between restrictive interpretation and non-application. Regardless of the highly paradigmatic nature of the parliamentary sovereignty model, adjudicative measures give some legal efficacy to constitutional principles. The more active courts behave in this regard, the more ‘U.S. definitive’ the British Constitution will become.

The examples portrayed in this paper from British and U.S. law illustrates the fluidity of the concepts of a ‘paradigmatic’ or ‘definitive’ constitution. A constitution, whether written or unwritten, may rely upon judicial and political enforcement of its provisions to varying degrees. To characterize a constitution as either paradigmatic or definitive, however, is only a convenient term of generalization⁸⁴, ‘wherein exist many shades of gray’⁸⁵. Just as the British and U.S. Constitutions rely upon judicial review differently, they also draw differently upon textual references. In either culture, however, underlying normative values of constitutionalism precede the constitutional form. A constitution is instrumental to constitutionalism not only through its establishment of clear institutional structures and substantive rules, but also in its manner of expression. It is through this expressive form that political and legal institutions find guidance in

⁸⁴ As Lord Irvine of Lairg explained, “Constitutional supremacy and parliamentary sovereignty are often perceived as concepts which are polemically opposed to one another, given that the former *limits* legislative power and *entrenches* fundamental rights, while the latter embraces formally *unlimited* power and *eschews* the entrenchment of human rights. However, the better view is that they represent two different parts of a continuum, each reflecting differing views about how the judiciary and the other institutions of government ought to interrelate. This conceptualization follows (in part) from the fact the notions of constitutional and legislative supremacy are themselves *elastic*. . . . Since they are each *catholic* principles which accommodate a *range* of views concerning institutional interrelationship, it is meaningless to suggest that they are inevitably opposed to one another. . . . [T]he two theories are best thought of as different parts of a *spectrum* of views concerning how judges should relate to the other branches of government”, *Comparative Perspective* at 7-8.

⁸⁵ *Supra* n.17

articulating or following underlying constitutional principles⁸⁶. In the United States, courts first look to the written Constitution in restraining government, while U.K. courts directly refer to the rule of law and common-law rights that traditionally do not derive from a textual source.

Canada, on the other hand, having a constitution ‘similar in Principle to that of the United Kingdom’, has, in contrast, long recognized that a constitution can consist of both written and unwritten elements. The Canadian Constitution strikes an interesting balance between political and judicial determination of constitutional issues in regard to its Charter of Rights and Freedoms⁸⁷. Section 33 of the Constitution Act, 1982, allows Parliament or a provincial assembly to declare that a statute will have effect notwithstanding a possible violation of certain guarantees in the Charter⁸⁸.

Consequently, the effect of this provision is that the legislative branch retains the ultimate authority to legislate contrary to certain rights protected in the Charter of Rights and Freedoms. Parliament and the assemblies retain sovereign authority to legislate contrary to specified Charter provisions, thereby preventing any substantive judicial review of the statute in question in such an instance. This balance between judicial and legislative authority recognizes the popularly elected legislature as making ultimate determinations as to the political necessity of a Charter override. It thus thereby accommodates the doctrine of parliamentary sovereignty within a written constitutional

⁸⁶ See ANTHONY KING, DOES THE UNITED KINGDOM STILL HAVE A CONSTITUTION? 3-6 (2001).

⁸⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [hereinafter Charter]

⁸⁸ PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 773 (2000), *‘[I]t is obvious that there is room for argument over the question of which institutions should have the power to determine questions of rights. The British solution is the doctrine of parliamentary sovereignty. . . . The American solution is judicial review. . . . The power of override places Canada in an intermediate position. . . . [B]y virtue of s. 33, a judicial decision to strike down a law for breach of s. 2 or ss. 7 to 15 of the Charter is not final. The judicial decision is subject to legislative review.’*

framework. This unique hybrid of parliamentary sovereignty and U.S. style judicial review demonstrates paradigmatic traits: the legislature is legally competent to adhere to or disregard Charter rights and values at its discretion. Ultimately, the Canadian Charter of Rights illustrates how a constitution can exhibit both paradigmatic and definitive characteristics through the sophisticated interaction between the judicial and political branches, and have provisions that rely differently upon legal or political controls for their enforcement.

Courts of all three countries, however, do in fact refer to both written and unwritten sources of law when adjudicating constitutional issues⁸⁹. Walter Murphy has summarized this position when comparing Canada and the United States in this regard⁹⁰.

Written and unwritten constitutional principles, then, must not exist exclusively of one another⁹¹. The extent to which U.K. and U.S. courts refer to unwritten and written sources of law, and how determinative or influential those sources are, exist on extremely opposite ends of a spectrum. In the United Kingdom and the United States, foundational

⁸⁹ Strauss comments that '[t]he written constitutionalism of the United States has much more in common with the unwritten constitution of Great Britain than it does with the written constitutionalism of a newly formed Eastern European state or, for that matter, than it does with the written constitutionalism of, say, the postwar German Federal Republic or the Fifth French Republic in its first decade' David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) (writing that the written [U.S.] constitution has, by now, become part of an evolutionary common law system. . . .), at 890

⁹⁰ '[Canadians] distinguished between the constitutional document and the larger constitution. Indeed, the Canadian Constitution Act, 1982, lists a series of other texts imbued with constitutional status, and the Canadian Supreme Court has accepted that the broader constitution includes custom and tradition. In the United States, however, scholars, judges, and other public officials seldom speak so clearly. Often the constitution to which they refer seems coterminous with the text of 1787 as amended. Almost equally as often, however, the constitution implicit in their arguments goes far beyond that document to include interpretations, practices, traditions, and original understandings conveniently, if not always accurately, ascribed to founders or emendators' Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 129 (1991) [hereinafter *Constitutional Democracy*], at 114-15. Murphy further writes that 'a constitution need not employ a written text, and indeed, probably is never fully encapsulated in a document. . . .'. Conversely, it would seem remarkable if an unwritten constitution, such as that of the United Kingdom, never had reference to particularly significant legal or political documents.

⁹¹ Richard Fallon flatly states that 'the United States has an unwritten as well as a written constitution'. RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* 111 (2001). He further asserts that the written Constitution exists alongside an unwritten, more general constitution comprised of such elements as binding precedent, historical practice, and norms guiding adjudication. *Id.* at 113-14, 116.

texts occupy different amounts of ‘constitutional space’⁹². Both constitutions also have different compositions in regard to the form of written texts that they primarily use. The U.S. Constitution for instance is one coherent and integrated document, and the British Constitution can be said to derive from both unwritten sources and written textual sources that exist as an accumulation of treaties and statutes.

Conclusion

What this paper has shown is an emergence of the new paradigm of an alternative perspective on the U.K.’s Constitution, which can come to include both ‘written’ and ‘unwritten’ elements, constitutionalized much like that of the U.S. and Canada, and enforced by the judiciary in a common-law manner that reflects shifting normative assumptions of the ‘popular’ sovereign. This process, premised upon a continuing and complex interaction between the judicial, executive and legislative branches, is a gradual, evolutionary means of constitutional development that maintains continuity with both British common-law and American textualist political traditions. In recent decades, the emergence of constitutionally significant statutes and vigorous employment of *ultra vires* review seems to signal a weakening in the doctrine of legislative supremacy and parliamentary sovereignty, as well as an increased authority in the British judiciary. Not only can the British common-law tradition theoretically accommodate written constitutional texts, it has already begun to do so. The determination of whether written principles have a constitutional status higher than ordinary law ultimately depends upon their normative force in ordering the political system, rather than their particular characteristics or modes of operation. The process by which certain texts can become

⁹² *Supra* n.17

entrenched as constitutional documents, despite originating as ordinary statutes or treaties, presents a unique approach to constitutional development that remains true to the common-law tradition. Rather than relying upon formal and conspicuous amending procedures, U.K. public law may incorporate paramount written texts through gradual constitutionalization, cautiously determined through adjudication, slowly moving towards a U.S type constitutional interpretive system; and, as expounded, the new model seems to be coherent with the jurisprudential legal theory of Harts' rule of recognition and Strauss' common law constitutional interpretation method.