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Changing the United Kingdom Constitution: The Blind Sovereign

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Changing the United Kingdom Constitution: The Blind Sovereign

*Richard S Kay**

It has frequently been remarked that it seems to have been reserved to the people of this country by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

Alexander Hamilton *The Federalist* (No 1)

A. Introduction

In the middle of the last century, the fundamental rules governing public power in the United Kingdom could be stated succinctly and fairly uncontroversially. In AV Dicey's 1908 formulation 'Parliament' (the monarch, the House of Lords, and the House of Commons 'acting together') had the right to 'to make or unmake any law whatever' and 'no person or body [had] a right to override or set aside the legislation of Parliament'.[1] There was a necessary corollary. No individual Parliament could restrict the power of Parliament as an institution: no Parliament could bind its successors.[2]

Today, this doctrine of the 'sovereignty' of Parliament is a matter of serious doubt. Many commentators have proposed that there are some things Parliament may *not* do. My purpose in this chapter is not to question the fact, the extent, or the propriety of this change in the constitution.[3] I want rather to consider one feature of the *process* by which such change is thought to have occurred and, by inference, the

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[1] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982) 3–4.

[2] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA), 597; 1 Bl Comm 93: ('Acts of Parliament derogatory from the power of subsequent parliaments bind not'). Dicey (n 1) 23–4, fn 48.

[3] My examination is limited to the criteria for producing binding rules of law. I exclude 'constitutional conventions', the rules, practices, and traditions that are, in fact, observed in the operation

process by which future constitutional change may occur in the United Kingdom: the constitution emerges from a series of specific decisions—executive, legislative, and judicial—dealing with particular political problems. We know what the constitution is by inference from these individual acts. I want to contrast this method of constitutional change with the standard model of constitutional creation and wholesale constitution reform in the rest of the world. According to that model, the 'sovereign'—in just about all modern societies this is some version of the 'people'—deliberates on and frames a set of ultimate rules that define institutions, grant them stated powers, specify necessary procedures, and impose certain limits. Constitution-making, that is, is a rule-making event. It takes place at a certain moment and it is the work of an identifiable group of people. It is a 'datable act of human will'.[4]

In Section B, I briefly outline the particular developments in UK public law that, together, point toward fundamental changes in the rules of the constitution. In Section C, I describe the more typical process of defining public power that has prevailed in constitutional States for the last two centuries—the conscious and intentional formulation of written constitutions by identifiable institutions. In Section D, I elaborate the description of developments in the United Kingdom and in Section E I raise some difficulties associated with this piecemeal kind of constitution-making. Finally, in Section F, I qualify my description of the standard model of constitution-making, using as my main example, its best known manifestation—the constitutional law of the United States. I suggest that the process of American constitutional interpretation has resulted in a kind of constitutional change not unlike the one that has prevailed in the United Kingdom.

B. Some Changes in the Constitution

Many observers believe that the simple rule of parliamentary sovereignty no longer obtains in the United Kingdom. This conclusion is based on a number of discrete developments. Each of them has been the object of extensive critical discussion. In this chapter, it is sufficient briefly to describe a few of them to show how the traditional understanding has been undermined.

The most explicit alteration has been the subordination of Acts of Parliament to European law. The European Communities Act of 1972, authorizing the United Kingdom's accession to the European Treaties, provided (consistent with the case law of the European Court of Justice) that any 'enactment passed or to be passed' would only take effect subject to applicable European law.[5] The Act thus explicitly recognized, *pace* Dicey, a body with 'a right to override . . . legislation of Parliament'.

of government but would not be enforceable in a court of law. See AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson 2007) 20–30.

[4] L Alexander, 'Introduction' in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 6. See also Section C below.

[5] European Communities Act 1972, s 2.

The effectiveness of this limitation was affirmed by dicta in the House of Lords' 1991 judgment in *R v Secretary of State for Transport ex parte Factortame (No 2)*.[6] In his speech, Lord Bridge chose his words with care: it was the duty of United Kingdom courts 'to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.[7] While it is generally believed that Parliament could remove this limitation by express repeal of the European Communities Act 1972,[8] even requiring a particular form of legislative action to effect some objective constitutes a substantial chink in the Diceyan orthodoxy.[9]

Although it lacks the explicit judicial imprimatur given to the priority of European law, a further limitation on the unfettered authority of Parliament has been taken for granted for a much longer time. Parliament, over the course of the last century, relinquished its right to legislate for former colonial possessions. Section 4 of the 1931 Statute of Westminster stated that no Act of Parliament would 'extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof'.[10] More emphatic renunciations were repeated in subsequent Independence Acts.[11] Although judicial dicta have questioned the strict legal effectiveness of such Acts,[12] courts or commentators all agree today that any attempts by the Westminster Parliament to legislate for territories to which it had granted independence would be ineffective in those jurisdictions. It is hard to find an observer willing to quarrel with Lord Sankey's observation that Parliament's power to repeal the Statute of Westminster 'is theory and has no relation to realities'.[13] Geographically, at least, Parliament has irreversibly ceded part of its power to legislate.[14]

While its impact is less direct, the radical expansion of the power of judicial review of government action is at least as significant an indication of a basic change in the constitutional allocation of power. In the past several decades, courts have invigorated their power to review and to invalidate decisions of agencies acting within the apparent scope of the authority granted to them by legislation. The

[6] [1991] 1 AC 603 (HL).

[7] *Factortame* (n 6) 659. In the case itself, the only law 'overridden' was the law concerning interim relief which predated the 1972 Act. See PP Craig, 'Sovereignty of the United Kingdom Parliament After Factortame' [1991] 11 *Yearboook of European Law* 221, 248. The dictum according supremacy to Community law over *subsequent* legislation, however, is usually accorded controlling significance. See also *R v Secretary of State for Employment, ex p. Equal Opportunities Commission and Day* [1995] 1 AC 1 (HL) (courts may issue declarations that an Act of Parliament is inconsistent with European law).

[8] See latterly European Union Act 2011, s 18.

[9] *Factortame* 'prompted even the most devoted Dicey apologist to acknowledge that the traditional theoretical order had ended'. PC Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005) 77.

[10] The Statute of Westminster recently proved relevant in the context of the Succession to the Crown Act 2013.

[11] See, eg, Kenya Independence Act, 1963, s 1(2).

[12] *Manuel v AG* [1983] Ch 77 (CA), 88

[13] *British Coal Corp v R* [1935] AC 500 (PC), 520.

[14] See Bradley and Ewing (n 3) 63. It is too early to say whether a similar conclusion can be drawn with respect to any or all of the sub-state legislatures established in the United Kingdom proper. See C Turpin and A Tomkins, *British Government and the Constitution: Text and Materials* (7th edn, CUP 2011) 241.

courts have applied a number of criteria to such actions, including requiring that procedures be minimally fair and that measures be rationally related to public aims.[15] These grounds of review usually appear nowhere in the texts of the authorizing legislation and it is widely agreed they are creations of the reviewing courts. There is an intense and voluminous literature on the legal justification for such a robust judicial role. One school suggests that the judicially imposed limits are properly attributable to a supposed parliamentary intention to restrict agencies within standards to be developed by the courts.[16] Another holds that such review is directly rooted in the common law and is, therefore, subject to judicial development with no need to refer to any implicit parliamentary authorization.[17] For our purposes, the distinction is immaterial. Under either version, certain operations of the State are not constrained solely by rules intended by Parliament. They are, rather, under the supervision of courts, acting according to judicially formulated standards and procedures.[18] Parliament might, perhaps, reassert its power in a particular case and authorize government action not meeting the judicial standards. The courts, however, have shown a marked unwillingness to acknowledge the force of such legislation.[19] Much less probably, it might, by painfully explicit enactment, attempt to strip courts, in general, of the right to regulate government action although some judges have declared that such a law should be treated as invalid,[20] suggesting that the assertive use of judicial review has laid the basis 'for a reevaluation of the concept of Parliament's legislative supremacy'.[21]

A fourth major development bearing on the extent of parliamentary authority is the jurisprudence of the Human Rights Act 1998 ('HRA'). By its terms, the Act does not purport to limit Parliament's right to legislate. A court confronting legislation that it deems in conflict with the prescribed rights is limited to issuing a 'declaration of incompatibility' that 'does not affect the validity, continuing operation or enforcement' of the law in question.[22] The government White Paper published to explain the Bill reaffirmed that 'Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes'.[23] But another section of the HRA may have had a greater impact on

[15] See Bradley and Ewing (n 3) 725–57.

[16] See, eg, M Elliott, *Constitutional Foundations of Judicial Review* (Hart Publishing 2001).

[17] See, eg, P Craig, 'Competing Models of Judicial Review' [1999] *PL* 428.

[18] On the relationship between assertive judicial review and parliamentary sovereignty see M Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 *LQR* 119.

[19] '[I]t is a basic rule of administrative law that even when a statutory discretion is phrased in absolute terms, the courts do not accept that the power is absolute or unlimited.' AW Bradley, 'The Sovereignty of Parliament—Form or Substance?' in J Jowell and D Oliver (eds), *The Changing Constitution* (4th edn, OUP 2000) 23, 35.

[20] See text around nn 57–61.

[21] EW Thomas, 'The Relationship of Parliament and the Courts' [2000] 31 *Victoria University, Wellington L Rev* 5, 14.

[22] Human Rights Act 1998, s 4.

[23] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) reproduced in part in MW Janis, RS Kay, and AW Bradley, *European Human Rights Law: Text and Materials* (3rd edn, OUP 2008) 859, 862.

the constitutional allocation of authority. Section 3 enjoins courts, 'so far as it is possible to do so' to 'read and give effect' to primary legislation 'in a way which is compatible with Convention rights'. The received meaning of this duty was articulated in Lord Nicholls' speech in *Ghaidan v Godin-Mendoza* in 2004:

> Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning (…) Section 3 may require the court to depart from this legislative intention, that is depart from the intention of the Parliament which enacted the legislation.[24]

So long as courts adhere to this notion of interpretation, Parliament cannot 'make or unmake any law whatever', even if it expresses its intention to do so in words that 'admit of no doubt'. Again, Parliament might, in theory, reassert its plenary power by repealing the Human Rights Act and, from time to time, exactly such action has been proposed. It is hard, at this late date, however, to imagine that some form of legislatively created and judicially interpreted fundamental rights will ever be fully removed from the British legal system.[25]

The cumulative effect of these and other developments has resulted in an arrangement of governing authority markedly different from the one that prevailed in the 1950s. Their larger constitutional significance has been highlighted by academic commentators and, notably, by judges.[26] In *R (Jackson) v Attorney General,* the Law Lords rejected a challenge to the validity of the Parliament Act of 1949 extending the circumstances in which the House of Commons might legislate without the assent of the House of Lords. That Act had itself been enacted without the Lords' assent under the Parliament Act of 1911 that had specified a more restricted procedure for legislation by the Commons acting alone. The complainants' argument in *Jackson* supposed that (1) legislation under the 1911 Act, was an exercise of delegated authority and (2) the 1949 Act was an ineffective attempt by a delegate to enlarge its own power. The Lords rejected this characterization of the 1911 Act finding that it did not provide for a form of subordinate law-making. Rather it redefined the procedure for primary legislation.[27] The implications of this holding

[24] [2004] UKHL 30, [2004] 2 AC 557, paras 29–30. It is uncertain whether or not the House of Lords has adopted a more cautious approach in subsequent cases. See A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009) 92–5 (discussing *R (Wilkinson) v IRC* [2005] UKHL 30, 1 WLR 1718). The High Court of Australia declined to follow *Ghaidan* in construing a materially similar provision in the Victoria Charter of Human Rights and Responsibilities 2006: *Momcilovic v The Queen* [2011] HCA 34, 280 ALR 221. See also, on the New Zealand Bill of Rights Act 1990, *Hansen v R* [2007] NZSC 7.

[25] See, eg, Ministry of Justice, *Commission on a Bill of Rights, A UK Bill of Rights: The Choice Before Us* (Members of the Commission on a Bill of Rights, 2012) para 12.24 ('We conclude… that mechanisms in the UK Bill of Rights should be broadly similar to those in the Human Rights Act'). But see Anthony Speaight QC, 'Mechanisms of a UK Bill of Rights' in *Commission on a Bill of Rights, A UK Bill of Rights: The Choice Before Us* (Members of the Commission on a Bill of Rights, 2012) 257–62.

[26] See especially Bradley (n 19).

[27] *Jackson* [2005] UKHL 56, [2006] 1 AC 262. For a summary and critical review of the judgments see J Allan, 'The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?' [2007] 18 *Kings College LJ* 1.

for *restricting* parliamentary power were articulated in some of the judgments. In particular, Lord Steyn asserted that Dicey's 'classic account' of a 'pure and absolute' parliamentary supremacy was 'out of place in the modern United Kingdom'. While Parliament's authority was still the presumptive rule, courts might, in exceptional cases, such as legislation 'attempting to abolish judicial review or the ordinary role of the courts', properly refuse to recognize it. Lord Hope said that 'courts have a part to play in defining the limits of Parliament's legislative sovereignty'.[28] In 1995, Stephen Sedley, then a High Court judge, had described a 'new and still emerging constitutional paradigm' claiming that Dicey's parliamentary sovereignty had morphed into a 'bi-polar sovereignty of the Crown, in, Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable—politically to Parliament, legally to the courts'.[29] It has been, according to Adam Tomkins, 'one of the most fundamental realignments of the constitutional order since the end of the seventeenth century . . . The constitution is up for grabs, and it is the judges who are grabbing it.'[30]

As noted, my main concern is not the exact shape of the new constitution or the suitability of the arrangements it prescribes. It is rather how such a new dispensation may have come into being. A number of discrete decisions took place over many years, some by Parliament, some by the executive, and some by courts. Sometimes these institutions worked independently, sometimes in tandem, and sometimes at cross purposes. The various decisions were motivated by numerous factors including, among other things, matters of short-term politics, foreign policy, economic development, and institutional rivalry. Their impact on the long-term nature of the constitution was sometimes part of the decision-making calculus but rarely the most important part. These days, this is a funny way to make a constitution.

C. The Designed Constitution

That is, of course, because these days the British Constitution is a funny kind of constitution. The term 'constitution' in the United Kingdom legal system is often used to refer to the whole complex of rules, institutions, and practices that define the operation of government.[31] I use it here in a narrower sense, one that more closely corresponds to the usage in States with constitutional texts. The United Kingdom is usually cited as one of only two national jurisdictions that lack an authoritative constitutional text that stipulates rules at the highest level of the

[28] *Jackson* (n 27) [102] and [107]. See also *Thoburn v Sunderland CC* [2003] QB 151(DC) [60] (Laws J) (the 'scope and nature of parliamentary sovereignty are ultimately confided' to the courts). *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50] (Lord Hope) ('The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion'). See, too, Chapter 6 in this volume by Lord Hope.

[29] S Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *PL* 386, 389.

[30] A Tomkins, *Public Law* (OUP 2003) 23.

[31] See, eg, Bradley and Ewing (n 3) 4–6.

legal system.[32] Such a text creates and defines the institutions of the State, specifies the exclusive means by which they may act and, usually, imposes limits on their powers. This kind of constitution specifies those principles that are accepted as the ultimate legally binding restraints on the exercise of all forms of public power. In the United Kingdom, until recently, the unwritten counterpart of such a constitution was the single rule of parliamentary sovereignty—and the concomitant limit on Parliament's ability to bind its successors. It is that 'constitution' which appears to be changing.

In most of the rest of the world, where written constitutions are employed, there is a standard, if rather idealized, picture of how such a constitution comes into being. A political society becomes dissatisfied with existing governing arrangements. An intense form of public debate ensues and some kind of representative process emerges with a licence to speak on behalf of 'the people' of that society.[33] That process results in a plan for instituting new government with characteristics that are thought suitable for that people in that place and time. The plan is reduced to a text which is promulgated as the binding constitution.[34]

I refer to the agency that creates this constitution as the 'sovereign'. It is worth pausing to clarify this term. In the current discussion in the United Kingdom, the term 'sovereignty of Parliament' sometimes refers to the capacity of Parliament as it is defined by the existing legal system. Thus Dicey was able to describe the sovereignty of Parliament 'under the English constitution'.[35] Arguments about this kind of sovereignty are arguments *of law*, such as the claim that the judges can restrain parliamentary authority because parliamentary sovereignty is itself a rule of common law.[36] In contrast, the sovereign whose actions I described in the previous paragraph is the force that *defines the legal system*. As such, this sovereign cannot be a subject of that legal system and an assertion about its 'legal authority' is incoherent.[37]

This does not mean that the identity of this sovereign or the propriety of its decisions cannot be the subject of rational argument. But such argument must proceed

[32] The other is New Zealand. Israel's Basic Laws have been interpreted as authoritative texts that are superior to all kinds of other law but they have been passed one by one over a long period of time and do not purport to control every exercise of public power. See A Maoz, 'The Institutional Organization of the Israeli Legal System' in A Shapira and KC DeWitt-Arar (eds), *Introduction to the Law of Israel* (Kluwer 1995). They thus share some, but not all, of the peculiar features of the UK constitution-making process.

[33] See B Ackerman, *We the People: Foundations* (Belknap 1991) 6–10.

[34] PC Oliver, 'Sovereignty in the 21st Century' [2003] 14 *Kings College LJ* 137, 156.

[35] Dicey (n 1) 3.

[36] See, eg, *Jackson* (n 27) [102] (Lord Steyn); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 271.

[37] See HWR Wade, 'The Basis of Legal Sovereignty' [1955] *CLJ* 172, 187–8, 192; compare Chapter 4 in this volume by J Goldsworthy and PC Oliver, 'Change in the Ultimate Rules of a Legal System' (2006) (*draft on file with the author*) 26. On the two kinds of sovereignty see JDB Mitchell, 'What Happened to the Constitution on 1st January 1973?' (1980) 11 *Cambrian L Rev* 69, 72–3 (contrasting the 'sovereignty of Parliament and the sovereignty of the nation or Kingdom'); AL Young, 'Sovereignty: Demise, Afterlife, or Partial Resurrection?' [2011] 9 *International Journal of Constitutional Law* 163, 169–70 (contrasting sovereignty 'in terms of lawmaking power' and sovereignty 'in terms of power over constitutive rules').

on the basis of some shared political, social, or moral values, not on the grounds of supposedly binding positive law.[38] In modern democracies, there is near universal agreement on one characteristic of a proper constitution-making sovereign: it must represent the will of 'the people'. There are, to be sure, multiple and acute problems with constructing a plausible surrogate for 'the people', capable of translating its will into defined rules.[39] But, however those problems are resolved, every model of 'the people' as a constitution-maker supposes that it can act knowingly and intentionally. The State in this vision is the product of a collective decision. So Locke saw the people 'appoint[ing] the form of the commonwealth . . . by constituting the legislative, and appointing in whose hands that shall be',[40] and Rousseau contemplated the people 'legitimately assembled' and 'decree[ing] that there shall be a governing body established in this or that form'.[41] These hypothetical exertions of popular will were translated into practical action in the constituent assemblies of the independent American states at the end of the eighteenth century. Those bodies deliberated, drafted, and revised. Their products were often further debated in the general population before final approval. In the case of the Federal Constitution of 1787–9, the arguments in *The Federalist Papers* illustrate the kind of enterprise that constitution-making was understood to be. Those tracts relied on reason, history, and comparative experience to make the case that the rules proposed by the Philadelphia Convention were, in the circumstances, suitable for the United States.[42]

This picture of the process of constitution-making fits naturally with the idea that constitutions are necessarily the acts of a 'constituent power'. For Sieyès, that power resided in the 'nation' which would be represented in an 'extraordinary representative body'. 'The community needs a common will; without singleness of will it could not succeed in being a willing and acting body.'[43] This assumption is implicit in recent debates about the minimum coherence that a population must exhibit before it is capable of uniting in a constitutional State.[44] We insist on certain commonalities because we think that only then can the actions of representatives be treated as judgments attributable to a group of human beings. According to Carl Schmitt, '[l]ike every other order, the legal order rests on a decision and not on a norm.'[45] No such decision is possible unless an aspiring

[38] See HLA Hart, *The Concept of Law* (OUP 1961) 104.

[39] See RS Kay, 'Constituent Authority' (2011) 59 *Americal Journal of Comparative Law* 715, 735–55.

[40] J Locke, *Treatise of Civil Government and A Letter Concerning Toleration* (C Sherman ed, D Appleton-Century Co 1937) 95; Locke 67: 'So that politic societies all began from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors and forms of government.' See also Kay (n 39) 67.

[41] J Rousseau, *The Social Contract* (M Cranston trans, Penguin 1968) Book III, chs xiv, xvii.

[42] A Hamilton, J Madison, and J Jay, *The Federalist Papers* (Clinton Rossiter ed, New American Library 1961).

[43] EJ Sieyès, *What is the Third Estate?* (M Blondel trans, SE Finer ed, Praeger 1964) 121, 130–1.

[44] See J Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999) 337.

[45] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (G Schwab trans, MIT 2005) 10.

constitutional collectivity is capable of acting as 'a person with all the attributes of personality, conscience and will'.[46]

From these ideas follows the standard assortment of constitution-making devices employed by modern societies—special legislative acts, constituent assemblies, and referendums.[47] Indeed, there is no way to create a formal constitutional text without the deliberate, methodical application of human intelligence and judgment. The logical relation between an expression of will and the creation of a constitution is often displayed in constitutional preambles. They commonly explain how the process of constitution-making was a reasonable way of expressing the will of the sovereign. So, whether promulgated by an ordinary legislature or a special constituent assembly, preambles are likely to declare the enactors' right to act for 'the people'.[48] Even more commonly, preambles will list a set of values that are supposed to inform the whole constitution, reinforcing the idea that the document is the expression of a coherent political will.

This standard model presumes that constitutions are the product of the rationalist enterprise criticized by Friedrich Hayek, one that pictured 'intelligent men coming together for deliberation about how to make the world anew'.[49] The resulting legal system, on this view, is what Hayek would later characterize as a *taxis*, a 'made order' (to be contrasted with a *cosmos* or 'spontaneous order').[50] Hayek defends the competing view, one deeply sceptical of reliance on human design of social institutions. Edmund Burke, mistrusting 'the fallible and feeble contrivances of our reason', found 'the very idea of the fabrication of a new government is enough to fill us with disgust and horror'.[51] With respect to making constitutions, however, Burke's warning would fall on deaf ears. New governments have come to be universally understood as things to be 'fabricated', purpose-made by the calculated application of human intelligence. (Hayek's own preference for rules that 'manifest themselves only by being observed' was, it should be noted, largely confined to rules of primary conduct and did not extend to public institutions and procedures which he acknowledged were fit for deliberate design).[52] Shortly after Burke published his warning about the futility of intentional design of the State, Thomas Paine published *Rights of Man,* affirming the possibility of an ever-improving human science of constitution-making. 'There is', he wrote, 'a morning of reason

[46] L Duguit, *Traité de Droit Constituionnel*, vol 1 (2nd edn, E de Boccard 1921) quoted and translated in CI Keitner, *The Paradoxes of Nationalism: The French Revolution and its Meaning for Contemporary Nation-Building* (SUNY Press 2007) 27.

[47] See Kay (n 39) 735–55.

[48] See, eg, Preamble, Constitution of the Czech Republic, 16 December 1992 (promulgation by Parliament); Constitution of Colombia 1991 (promulgation by Constituent Assembly).

[49] See FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 57. Interestingly, Hayek characterized the rationalist tradition as 'French' and the opposing, empirical tradition as 'British' (54–8).

[50] See FA Hayek, *Law, Legislation and Liberty: Rules and Order*, vol 1 (University of Chicago Press 1979) 28, 38.

[51] E Burke, *Reflections on the Revolution in France* (Gateway 1962) 50, 54.

[52] Hayek (n 50) 43, 124–5, 134.

rising upon man, on the subject of government, that has not appeared before.'[53] It is Paine's conception that has carried the day.

D. The Accidental Constitution

With this background, we can reconsider the apparent process of constitutional change in the United Kingdom. The standard model of constitutional renewal—the drafting of a written constitution approved by some acceptable surrogate of 'the people'—has been a minor theme in British literature on this subject. The Levellers' proposed Agreement of the People and Cromwell's short-lived Instrument of Government show that the idea of an enacted written constitution has not been entirely absent from English history.[54] More recently, the Charter 88 movement called for a 'new constitutional settlement', establishing a Bill of Rights, reforming the composition and election of Parliament, and limiting the exercise of power by the government. The last of its ten demands was for 'draw[ing] up a written constitution anchored in the idea of universal citizenship that incorporates these reforms'. Little attention was devoted to elaborating just how this document would be 'drawn up' and, in truth, the Charter's advocates appeared much more interested in substantive changes than in the proper means of defining State power.[55]

Recognition of the cumulative constitutional changes of the recent past—those outlined in Section B, as well as several others, especially the emergence of regional parliaments or assemblies in Scotland, Wales, and (again in) Northern Ireland—have stimulated further interest in deliberate constitutional reform. Several parliamentary committees have examined aspects of the subject. So far, however, none has recommended a thorough and comprehensive process for the creation of a binding written constitution. The Political and Constitutional Reform Committee of the House of Commons, for example, recently issued an equivocally positive report on the question, 'Do We Need a Constitutional Convention for the UK?' The kind of convention the committee endorsed, however, would do little more than 'discuss constitutional change' and 'consider how, in the future, our constitution can best serve the people of the UK'. As to whether or not such a process should lead to a written constitution, the committee 'believe[d] further work is necessary fully to examine this option'.[56]

[53] T Paine, *Rights of Man* (1791) reprinted in *The Life and Major Writings of Thomas Paine* (PS Foner ed, Citadel Press 1974) 396. See also J Wilson, *Lectures on Law* (1791) reprinted in *The Works of James Wilson*, vol 1 (J DeWitt Andrews ed, Callaghan 1896) 375 (The people 'have the right to mould, to preserve, to improve, to refine and to finish' the constitution).

[54] See M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constitutional Power and Constituent Form* (OUP 2007) 27, 36–9.

[55] See, eg, D Erdos, 'Charter 88 and the Constitutional Reform Movement: A Retrospective' (2009) 62 *Parliamentary Affairs* 537

[56] House of Commons Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (HC 2012–13 371) paras 15, 53, 81. The desirability of a written constitution is to be examined in a further planned inquiry of the committee, 'Mapping the Path to Codifying—or

The current debate about the British Constitution involves a number of alternative propositions purporting to describe (or to prescribe—sometimes it is hard to say which) the set of rules replacing Dicey's ascription to Parliament of power to make any law at all. One version modifies the corollary that Parliament's power does not extend to the right to bind future Parliaments. Once this limitation is relaxed, any sitting Parliament may irreversibly alter the conditions for the effective exercise of public power. In some variations, this authority is limited to the imposition of 'manner and form' limitations. That is, Parliament might be obliged to follow any procedures laid down by a predecessor but, if it follows such a procedure, it remains free to legislate on any subject to any substantive effect. So, one Parliament could, by ordinary legislation, require that certain enactments, such as a Bill of Rights, may only be altered by a two thirds vote of the House of Commons or only by using certain formulary language.[57]

Somewhat more ambitiously, other versions have proposed that Parliament could bind its successors both procedurally and substantively: it might enact, for example, a Bill of Rights which no future statute could contravene, no matter the manner in which it was passed. If we take the Independence Acts for former colonial possessions to be legally effective, irrepealable abdications in British law, they would provide a precedent.[58]

Yet another possible description of the transformed constitution supposes that limitations on Parliament have emerged independently of any act attributable to Parliament itself.[59] Sometimes these restraints are ascribed to the 'common law'. In *Jackson*, Lord Steyn described the principle of parliamentary supremacy as 'a construct of the common law. The judges created this principle . . . [I]t is not unthinkable that circumstances could arise where the courts have to qualify [it].'[60]

Not Codifying—the UK's Constitution', available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/parliament-2010/mapping-the-path-to-codifying---or-not-codifying---the-uks-constitution/> (last accessed 7 July 2013). At the time of writing, no report on the latter question has been published. See also House of Lords Constitution Committee, *The Process of Constitutional Change*, paras 27–34, 58 (2011) (stressing the need for comprehensive examination of constitutional change).

[57] This seems to be the way most of the Law Lords interpreted the Parliament Act of 1911 in *Jackson* (n 27) [24] (Lord Bingham), [64] (Lord Nicholls), [91] (Lord Steyn), [163] (Lady Hale), [173] (Lord Carswell). The European Union Act 2011, s 2 prohibits UK agreement to certain changes in the European Union treaties without approval by an Act of Parliament that would itself require endorsement of the change in a referendum. If this provision is effective, Parliament must now authorize any qualifying treaty change *and* that approval can only be manifested by either (1) an enactment coupled with approval via referendum or (2) repeal of the European Union Act's requirements altogether. It is also arguable that Parliament might approve a treaty change by use of an explicit provision stating that it is to operate 'notwithstanding' the European Union Act. Recognition of such a power, however, would make the supposed authority to create 'manner and form' limits decidedly less significant. In Chapter 4 in this volume, Jeffrey Goldsworthy defends the propriety of certain form and manner requirements. See also Chapter 5 in this volume by Alison L Young.

[58] Peter Oliver regards the possible recognition of such limitations not as changes in the basic rules but as potential articulations of aspects of the existing rule of recognition which has a necessary penumbra of uncertain application. Oliver (n 37) 12–15.

[59] N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 9–10.

[60] *Jackson* (n 27) [102]. See also TRS Allan, 'Parliamentary Sovereignty: Law Politics and Revolution' (1997) 113 *LQR* 443, 445.

As matter of history, however, the claim that Parliament's power originated in the common law decisions of the judges is highly doubtful.[61] For other writers the 'common law' limitations on Parliament are more abstract. They are implicit in basic values necessarily presupposed by the legal system. According to this view, any exercise of power manifestly inconsistent with these values should be treated by courts as invalid.[62] Perhaps, we should not be too surprised that the prime example of a statute that judges have suggested would violate these principles and justify nullification is one that would abolish the power of judicial review of government action.[63]

To reiterate, I am less interested in which, if any, of these descriptions is accurate or desirable than in the process by which people believe the alteration has come or ought to come about. The discussion in Section B shows that any new United Kingdom constitution seems to have emerged one step at a time from a series of narrowly focused enactments and judgments. From these measures, more general inferences are drawn about the loci of public power. The resulting constitution is optimistically supposed to be 'an integrated expression of historical experience conferring a unified meaning on political existence'.[64] For common lawyers, this is a familiar process and, although, for the reasons stated, the basic rules cannot themselves be regarded as aspects of the common law, this way of looking at things does resemble a kind of common law process of constitution-making.[65]

Unlike actual common law, these rules are not evidenced exclusively in the process of litigation and the judgments of the courts. One of the fallacies resulting from treating the basic rules as genuine rules of common law has been to conclude that the final decision on the shape of the constitution rests with the judges. An example is Lord Steyn's dictum in the *Jackson* case that it was in the power of judges to 'qualify' the rule of parliamentary sovereignty. Somewhat more realistically, others have argued that, whatever we call it, the practical fact is that no constitutional change will be thought effective unless and until the courts accept it as binding in their decisions. RTE Latham claimed that 'the *Grundnorm* of a case-law system is simply the sum of those principles which command the ultimate allegiance of the

[61] See J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 242–4; J Goldsworthy, 'The Myth of the Common Law Constitution' in DE Edlin (ed) *Common Law Theory* (CUP 2007) 204.

[62] TRS Allan, for example, sees the doctrine of parliamentary sovereignty as a 'doctrine of the common law' that arises from a 'substratum of constitutional principle' associated with 'the rule of law, the separation of powers…and representative democracy'. '[S]ome common law values', moreover, 'are too deeply entrenched…to be vulnerable even to explicit statutory incursion.' TRS Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 *International Journal of Constitutional Law* 155, 157–8. Allan's understanding of the constitution is further described and criticized in Chapter 4 in this volume by Jeffrey Goldsworthy.

[63] See *Jackson* (n 27) [102] (Lord Steyn), [159] (Lady Hale); *AXA General Insurance* (n 28) [50] (Lord Hope); Lord Woolf, 'Droit Public—English Style' [1995] *PL* 57, 69. See also Chapter 6 in this volume by Lord Hope.

[64] See AW Bradley (n 19) 28–30 (quoting M Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge 1989) 87).

[65] See M Loughlin, *Public Law and Political Theory* (OUP 1992) 232.

courts'.[66] And for HWR Wade, it was 'obvious . . . that this grundnorm, or whatever we call it, lies in the keeping of the judges and it is for them to say what they will recognize as effective legislation'.[67] So central were the courts for Wade that he suggested that a fundamental law could be entrenched by persuading the judges to submit to it through subscription to a modified judicial oath.[68]

More commonly, however, the emergence of fundamental rules is seen as evidenced by a combination of the actions of judicial and legislative agents.[69] A mere declaration by the highest court will be insufficient unless the political actors in the system accept it as an accurate statement of the criteria for recognition of legally binding norms. Commentators have stated something of a formula: a modification in the constitution attempted by one of these institutions that is accepted by the other is *ipso facto* valid. So the new relationship between European law and Acts of Parliament follows from enactment of the European Communities Act 1972 and acceptance of the priority it stipulated in the *Factortame* case.[70] These actors are, doubtless, critical in effecting a change in the constitution but, since we are now observing a social-political phenomenon and not an act of legislation according to some legally defined process, it makes sense to factor in the actions and reactions of all the agents involved, including the government, the opposition, the press, the academy, and other opinion-makers. It may be that, at the end, an effective change manifests itself, in acceptance of the new arrangements by the 'officials' of the system, but the reasons for that acceptance are likely to involve actions and opinions of many people, official and unofficial.[71]

E. The Blind Sovereign

The kind of constitutional change observed in the United Kingdom marks a distinct contrast to the standard process I outlined in Section C. In that model, basic rules of the legal system may be influenced by a messy assortment of social factors. But the rules themselves are produced formally by the application of human intelligence

[66] RTE Latham, *The Law and the Commonwealth* (Greenwood Press 1970) 525. See also M Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconstructing Jennings and Wade' [2009] *PL* 519, 537–8.

[67] HWR Wade, *Constitutional Fundamentals* (Stevens 1980) 26.

[68] Wade (n 67) 37–8.

[69] See Oliver (n 9) 80 ('[T]here is a great difference between courts agreeing to recognize that which a Parliament has enacted . . . and those same courts deciding to impose limitations at their own initiative').

[70] See Oliver (n 34) 163, fn 103; D Oliver, 'The United Kingdom' in D Oliver and C Fusaro (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 329, 349–30. See also Chapter 4 in this volume by J Goldsworthy.

[71] See Hart (n 38) 113–20. One of Hart's examples illustrates the point. He describes a period in the 1950s when the rule of recognition of South Africa was in contest, as evidenced by opposing actions of the Parliament and the courts, each premised on different views of the limits of the legislative power (118–19). To restrict one's examination of that conflict to the actions of these two official institutions would provide a grossly incomplete picture of the causes of the constitutional change taking place. See M Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (CUP 2001) 514–19; see generally B Beinart, 'The South African Appeal Court and Judicial Review' (1958) 21 *MLR* 587.

and deliberate political choice. That is, constitutional rules—like all rules of positive law—are 'laid down'.[72] The British Constitution, to be sure, is the product of a series of intentional actions. Moreover, some of those actions, particularly legislative measures, may be undertaken with some understanding of their long-term constitutional significance. But they are not part of a plan to create a coherent constitution. The sovereign is not a human agent but an uncoordinated series of largely unrelated incidents. This 'sovereign' lacks any unified vision of the resulting constitution. It is, in that sense, blind.

Not everyone finds this blind constitution-making defective. Commentators going back at least to Burke have praised the gradual, organic way in which the British Constitution has changed. In fact, the idea that a complicated and coherent order can emerge from a multitude of independent and uncoordinated actions is familiar in other contexts. The idea of a blind sovereign may call to mind the ethologist Richard Dawkins' picture of biological evolution as a 'blind watchmaker', producing what looks like a carefully designed organism through the random medium of natural selection.[73] Dawkins posited an analogous process for the evolution of cultural artefacts resulting from the 'differential survival of replicating entities' he called 'memes'.[74] Even more familiar is the analogy of the well-functioning market economy allocating resources to their best uses and maximizing the welfare of a whole society as a result of a multitude of independent, selfishly motivated transactions. Hayek, who was deeply influenced by the model of evolutionary biology as well as of market economics, thought that something like the market's invisible hand was also responsible for the production of successful rules of social conduct.[75]

Similar advantages have been noted with respect to the evolutionary development of a constitution. The step-by-step process avoids the wrenching disruptions of full scale replacement and allows each incremental reform to be tested, with limited cost, against the demands of experience. In the *Jackson* case, Lord Carswell described the constitution as a 'delicate plant . . . capable of being damaged by over-vigorous treatment, which may have incalculable results'.[76] Peter Oliver, arguing the value of binding incremental changes implemented by Parliament, questions the virtues of all-at-once constitutions drafted to meet the concerns of a particular moment. 'Over the coming decades and centuries the United Kingdom [can] cautiously and pragmatically develop an organic constitution making use of the full range of possibilities as appropriate.'[77] John Laws, then a High Court judge, described the constitution and the constitution-making process in terms that highlight both their virtues and their risks:

> [T]he absence of what I will call a sovereign text means that the legal distribution of public power consists ultimately in a dynamic settlement, acceptable to the people, between the

[72] AWB Simpson, 'The Common Law and Legal Theory' in AD Renteln and A Dundes (eds) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol 1 (Garland 1994) 119, 122.

[73] R Dawkins, *The Blind Watchmaker* (WW Norton 1996) 4–20.

[74] R Dawkins, *The Selfish Gene* (OUP 1989) 189–201.

[75] See Hayek (n 50) 18. See also M Rutherford, *Institutions in Economics: The Old and the New Institutionalism* (CUP 1994) 83–4.

[76] *Jackson* (n 36) [176]. [77] Oliver (n 34) 156.

different arms of government. It is not written in stone; it is not even written in paper. It cannot therefore be ascertained by reference to the pages of a book whose authority is unquestioned, scriptural. The settlement is dynamic because, as our long history shows, it can change; and in the last 300 years has done so without revolution.[78]

The characteristics that have given satisfaction to these commentators, however, may equally be conceived as defects in the constitution-making process. We can identify three problems of an evolutionary constitution: (a) it definitionally lacks the benefits of deliberate design, of what Alexander Hamilton called 'reflection and choice'; (b) it leaves the constitutional rules at any moment essentially unknowable, frustrating one of the central purposes of constitutionalism; and (c) it lacks the legitimating authority of popular approval.

One observer has described the United Kingdom process as 'unique in the democratic world [in] gradually giving ourselves a constitution (...) in a piecemeal and ad hoc way, there being neither the political will to do more nor any degree of consensus as to what the final resting place should be'.[79] In general, this is not how human beings go about creating institutions that they hope will be effective or coherent in bringing about some desired State of affairs. It was for this reason that Bentham, Hume, and others thought that law reform was properly a subject of legislation rather than adjudication.[80] It has sometimes been remarked that the fundamental rules in the United Kingdom amount to a kind of customary law.[81] Customary law, by definition, is not intended by anyone. Judges and other officials contribute to changing such rules but only as 'accidental participant[s]'.[82] This kind of constitution-making recalls the effort of the Laputan professor to 'give the world a complete body of arts and sciences' by mechanically accumulating random collections of words.[83] Judicial common law law-making which is, if anything, more disciplined than the constitution-making at issue here, has often been criticized for its unsystematic quality. For Bentham, 'as a system of general rules', it was 'a thing merely imaginary',[84] and for TE Holland, 'a chaos with a full index'.[85]

It follows that the resulting constitution will end up as an uncertain guide to the permissible limits of public action. Neil MacCormick observed that 'the curiously evolutionary character of [the United Kingdom's] constitutional arrangements' has led to a 'highly flexible constitutional law'.[86] Ivor Jennings was sanguine in his

[78] J Laws, 'Law and Democracy' [1995] *PL* 72, 81.

[79] V Bogdanor, 'The Sovereignty of Parliament or the Rule of Law?', 10–11 (Magna Carta Lecture, 15 June 2006).

[80] See D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989) 239; N McArthur, 'David Hume and the Common Law of England' (2005) 3 *Journal of Scottish Philosophy* 67, 78–9.

[81] See, eg, J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 124

[82] J Gardner, 'Some Types of Law' in DE Edlin (ed) *Common Law Theory* (CUP 2007) 51, 64.

[83] J Swift, *Gulliver's Travels* (Rand McNally 1912) 172. See House of Lords, Constitution Committee (n 56) para 29 (the current practice of 'continuous constitutional change' may mean that 'little thought is given to the constitution as a whole').

[84] J Bentham, 'A Comment on the Commentaries', reprinted in *A Comment on the Commentaries and a Fragment of Government* (JH Burns and HLA Hart eds, Athlone Press 1977) 119.

[85] TE Holland, *Essays Upon the Form of the Law* (Butterworths 1870) 171.

[86] MacCormick (n 59) 49.

assessment of the constitution as 'a transient thing, changing like the colours of the kaleidoscope'.[87] If, however, one thinks that a central purpose of constitutional law is to provide the security that follows from knowing the circumstances in which the State may, and may not, intervene in the life plans of individuals,[88] this kind of uncertain constitution is gravely defective. Bentham thought law in general was obliged to 'mark out the line of the subject's conduct by visible directions instead of turning him loose into the wilds of perpetual conjecture',[89] a capacity even more important when the conduct to be regulated is the State's. The fact that the shape of the existing constitution continues to be a matter of deep but reasonable disagreement demonstrates this deficiency. One contemporary advocate of a 'common law' constitution believes 'the limits of legislative power' can be discovered only 'through the process of adjudication' where 'fundamental principles are tested and refined'.[90] As with the common law, 'the point . . . is not that everything is always in the melting-pot but that you never quite know what will go in next'.[91] This is a far cry from Thomas Jefferson's idea of a constitution: 'Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.'[92]

Probably the most serious problem with continuous, ad hoc constitution-making is its doubtful political legitimacy. The ultimate rules in a legal system may not derive their force from law but that does not mean that they acquire their status with no authority of any kind. Such rules may be facts but they are not brute facts. They need to be consonant with the values of the society in which the legal system is to operate. Beyond that, they need to issue from a source that is regarded as an appropriate maker of fundamental law.[93] In modern democracies there is wide agreement that constituent authority resides in 'the people', who alone have the moral or political right to construct a system of collective coercion. This explains the standard process of constitution-making in the rest of the world. While there are many variations, all of them employ decision-making machinery that claims to represent the consent of the human population that will be subject to the system of government created. Depending on which version one adopts, the constituent process in the United Kingdom is an imperfect or a totally deficient vehicle for representing the popular will that can legitimate a constitution.

This difficulty may, in part, explain the accelerating use of referendums for approval of constitutionally significant legislation.[94] The electorate was consulted in connection with Britain's accession to the European Communities, with legislation

[87] Quoted in KD Ewing, 'Law and the Constitution: Manifesto of the Progressive Party' (2004) 67 *MLR* 734, 738. See also House of Lords Constitution Committee (n 56) para 20 ('[T]he way the UK constitutional arrangements may be changed is more flexible than in virtually any other western democracy').

[88] See RS Kay, 'American Constitutionalism', in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 16, 22–4.

[89] Bentham (n 84) 95. [90] Allan (n 36) 249ff. [91] Simpson (n 72) 131.

[92] Letter from T Jefferson to WC Nichols (7 September 1803) in A Koch and W Peden (eds), *The Life and Selected Writings of Thomas Jefferson* (Random House 1944) 573.

[93] I elaborate these conditions in Kay (n 39).

[94] See Chapter 9 in this volume by Peter Leyland.

devolving authority on assemblies in Scotland, Wales, and Northern Ireland and, most recently, with a proposed alteration in the parliamentary electoral system.[95] The new European Union Act requires that (subject to important exceptions) changes in European treaties be approved in a referendum.[96] And 2014 will see a referendum on independence for Scotland. Whatever it says about the future, however, this isolated and irregular resort to popular sanction remains far removed from the kind of comprehensive endorsement of 'the people' underlying constitutional legitimacy in most of the world.

The political deficiency is evident if we presume that the basic rules of the constitution are, like the common law, a form of customary law.[97] Legitimacy has always been something of a problem for customary law. Its force has historically been based on the claim that it represented universally accepted practice. Hale said that common law rules 'acquired their binding power . . . by a long and immemorial usage and by the strength of custom and reception in this kingdom'.[98] He did not explain how the fact of an ancient and universal custom translated into a normative imperative. For a modern critic, focused on the question of authority, the argument looks very much like the simple inference of an 'ought' from an 'is'.[99] 'Consistent behavior in accordance with particular implicit rules', as Alan Watson observed, 'does not indicate that people should so behave.' Consequently, '[c]ustomary law flourishes in circumstances where law is likely to be the least theoretical.'[100]

At least two explanations have been offered by modern scholars for the normative force of customary and, in particular, common law. One holds that, whatever its political authorization, this kind of law-making is likely to produce rules that will maximize the welfare of the society that it regulates. The second suggests that, despite the absence of an explicit process of popular consent, customary law reflects widely shared values and is legitimated by the tacit approval of the population.

The first justification supposes that, since customary law arises only after a long experience of shared practice, its very longevity is a commendation. The seventeenth-century common lawyer Sir John Davies reasoned that when an act 'once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use and practice it again and again, and so by often iteration and multiplication of the act becomes a custom'.[101] The resulting body of

[95] A list, complete to 2010, is found at House of Lords Constitution Committee, 'Referendums in the United Kingdom' (2010) 9–10. On the alternative voting system referendum, see <http://www.electoralcommission.org.uk/elections/referendums/referendum> (last accessed 7 August 2012).

[96] See n 57. See also Chapter 10 in this volume by Paul Craig.

[97] Goldsworthy (n 81) 124; Gardner (n 82) 63–4; N MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 42–5.

[98] M Hale, *The History of the Common Law* (C Runnington ed, Dublin 1792) (spelling has been modernized) 23–4. See also *Ellen Street Estates Ltd v Minister of Health* [1934]; 1 Bl. Comm. 55.

[99] 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV', OW Holmes, Jr, 'The Path of the Law' [1897] 10 *Harv L Rev* 457, 469. See Hayek (n 49) 79–82. J Kammerhofer, 'Book Review' (2012) 23 *European Journal of International Law* 583.

[100] A Watson, 'An Approach to Customary Law' [1984] *University of Illinois L Rev* 561, 561. See also TW Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta 1991) 4 ('By an enigmatic process that has never been fully understood the "is" of custom may become the "ought" of law').

[101] Quoted in JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (CUP 1987) 33; GJ Postema, 'Classical Common Law

law may be refined and perfected by learned judges but, at its core, it reflects the lived experience of society. As such, it may be easily 'incorporated into [the] very temperament' of society and provides the best basis for cooperative and productive human action.[102]

The second justification is premised on the idea that customary law 'rises up from the population'.[103] Classical common law jurists sometimes assumed that ancient practice was simply evidence of a real, explicit agreement among the people though the actual moment of that agreement preceded the reach of human memory. They also saw the day-to-day integration of the common law rules into people's daily lives as manifesting approval.[104] In a much noted passage, Blackstone quoted the Roman jurist, Salvius Julianus on the authority of unwritten law: '[W]here is the difference whether the people declare their assent to a law by suffrage or by a uniform course of acting accordingly?' Custom, said Blackstone, carried an 'internal evidence of freedom, that it probably was introduced and maintained by the voluntary consent of the people'.[105]

Neither of these attempts to legitimate customary law—that based on its intrinsic merits and that based on tacit consent—is convincing with respect to the common law as it is understood today. Both arguments assume that the law in question is, at its core, the reflection of well-settled customary practice, subject only to occasional judicial tweaking. In fact, we know that the development of the common law has always been dominated by courts and the 'reason' that has been used to adjust and refine it is not everyman's reason but the 'artificial reason' of the judges.[106] The notion that custom was the true source of the common law largely disappeared with the triumph of legal positivism at the end of the nineteenth century. 'The common law', Holmes wrote in 1917, is only 'the articulate voice of some sovereign . . . that can be identified'.[107] The idea of a law that rises up from the people, one that is thus peculiarly appropriate for them or has earned their consent cannot survive the common law's redefinition as a form of judicial legislation.

These considerations apply with at least as much force to the 'common law' process of constitution-making. The most plausible descriptions of that process see it as a series of actions and responses by various actors, notably Parliament and the

Jurisprudence (Part I)' [2002] *OUCLJ* 155, 171. See also JQ Whitman, 'Why Did the Revolutionary Lawyers Confuse Custom and Reason?' (1991) 58 *University of Chicago L Rev* 1321, 1349.

[102] Hale (n 98) 51. For a discussion of Hale's 'common law' response to Hobbes' argument that society was constructed according to abstract principles, see D Saunders, *Anti-Lawyers: Religion and the Critics of Law and State* (Routledge 1997) 41–7.

[103] Gardner (n 82) 73.

[104] GJ Postema, 'Classical Common Law Jurisprudence (Part II)' [2003] *OUCLJ* 1, 22–5.

[105] See 1 Bl. Comm. 65ff. See also Watson (n 100) 561, quoting Ulpian: 'Custom is the tacit consent of the people deeply rooted through long usage.'

[106] *Prohibitions del Roy* (1607) 12 Coke Rep 63, 77 ER 1342. See A Vermeule, 'Many-Minds Arguments in Legal Theory' [2009] 1 *Journal of Legal Analysis* 1, 25ff ('[C]alling the body of precedent produced [by the justices of the United States Supreme Court] "the work of many minds" exaggerates, at least if the comparison is to genuinely widespread social customs and traditions').

[107] *Southern Pacific Co v Jensen* 244 US 205, 222, 37 S Ct 524, 531 (dissenting opinion). See Simpson (n 72) 122–3; Simpson, himself, however, doubted that all common law rules could reasonably be described as judicial legislation (at 126).

courts. These isolated decisions of politicians and judges can in no way claim the virtues that are supposed to inhere in widespread customary practice. Unlike true customary rules, the norms inferred from them do not prove their merit by being chosen over and over again in countless individual transactions. Nor can they claim popular agreement by a 'uniform course of acting accordingly'. The participation of Parliament might impart some popular element, but it is far from the kind of expression of the will of the people associated with constitution-making in the rest of the world. Ordinary legislatures do sometimes re-write constitutions but they tend to use special procedures that are thought better to signify popular approval.[108] The version of parliamentary constitution-making observable in the United Kingdom, moreover, privileges that particular form of democratic decision-making reflected in the electoral and institutional arrangements currently in place. Consequently, 'constituent power is almost completely absorbed by constituted powers within the settled constitutional form'.[109] Furthermore, when other legislatures make constitutions, they do so comprehensively and deliberately, not as the incidental fallout of legislative initiatives that are not directed at the shape of the constitution but rather at independent political goals.[110] In any event, we still need to justify the indispensable role of the judiciary present in almost all current accounts. Almost every commentator assumes that constitutional change by parliamentary enactment is incomplete until adopted by the courts. In the case of sub-constitutional law, decisions of courts are subject to correction by the elected legislature. In this case, the contemplated judicial role is to help define the legislative power itself. Its undemocratic aspects, therefore, cannot be easily domesticated. Ultimately, the political justifications for this method of laying new foundations for the legal system remain profoundly obscure.

F. Interpretation and Constitutional Design

I have contrasted two ways in which the basic legal rules defining public power are made and re-made. In most of the world, those rules are set out in an authoritative text, promulgated in a discrete process representing the decision of the sovereign 'people'. The individuals participating in that process hammer out a set of procedures, institutions, and limitations that represent a considered view about the best way to organize public power in that society. In the United Kingdom, on the other hand, the content of those basic rules are inferred from the history of State practice

[108] See Kay (n 39) 743–5. In Chapter 4 in this volume, Goldsworthy suggests a number of devices of constitutional legislation—including referenda—that might provide a politically enhanced basis for altering the substantive scope of parliamentary authority.

[109] M Goldoni, 'Political Constitutionalism and the Value of Constitution-Making' (2013) 26 *Ratio Juris* (forthcoming). See also Chapter 4 in this volume by Jeffrey Goldsworthy noting the danger of a temporary parliamentary majority attempting permanent constitutional change.

[110] See Goldoni (n 109). Both the House of Lords Constitution Committee and the House of Commons Political and Constitutional Reform Committee have expressed concern that Parliament's piecemeal process of constitutional change means that it has neglected the coherence of the whole constitutional structure, see (n 56).

and have never been reduced to canonical form. They develop in an irregular and necessarily uncertain way. It follows that, at any given moment, there may be competing plausible descriptions of the constitution.

In practice, however, this contrast is not so clear-cut. I have described developments in the United Kingdom with reference to some of the changes that have actually taken place but I have set out the alternative model only in abstract, and therefore deceptively neat, form. In fact, the limits on State power formulated in an original constitution-making act never play out exactly as the constitution-makers planned.[111] The effectiveness of written constitutional rules depends on the existence of an agency that can, on appropriate occasions, declare when those rules have been violated, an agency whose rulings will be respected. It requires, that is, some kind of constitutional court.[112] The first job of such a court is to make out the meaning of the codified constitutional rules—to interpret them. We now have a long record and a voluminous literature on the topic of constitutional interpretation. One clear conclusion can be drawn from that record and literature. The limitations that courts, in fact, apply to the actions of public authorities deviate and sometimes deviate substantially from those that the designers of the written constitution contemplated at the time the rules were chosen.[113]

The intense American debate on the propriety of 'originalist' constitutional interpretation illustrates the point. Constitutional adjudication in the United States has from an early date commonly departed from the originally intended meaning of the rules of the constitutional text. The *Dred Scott* case of 1856,[114] the economic liberty cases of the late nineteenth and early twentieth centuries,[115] and the invention of a constitutional 'right of privacy' in the 1960s and 1970s,[116] are a few of many examples that could be cited. Uneasiness with the legitimacy of these decisions led, in the last decades of the twentieth century, to an explicit call for tethering constitutional interpretation to the 'original' meaning of the constitutional text invoked. A central argument for this 'originalist' jurisprudence was that only the originally intended rules were legitimated by the extraordinary political process that could lay claim to the endorsement of 'we the people'.[117]

Strong academic resistance to originalism has yielded over time to a substantial body of opinion agreeing that the job of courts is to apply the original constitutional meaning.[118] This victory, however, has turned out to be somewhat formal: the 'original meaning' that most current proponents of originalism promote is not the

[111] See MacCormick (n 97) 46. [112] See Kay (n 88) 42.

[113] See RS Kay, 'Judicial Policy-Making and the Peculiar Function of Law' (2007) 26 *University of Queensland LJ* 237, 246–9.

[114] *Dred Scott v Sandford* 60 US (19 How) 393 (1857).

[115] See, eg, *Adkins v Children's Hospital* 261 US 525, 43 S Ct 394 (1923); *Lochner v New York* 198 US 45, 25 S Ct 539 (1905).

[116] See, eg, *Roe v Wade* 410 US 113, 93 S Ct 705 (1973); *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (1965).

[117] See, eg, RE Barnett, 'Scalia's Infidelity: A Critique of Faint-Hearted Originalism' (2006) 75 *University of Cincinnati L Rev* 7, 9.

[118] See LB Solum, '*District of Columbia v. Heller* and Originalism' (2009) 103 *Northwestern University L Rev* 923, 933–4.

meaning actually intended by the human beings who enacted the constitution but any meaning that would have been understood by a reasonably competent English-speaker at the time of adoption.[119] This re-formulation gives the interpreter considerable room for reaching a preferred outcome.[120] One prominent exponent is candid: this kind of originalism is 'actually a form of living constitutionalism'.[121] Some 'public meaning' originalists go a step further. They find that certain disputed questions of constitutional authority are not resolved by recourse to the original meaning, perhaps because that meaning—considered independently of the intentions of the enactors—is broad enough to be consistent with contradictory results. In such a case, it is proper for a court to engage in something called constitutional 'construction'. This allows the interpreter to decide the question based, in part, on 'considerations extrinsic to [the inadequate] meaning', such as 'one's theory of constitutional legitimacy'.[122] It should go without saying that, notwithstanding the presence on the United States Supreme Court of several self-professed originalists, their judgments have continued to be persuasively criticized as unsupported by original meaning.[123] As a theoretical matter, adherence to the original meaning continues to exert a strong appeal but, in practice, the discipline of unchanging constitutional rules that such adherence demands has proved too severe for both commentators and courts.

The consequence is that the United States (and almost every other jurisdiction with a written constitution and an active constitutional court) has gone through the exercise of deliberate and comprehensive constitution-making but has ended up living under constitutional arrangements that change over time in an unpredictable manner. They have ended up, that is, in a situation roughly equivalent to that of the United Kingdom. In fact, it is more or less a commonplace in such jurisdictions to describe the effective set of basic rules as a 'living constitution'.[124] In much cited language, Justice Holmes declared that the American founders had 'called into life a being the development of which could not have been foreseen completely (…) [T]hey had created an organism.'[125] In a series of articles, and in

[119] See, eg, A Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton University Press 1997) 38.

[120] See RS Kay, 'Original Intentions and Public Meaning in Constitutional Interpretation' (2009) 103 *Northwestern University L Rev* 703, 719–25.

[121] JM Balkin, 'Original Meaning and Constitutional Redemption' (2007) 24 *Constitutional Commentary* 427, 449.

[122] RE Barnett, 'The Misconceived Assumption About Constitutional Assumptions' (2009) 103 *Northwestern University L Rev* 615, 632, 639.

[123] See, eg, GE Maggs, 'Which Original Meaning of the Constitution Matters to Justice Thomas?' (2009) 4 *New York University Journal of Law & Liberty* 494; TB Colby and PJ Smith, 'Living Originalism' (2009) 59 *Duke LJ* 239, 244–5.

[124] The phrase has its counterparts in other jurisdictions. See, eg, *Edwards v Canada (A-G)* [1930] AC 124 (PC), 136 (Sankey, LC) ('The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits'); *Pla and Puncernau v Andorra* (application no 69498/01) (13 July 2004), sec 4 ECHR 2004–VIII (2006) 42 EHRR 25, para 62 ('[T]he [European] Convention [on Human Rights] which is a dynamic text… is a living instrument, to be interpreted in the light of present-day conditions').

[125] *Missouri v Holland* 252 US 416, 433 (1920) 40 S Ct 382, 383 (1920).

a recently published book, David Strauss has described and lauded the American living constitution, 'one that evolves, changes over time and adapts to new circumstances'.[126] It is, moreover, a 'common law constitution', one to be adapted by the judges to new circumstances. The judges are not free to decide its meaning as they like. They are constrained by the common law method. They may change the rules 'only by continuing the evolution not by ignoring what exists and starting anew'.[127] His defence of this system has much in common with the Burkean justification of the gradualist, pragmatic British Constitution. 'There does not have to be one entity who commanded the law in a discrete act at a particular time.'[128] Like Burke, Strauss distrusts 'abstractions when those abstractions call for casting aside arrangements that have been satisfactory in practice, even if the arrangements cannot be fully justified in abstract terms'.[129]

The parallels with the process of constitutional change in the United Kingdom that I have described in this chapter go further. A fashionable theory of constitutional interpretation posited in various jurisdictions suggests the influence of a 'dialogue' between the courts and the political branches of government. An instance of legislation may be found constitutionally invalid in a judgment in which its particular vices are elaborated. In response, the legislature may re-enact the law in a somewhat modified form, responding to the problems identified by the court but also expressing the law-makers' own appreciation of the constitutional values at stake. By this process of iteration a satisfactory constitutional norm evolves, incorporating and compromising the positions of the various participants.[130]

It is important not to carry this argument too far. There are still some basic distinctions between the options for constitutional change in the United Kingdom and in countries with written constitutions. Certain institutional features are far more fixed in the latter and the texts even of broadly worded constitutional provisions inhibit, even if they cannot eliminate, the introduction of significant new limitations by judicial action. Nonetheless, it is reasonably accurate to say that individuals in the United States and other jurisdictions with written constitutions are subject to public authorities whose powers cannot be known with substantial certainty and have, at best, a mixed popular sanction. That is because the fundamental rules are being continuously defined and redefined in a process involving courts and political institutions, a process which is itself uncontrolled by law. Its outcome, therefore, can never be precisely predicted. If definition of political power is the prerogative of the sovereign, then these sovereigns, perhaps all sovereigns, are blind.

[126] DA Strauss, *The Living Constitution* (OUP 2010) 1.
[127] Strauss (n 126) 38.
[128] Strauss (n 126) 37.
[129] Strauss (n 126) 41.
[130] See L Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press 1988) (US); P Hogg and A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter Of Rights* Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall LJ* 75 (Canada). The idea of constitutional dialogue is also discussed in Chapter 13 in this volume by Margit Cohn.