From Unwritten to Written: Transformation in the British Common-Law Constitution

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ABSTRACT

This Article posits that the British Constitution is changing by incorporating written principles that restrain Parliament through judicial review. The Author asserts that this constitutional model has basis in the common law and the orthodox theories of Blackstone and Dicey. In addition, the ultra vires *doctrine supports the model and provides a basis for judicial review of Parliament. As constitutions may accommodate written and unwritten elements of law, as well as various means of enforcement and change, the Author posits 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. Furthermore, the Author illustrates that such a "quasi-written," common-law constitution is already emerging in the United Kingdom by examining cases based upon the Human Rights Act and the European Communities Act.*

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I. INTRODUCTION

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 devolution.[1] 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 law.[2] 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 remain 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. 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 the alternative constitutional model and can take place through a gradual process of common-law adjudication.

This Article suggests that the shift from a completely unwritten to a partially written constitution occurs on two levels. Part II argues that orthodox constitutional theory, as articulated by Blackstone and Dicey, already has embedded within it strains of thought conducive to the idea of a limited Parliament with a judiciary capable of exercising review over primary legislation. Blackstone and Dicey, therefore, emphasized positive law and political processes, rather than judicial process, without completely undermining counterarguments that support a limited Parliament.[3] These alternative arguments have a

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1. *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].

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

3. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND; A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1965).

long history in the common-law tradition. Blackstone's natural-law theory contains ideas found in other places such as the judicial opinions of Edward Coke.[4] Blackstone's theory accordingly offers a solid foundation upon which to assert a common-law power of judicial review to ensure that Parliament does not legislate contrary to higher legal principles. Dicey, in justifying parliamentary power by virtue of its moral accountability to the electorate, replaces the concept of natural law with democratic principles.[5] As Dicey justifies parliamentary supremacy on this account, he too invites counterarguments for legal restraints upon legislative actions that are contrary to democratic norms. Ironically, Blackstone and Dicey's orthodox theories offer a starting point for shifting to an alternative common law constitutional arrangement: parliamentary authority may be restrained by fundamental, democratically-based principles enforceable in some effective manner by judicial review. Independent, common-law review power already exists in the *ultra vires* doctrine, which allows courts to restrain executive action. This doctrine illustrates how courts can limit government action based upon common-law principles, and suggests that they may soon claim to exercise such review power against Parliament itself.

Part III illustrates how the common-law constitution can incorporate written principles. It explains that constitutions may be either paradigmatic or definitive. In particular, the former provides a legally unenforceable model for governance, while the latter imposes strict rules subject to judicial review and beyond which the government cannot act. A constitution can also be flexible or rigid in form. The flexible constitution requires no special amending procedures, while a rigid constitution establishes significant procedural obstacles to its alteration. Those concepts are not exclusive, however, and constitutions may exhibit mixed characteristics existing upon a sliding scale. 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

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4. EDWARD COKE, FOURTH INSTITUTE 36, *quoted in* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 41 (9th ed. 1939).

5. *See generally* DICEY, *supra* note 3.

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. Constitutional change is already occurring in the United Kingdom, as illustrated by judicial treatment of the Human Rights Act and the European Communities Act. That kind of change represents a transition to an alternative common-law, "quasi-written" constitution that effectively limits Parliament's exercise of, if not formal claim to, sovereignty.

II. THE COMMON-LAW FOUNDATIONS OF LIMITED GOVERNMENT AND JUDICIAL REVIEW

A. *Blackstone and Dicey: Theories of Parliamentary Sovereignty*

The doctrine of parliamentary supremacy, as A. V. Dicey wrote, is the "very keystone" of the British Constitution.[6] Parliament itself is unable to bind or restrict its own future actions, courts cannot question or refuse to give effect to its enactments, and all other law-making bodies in the United Kingdom are subordinate to it.[7] While Parliament remains supreme in theory up to the present time, there exists an alternative conception of the unwritten, common-law constitution that is a basis for reform and a foundation for a new constitutional settlement in the United Kingdom. Arguments for such a constitution have historical precedent, support contemporary *ultra vires* judicial review, and are embedded within the orthodox theory of parliamentary sovereignty itself. George Winterton states, "[n]owhere is the development of this doctrine [of parliamentary sovereignty] demonstrated more clearly than in the writings of Blackstone and Dicey."[8] An initial examination and comparison of Blackstone and Dicey's ideas, however, show that they can support counterarguments promoting judicial review and limited legislative

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6. DICEY, *supra* note 3, at 70.

7. STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 67 (8th ed. 1998).

8. George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined*, 92 LAW Q. REV. 591, 597 (1976).

authority based upon natural law or democratic conceptions of the public good.

William Blackstone, like Dicey later, recognized the supreme legislative power of Parliament. He described Parliament's authority in the following way:

> [Parliament's authority is] so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.[9]

An act of Parliament was thus the supreme law of the land, binding throughout the realm, and alterable only by another act of Parliament.[10] Such extensive legislative power rested upon two important foundations that underlay Blackstone's constitutional model. First, Blackstone's justification for parliamentary sovereignty depended upon a constitution properly balanced through its representation of competing political and social forces.[11] Second, he acknowledged natural law, along with its close connection to the common law, as a moral limitation upon Parliament's authority.[12] In his support of parliamentary power, Dicey would go beyond the balanced constitution in favor of one answerable to the electorate, while substituting the idea of democratic public good for natural law as a moral restriction upon legislative power.[13]

Blackstone defined Parliament as an assembly composed of the Commons, the Lords temporal and spiritual, and the Crown.[14] Only these three forces acting together comprised the sovereign Parliament, and were able to make law supreme throughout the realm.[15] The Crown, Lords, and Commons balanced each other; their competing interests created political tensions within Parliament to effectively restrain its exercise of limitless authority.[16] As under classic Blackstonian theory, Dicey also defined Parliament as the Crown, House of Commons, and House of Lords assembled.[17] The Crown in Parliament possessed absolute and unlimited legislative power, having the "right to make or unmake any law whatever."[18] According to Dicey, the concept of Parliament's sovereignty was the

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9. Blackstone cited Edward Coke for this proposition. *See* 1 BLACKSTONE, *supra* note 3, at *156, *158.
10. *Id*. at *178-79.
11. *Id*. at *156-79.
12. *See id*. at *156.
13. *See generally* DICEY, *supra* note 3.
14. 1 BLACKSTONE, *supra* note 3, at *155.
15. *Id*.
16. *Id*. at *50-51, *154-55, *159-60.
17. DICEY, *supra* note 3, at 39.
18. *Id*.

"one fundamental dogma of English constitutional law."[19] As Dicey is regarded as formulating the modern theory underlying parliamentary sovereignty, it is his ideas that will be first examined.

In characterizing the nature of Parliament's sovereignty, Dicey drew a clear distinction between legal and political sovereignty. He asserted that Parliament was the ultimate legal sovereign possessing boundless legislative authority.[20] The electorate, along with the Lords and Crown, possessed political sovereignty while Parliament remained legally supreme. This distinct political sovereignty did not restrict the Parliament's authority to make law. Dicey explained the difference between his two concepts of sovereignty in the following statement:

> [T]he sovereign power under the English constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested.[21]

The electors of Parliament were politically-sovereign. Their existence, however, did not affect the ability of the legally sovereign Parliament to act.

In distinguishing between political and legal sovereignty, Dicey criticized John Austin's description of sovereignty in the United Kingdom. First, Dicey complained that Austin confused the concepts of political and legal sovereignty.[22] Austin characterized sovereign power as existing in the Crown, House of Lords, and the Commons in the form of the electorate, rather than the House of Commons itself.[23] Dicey asserted that this view was inconsistent with lawyers' general understanding about parliamentary sovereignty because the electorate was clearly a separate institution from the House of Commons.[24] It further conflicted with Austin's own conception of the sovereign as the supreme law-making authority.[25]

Dicey clarified that the supreme law-making authority in England resided in Parliament, which was distinct from the electorate itself.[26] Contrary to Austin's claim, Parliament was not "in

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19. *Id*. at 145.
20. *Id*.
21. *Id*. at 73.
22. *Id*. at 70-76.
23. *Id*. at 71.
24. *Id*. at 73.
25. *Id*. at 71-73; Carol Harlow, *Power from the People? Representation and Constitutional Theory, in* LAW, LEGITIMACY, AND THE CONSTITUTION 62, 71-72 (Patrick McAuslan & John F. McEldowney eds., 1985).
26. DICEY, *supra* note 3, at 73-74.

any legal sense a 'trustee' for the electors."[27] In other words, the electorate had no share in the sovereign power to make law.[28] Dicey believed that Austin overlooked this critical separation of legal and political sovereignty. To illustrate that distinction, Dicey referred to the Septennial Act of 1715, which extended Parliament's life from three to seven years.[29] According to Dicey, the Act is important because it demonstrated that Parliament's legislative authority exists wholly independent from its legitimacy as a representative of the politically-sovereign electorate.[30] The parliamentary members in 1716 were elected under the Triennial Act of 1694, which limited the duration of Parliament to three years.[31] With the passing of the Septennial Act, however, Parliament extended itself beyond the period of time for which the electorate had chosen.[32] By ceasing to be representative of the electorate, Parliament owed its existence to its own exercise of legal power rather than to the choice of its electors. Such an exercise of parliamentary power, though remaining legally valid, infringed upon English principles regarding a representative legislature.[33] The Septennial Act, therefore, demonstrated that "in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents."[34]

Dicey's distinction between legal and political sovereignty had two important implications. First, it suggested that the interests between the legal and political sovereigns did not necessarily coincide.[35] Although the legal and political sovereigns were "intimately connected together," Dicey made it clear that they were nonetheless separate.[36] The legislature was not a "trustee" for the electors. As the legal sovereign, Parliament could act as it wished, and became subject only to the electors' powers to express their will through elections, or by altering the constitution in some way.[37] Second, Dicey recognized democratic foundations for the British Constitution and the moral legitimacy behind parliamentary action.[38] Although Parliament was not a trustee for the electorate, it

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27. *Id*. at 4.
28. *Id*.
29. *Id*. at 75. "[T]here is no single statute which is more significant either as to the theory or as to the practical working of the constitution than the Septennial Act." *Id*. at 44.
30. *Id*. at 75-76.
31. Triennial Act, 1694, 6 & 7 W. & M., c. 2 (Eng.).
32. DICEY, *supra* note 3, at 46-47.
33. *Id*. at 44-48.
34. *Id*. at 47-48. Dicey further wrote that "the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty." *Id*. at 48.
35. *Id*.
36. *Id*. at 74-76.
37. *Id*. at 76.
38. *Id*. at 75-76.

nevertheless could be expected to act upon the will of the political sovereign. Despite the legal omnipotence of Parliament, the will of the electorate existed independently as a possible standard by which to assess legislative acts.[39] This democratic element complimented the notion that the interests of the electorate and Parliament were potentially different. The will of the electorate acted as a moral obligation and check upon the all-powerful legislature even though it lacked any legal effect.[40]

The distinction between political and legal sovereignty, while recognizing the legal primacy of parliamentary acts over electoral will, offers a converse position favoring the Constitution's democratic foundations. Although Parliament remains legally supreme, it derives its moral legitimacy from democratic principles.[41] It was precisely for this reason that the Septennial Act was distasteful, despite its legality; it offended the notion that Parliament was to be chosen by, and representative of, the politically sovereign electorate.[42] The Parliament's electoral accountability, although not legally mandated, remains a central principle of the modern British Constitution.[43] Parliament should reflect the will of the electorate even if not obligated to do so in law. Dicey explained,

> For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British government. The matter may indeed be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact.[44]

Parliament then, though in law not a trustee of the electorate, still remains politically and morally accountable to it.

With regard to the political sovereign itself, Dicey's focus upon the electorate reflected the democratic norms that had become increasingly important in U.K. political life. In theory, the political sovereign was composed of the Crown, the Lords, and the electorate. The electorate, however, was by far the pre-eminent force.

Dicey was building upon England's past political theory, which maintained a balance of social forces and past practice, where the electorate had increased its political influence. Dicey stated,

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39. *Id*. at 75-81.

40. Harlow, *supra* note 25, at 73-74.

41. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 13-14 (2001) [hereinafter *Comparative Perspective*].

42. DICEY, *supra* note 3, at 46.

43. *Comparative Perspective*, *supra* note 41, at 14.

44. DICEY, *supra* note 3, at 73.

> [I]n a political sense the electors are the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience. . . . The electors are a part of and the predominant part of the politically sovereign power.[45]

Throughout the 19th century, not only did the House of Commons dominate the constitutional arrangement and eliminate the practical working of a balanced constitution, but government reforms also dramatically expanded suffrage.[46] By Dicey's time at the turn of the century, ministerial responsibility and effective ministerial exercise of prerogative powers also seriously eroded the balanced Parliament of Blackstone's conception. Parliament deferred to the government, merely acting as an approving body for government policy and as a forum for the opposition's dissent.[47] Ministers' exercise of their formidable executive powers in the name of the Crown further centralized authority in the hands of the government.[48]

The Constitution, as Dicey knew it in practice, was not so carefully balanced as Blackstone imagined it to be.[49] Thus, while Blackstone could trust Parliament with supreme legislative power due to built-in political tensions, Dicey could not. Instead, he articulated his distinction between political and legal sovereignty, emphasizing the ascendancy of the electorate within the political sovereign.[50] Therefore, Dicey gave democratic legitimacy to the omnipotent Parliament. Dicey simultaneously recognized the legal supremacy of Parliament while ascribing ultimate influence and control over it to the politically sovereign electorate.[51] This connection between the otherwise distinct sovereign powers justified Parliament's limitless legislative authority. The electorate's supreme political authority translated into supreme legal authority exercised

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45. *Id*. at 75-76.
46. *Comparative Perspective*, *supra* note 41, at 12.
47. DICEY, *supra* note 3, at clviii-clxiii.
48. *Id*.
49. In contemporary times, with the virtual extinction of personal Crown discretion and the complete subordination of the House of Lords to the Commons, the idea of the balanced constitution can no longer be said to hold at all. Blackstone wrote of such a possible situation that "if ever it should happen that the independence of any one of the three [Crown, Lords, and Commons] should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution." 1 BLACKSTONE, *supra* note 3, at *51-52. *See also* J.A.G. Griffith, *The Common Law and the Political Constitution*, 117 LAW Q. REV. 42, 52 (2001). Griffith writes, "[i]t is not and never has been the function of Parliament to govern. The principal role of the Government majority in the House of Commons is to sustain ministers in office." *Id.* *See also* Eric Barendt, *Separation of Powers and Constitutional Government*, 1995 PUB. L. 599, 614.
50. DICEY, *supra* note 3, at 74-76.
51. *Id*. at 75-76.

by its chosen representatives in Parliament. Hence, to trust Parliament was to trust the people.

Blackstone did not rely solely upon electoral accountability in controlling parliamentary supremacy even though he recognized its role.[52] Blackstone complimented the British Constitution on its mixed nature of democracy, aristocracy, and monarchy, while briefly pointing to elections as a political check on Parliament.[53] By Dicey's time, the Commons' ascendancy within the legal and political sovereigns meant that such balance no longer existed. Rather, democratic accountability to the electorate circumscribed the exercise of otherwise unlimited parliamentary power and normatively justified it.[54] By according such accountability a place in formal constitutional theory, Dicey suggested that the electorate was morally, even if not legally, supreme to Parliament.[55]

While Blackstone and Dicey presented different justifications for parliamentary supremacy, they relied upon political—as opposed to legal—checks upon legislative action.[56] As previously explained, Blackstone's balanced constitution accomplished this through powerful institutional checks that were absent from Dicey's modern constitutional model. Blackstone could support Parliament's legislative supremacy because Parliament's mixed and balanced nature created internal political tensions that prevented it from acting tyrannically.[57] Related to his idea that Parliament is accountable to the electorate, Dicey recognized another distinction between external and internal checks upon the exercise of legislative and executive powers.[58] Those were the only actual limitations upon Parliament that Dicey admitted, and he characterized them in terms of political, not legal, efficacy.[59] The strictly political nature of such checks was a corollary to the concept of omnipotent sovereignty in Parliament. Legal sovereignty was unitary and unlimited such that no other government institution could restrict or share its exercise of

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52. 1 BLACKSTONE, *supra* note 3, at *154-55.

53. These different forms of government were reflected, respectively, in the Commons, Lords, and the Crown. *Id*. at *48-51, *155-56. Blackstone further considered the statutory time limits for the life of a Parliament, as necessary to make it responsive to the common good through regular elections. *Id*. at *179-82.

54. Paul Craig, *Public Law, Political Theory and Legal Theory*, 2000 PUB. L. 211, 220-22 [hereinafter *Public Law*].

55. *Id*. at 221-22.

56. *Id*. at 218-22.

57. *Id*. at 218-20.

58. *Id*. at 221.

59. De Smith and Brazier identify six political factors that limit Parliament. DE SMITH & BRAZIER, *supra* note 7, at 98-99. These are (1) international obligations, (2) constitutional conventions, (3) practicability of enforcing the law, (4) fear of electoral backlash, (5) the influence of interest groups, and (6) the Government's lack of an overall majority in the House of Commons. *Id.*

authority.[60] External limits, as the term implies, were independent of Parliament itself.[61] Those limits, which applied to any sovereign, "[consist] in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws."[62] Such instances of disobedience, or even rebellion, could result from the sovereign's arbitrary or extreme changes in popularly entrenched ideals or values.[63] As Dicey suggested, imposing an Episcopal Church in Scotland, abolishing the monarchy, or disenfranchising the popular electorate are some examples of untouchable values during his own time.[64] External checks and values that supported them depended upon the "present state of the world."[65] Certain parliamentary acts that the populace may once have found acceptable might no longer be, just as previously intolerable actions might become appropriate or welcome.[66] External limits could, therefore, change over time, resulting in the possibility that constitutional principles could adapt to changing social needs and attitudes.[67] Internal checks, in contrast, related solely to the normative values held by a lawmaker himself.[68]

Regardless of the legal power to do as he willed, Dicey believed that the lawmaker would not act against certain fundamental ideals central to his own belief-system.[69] For example, Dicey wrote that a Muslim ruler would never think to outlaw the practice of Islam, just as Louis XIV would never have imagined to carry out a Protestant Reformation.[70] In the United Kingdom, those internal checks have traditionally come from deep-rooted values, such as respect for representative government, democratic accountability, and the rule of law.[71] Democratic ideals, which served as an external check and were greatly esteemed by the populace, also restrict in considerable degree the actions of Parliament due to their internal influence upon its members.[72]

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60. DICEY, *supra* note 3, at 76.
61. *Id*. at 77 (discussing operation of the limit on non-parliamentary governmental forms).
62. *Id*. at 76-77.
63. *Id*. at 78-79.
64. *Id*. at 79.
65. *Id*. at 79.
66. *Id*.
67. *Id*.
68. *Id*. at 80.
69. *Id*.
70. *Id*.
71. *See* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 330 (2002) (describing British reliance on these values).
72. *See* DICEY, *supra* note 3, at 83.

B. *Foundational Principles as a Restraint upon Parliament*

Blackstone's endorsement of parliamentary supremacy conflicted with his other central tenet of natural law's supremacy.[73] He described natural law as originating from God, immutable, and directing the actions of men.[74] Through reason, mankind could discover those natural principles, and apply them to various and particular worldly circumstances.[75] Natural law, as understood by man, was superior to any contrary human law, which was consequently not binding.[76] Blackstone wrote, "[N]o human laws are of any validity, if contrary to [natural law]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[77] Blackstone continued, "[I]f any human law should allow or enjoin us to commit [a crime against natural law], we are bound to transgress that human law, or else we must offend both the natural and the divine."[78] Blackstone was unclear at first how he intended to resolve this blatant contradiction between Parliament's supremacy and natural law.[79] Daniel Boorstin suggests that Blackstone saw no such contradiction, as Blackstone found natural law to be simultaneously prescriptive and descriptive.[80] Natural law dictated principles to which man-made law must conform, and those laws themselves, particularly common law, were evidence of natural law.[81] Through reason, mankind discovered, but did not create, pre-existing first principles of law.[82] Blackstone thus intimately connected the mysterious and divine with the rational and human.[83] He accordingly found English law to be informed by and representative of natural law, thereby complimenting its excellence and limiting criticism against it.[84]

By characterizing English law as representative of discovered first principles, Blackstone seemed unable to imagine Parliament legislating in a manner that was blatantly contrary to natural law.[85]

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73. *Compare* 1 BLACKSTONE, *supra* note 3, at *41 (arguing for the supremacy of natural law), *with* DICEY, *supra* note 3, at 90 (arguing for parliamentary supremacy).

74. 1 BLACKSTONE, *supra* note 3, at *38-41.

75. *Id*. at *38-39, *41-42.

76. *Id*. at *41.

77. *Id*.

78. *Id*. at *43.

79. *See* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES 30-31 (1941) (describing this conflict in Blackstone); 1 BLACKSTONE, *supra* note 3, at *43-47.

80. BOORSTIN, *supra* note 79, at 120-21.

81. *Id*. at 120-24; 1 BLACKSTONE, *supra* note 3, at *41-43.

82. BOORSTIN, *supra* note 79, at 20; 1 BLACKSTONE, *supra* note 3, at *41-42.

83. BOORSTIN, *supra* note 79, at 12, 17-18.

84. *Id*. at 23-25, 30, 49-56.

85. 1 BLACKSTONE, *supra* note 3, at *91.

Nonetheless, Blackstone implied a solution to such a problem: natural law, which is binding upon Parliament, had only moral and not legal effect.[86] An act of Parliament that offended against natural law principles, therefore, did not necessarily create an obligation of obedience upon the subject.[87] The subject might even have a moral duty to disobey the law in question, which would remain legally in force.[88] Such a position advanced an early positivist version of the law, where the law and its moral content could remain separate.[89] Yet such a moral distinction between natural law and acts of Parliament threatens Blackstone's unity between them. Parliament would remain the supreme legal power, even if notoriously acting contrary to the morally supreme mandates of natural law.[90] Blackstone essentially admitted this possibility by writing, "[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it."[91] Judicial power to reject such an unreasonable law would "set the judicial power above that of the legislative, which would be subversive of all government."[92] The only option left to the courts is to interpret the statute as far as possible with higher principles of law, but give effect to Parliament's clear intent.[93] Therefore, Blackstone's Constitution relied upon the balanced constitution—as well as the external political checks of the general electorate and parliamentarians' internal guidance by reason—in preventing Parliament's legislating against natural law.[94] In any case, restraint was to be found not in the courts, but only through the political process.[95] Hence, Blackstone gave precedence to the legislative process by

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86. J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 190 (1961).

87. *Id*. at 190-91; 1 BLACKSTONE, *supra* note 3, at *42-43.

88. 1 BLACKSTONE, *supra* note 3, at *43, *91.

89. Such a tension also exists in the writings of some positivist thinkers who assert that individuals may justifiably disobey immoral laws, although such laws are not invalid under the rubric of *lex iniusta non est lex*. *Comparative Perspective*, *supra* note 41, at 10-11; JAMES R. STONER, COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 167-68 (1992).

90. *See* 1 BLACKSTONE, *supra* note 3, at *90, *157.

91. *Id*. at *91.

92. *Id.*

93. *Id.* at *83-84, *87, *89; GOUGH, *supra* note 86, at 189.

94. Although Blackstone makes it fairly plain that judges cannot substitute their own reason for that of the legislators, there arises the broader question of to what extent a judge may continue to ignore his personal moral responsibility to refuse to obey an act of Parliament against natural law. This jurisprudential problem, however, is well beyond the scope of the paper.

95. 1 BLACKSTONE, *supra* note 3, at *91, *136-41 (describing protections for basic rights and operation of restraints on authority).

fundamentally intertwining the aspirational principles of natural law with positive acts of Parliament.[96]

Dicey's distinction between the political and legal sovereigns is comparable to Blackstone's interrelationship between natural law and the omnipotent Parliament. Both present very similar conceptions of Parliament's moral obligation to higher moral authority and the problems that such a dichotomy presents. As previously discussed, Blackstone constructed a theory that placed natural law as morally superior to parliamentary acts.[97] He continued to recognize the legal ability of Parliament to contravene first principles.[98] Both natural law and Parliament remained supreme in their respective spheres – natural law in the moral one, Parliament in the legal one. Dicey, by characterizing sovereignty as both legal and political, presented the same relationship between Parliament and higher legal principles as did Blackstone.[99] Dicey certainly did not consider natural law as constituting a reference point for the moral validity of law.[100] Instead, Dicey made Parliament accountable to the politically-sovereign electorate.[101] The electorate was the ultimate source of legitimacy for Parliament; Parliament was chosen by the electorate and morally obligated to act on its behalf.[102] Acts of the supreme Parliament were, theoretically, expressions of popular will. Dicey wrote,

> [T]he difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government . . . To prevent the divergence between the wishes of the sovereign and the wishes of subjects is in short the effect, and the only certain effect, of bonâ fide [sic.] representative government.[103]

Thus, external and internal limitations would become "absolutely coincident" to ensure Parliament's responsiveness to the people.[104] Similarly, Blackstone considered parliamentary acts as expressions of natural-law principles to which legislation was morally bound to adhere.[105]

Higher principles, discoverable through reason and experience, were generally discernable through a determination of what acts served the public welfare. Blackstone and Dicey shared two basic

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96. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 40, 49 (1989).
97. 1 BLACKSTONE, *supra* note 3, at *90.
98. *Id*. at *91, *156-57.
99. DICEY, *supra* note 3, at 39.
100. *Id*. at 62-63.
101. *Id*. at 73.
102. *Id*. at 73-74.
103. *Id*. at 83.
104. *Id*. at 84.
105. 1 BLACKSTONE, *supra* note 3, at *42, *52-56.

ideas in this regard, both compatible with one another. First, they asserted a higher authority to which Parliament was morally, but not legally, answerable.[106] For Blackstone this was natural law; for Dicey it was the political sovereign in the form of the electorate.[107] Second, both recognized the need for parliamentary acts to serve the public.[108] In Blackstone's theory, this requirement meant that Parliament sought to implement principles of natural law.[109] Although Dicey did not explicitly comment on the concept of public good, it is an easy presumption that he would have considered acts benefiting public welfare to reflect the desires of the electorate. This conclusion is a natural inference from his insistence that Parliament act on behalf of the political sovereign.[110] Hence, Blackstone and Dicey were able to equate beneficent parliamentary acts with the requirements of either natural law or democratically accountable government.[111] Both theories offered a means for legitimizing acts of Parliament, while suggesting moral limitations upon the exercise of otherwise unlimited legal authority.[112] These moral limitations derived from fundamental principles of natural law or democratic government that existed anterior and superior to legislative authority.[113]

Blackstone and Dicey, however, failed to address adequately the problems that resulted from the contradiction of pairing parliamentary sovereignty with another morally supreme source of legal legitimacy. When confronted with giving precedence to a higher, moral authority, or legislative will, Blackstone and Dicey chose the latter.[114] In the event of a conflict between natural law and popular will against parliamentary act, Blackstone and Dicey admitted that Parliament prevailed.[115] Despite recognizing a more abstract but higher authority for law, both writers ultimately embraced a preference for positivism in the form of legislative act.[116] Acts of Parliament received priority, though ostensibly reflecting natural law or democratic will, because they were certain and were matters of fact, rather than abstract principles requiring discovery

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106. *Id*. at *42-43; DICEY, *supra* note 3, at 73.
107. 1 BLACKSTONE, *supra* note 3, at *42-43; DICEY, *supra* note 3, at 73.
108. 1 BLACKSTONE, *supra* note 3, at *43, *52-53.
109. *Id*. at *39-41.
110. DICEY, *supra* note 3, at 78-79.
111. *Id*.; 1 BLACKSTONE, *supra* note 3, at *39-41, *52-53.
112. *Comparative Perspective*, *supra* note 41, at 13-15.
113. 1 BLACKSTONE, *supra* note 3, at *41; *see* DE SMITH & BRAZIER, *supra* note 7, at 140.
114. 1 BLACKSTONE, *supra* note 3, at *91, *156-57; DICEY, *supra* note 3, at 68-70.
115. 1 BLACKSTONE, *supra* note 3, at *157; DICEY, *supra* note 3, at 70.
116. 1 BLACKSTONE, *supra* note 3, at *157; DICEY, *supra* note 3, at 70.

through the courts.[117] Taking this positivist approach, both writers rejected the judiciary's authority to invalidate parliamentary acts that offended high principles.[118]

Deference to parliamentary supremacy in the face of strong support for either natural law or the political sovereignty of the electorate nonetheless presents a problem of justification. Although Blackstone and Dicey both suggested, and even admitted, that Parliament could legally act against the public interest, they did so only reluctantly.[119] Both scholars attempted to escape the problem by equating parliamentary acts, at least in ordinary cases, to expressions of natural law or popular will.[120] There remains, however, an obvious tension between this connection of first principles and electoral will with parliamentary act. Blackstone and Dicey tried to get around this difficulty through their particular characterization of the political process—a process centering upon the search for the public good.[121]

Blackstone believed that natural law found expression in laws that served the public good.[122] Based upon experience and a judicial

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117. Jeffrey Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, 1999 PUB. L. 448, 455-56 [hereinafter *Vires and Vacuums*]. Jowell notes the abstract nature of higher foundational principles, while recognizing their gradual realization in a way that seems consistent with the common-law and political processes described by Blackstone and Dicey,

> [C]onstitutional principles are not rules. They lack that element of specificity. They are prescriptive in character but indeterminate in content. Their content crystallizes over time when concrete problems throw up the need to settle competing claims of power and authority and rights. Judging these claims requires a strong empirical sense that allows an evaluation, within the bounds of democracy's inherent requirements, of changes in practice and expectations. New principles emerge by a process of accretion reflecting a constitution's changing imperatives and shifting settlements. These are based upon altering notions of the proper scope of governmental power as well as upon other fundamental social values which become endorsed over time.

Id. (footnotes omitted).

118. T.R.S. Allan, *The Politics of the British Constitution: A Response to Professor Ewing's Paper*, 2000 PUB. L. 374, 375 [hereinafter *Response*]. Allan writes that "[t]he doctrine of absolute parliamentary sovereignty has nourished, and been sustained by, a general embrace of legal positivism: legal rights and obligations being essentially matters of fact[,] . . . their merits and consequences for the common good were matters of judgment for politics." *Id.* He further remarks that "[t]he dominance of legal positivism and the uncritical acceptance of unqualified parliamentary sovereignty were remarkable features of a jurisdiction based on the common law, which is inherently antithetical to both." *Id.* at 376.

119. 1 BLACKSTONE, *supra* note 3, at *91; *see* DICEY, *supra* note 3, at 83-85.

120. 1 BLACKSTONE, *supra* note 3, at *157; DICEY, *supra* note 3, at 83-85.

121. *See* DICEY, *supra* note 3, at 49, 68; 1 BLACKSTONE, *supra* note 3, at *52-55, *83.

122. *See* 1 BLACKSTONE, *supra* note 3, at *52-53, *55 (discussing the operation of laws regarding the government of indifferent aspects of life, designed to promote welfare of society).

reasoning process that sought to discover natural law, the common law continued to apply tradition and adapt to societal needs.[123] As a representative body, Parliament also sought to benefit the public through the legislative process.[124] First principles were capable of expression in very different forms, tailored to a society's particular circumstances. [125] At the same time, some laws concerned matters indifferent to natural law and involving only the regulation of societal relations.[126] Even if the common law or Parliament erred in following fundamental principles of natural law, Blackstone believed such error was unintentional due to man's faulty reason.[127] It was Parliament's manifest desire to contravene such principles that Blackstone found highly unlikely, even though grudgingly recognizing that body's legal supremacy in such an event.[128] In the normal judicial and legislative process, Blackstone seemed to imagine a self-correcting process premised upon a reasoned search for the public good.[129] The balance of forces within the constitution would facilitate

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123. A comment by T.R.S. Allan illustrates the connection between the common law and the public good in a manner that reflects the Blackstonian conception:

> The common law articulates the content of the common good, according to the society's shared values and traditions. The judges are its authoritative exponents because their role is to express the collective understanding, by interpretation of the precedents, as a basis for the impartial determination of particular disputes. The special strength of the common law, as a foundation for constitutional government, lies in its inherent commitment to rationality and equality.

T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 LAW Q. REV. 221, 239 (1999) [hereinafter *Consent and Constitutionalism*].

124. 1 BLACKSTONE, *supra* note 3, at *156-57.

125. *Id*. at *41-42, *53-55 (discussing matters indifferent to natural law and offering examples of such as a landlord's taking a cow in lieu of unpaid rent and a wife's property becoming the property of her husband upon marriage).

126. *Id*.

127. *Id*.

128. *Id*.

129. Blackstone wrote,

> In general, all mankind will agree that government should be reposed in such persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three general requisites, I mean, of wisdom, of goodness, and of power: wisdom to discern the real interest of the community; goodness to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

Id. at *47-48; *see also id*. at *40-42, *46-48, *91.

this search by ensuring that no single estate would dominate to the detriment of other societal interests.[130]

Dicey also seemed to envision that Parliament would act for the public good.[131] Rather than evidencing principles of natural law, the public good would represent the will of the electorate.[132] Parliament also might occasionally err in serving the public interest, but its ultimate accountability to the electorate resulted in a self-correcting democracy.[133] Through this democratic process of accountability and self-correction, Parliament would eventually right poorly made or unjust laws.[134] Like Blackstone, Dicey also imagined any parliamentary deviations from the public good to be occasional and unintentional, and express actions contrary to the electoral will as being highly improbable.[135] Dicey thereby erected a constitutional structure in which Parliament's legitimacy to act remains fundamentally linked with its pursuit of the public good.[136] Sir John Laws eloquently asserts this premise in regard to the modern constitution,

> The government's constituency is the whole body of such citizens; and a democratic government can have no remit but to act in what it perceives to be their best interests. It may get it wrong, and let the people down. But it cannot *knowingly* do so, for that would be to act in bad faith; and no government can justify its own bad faith by pointing to the fact that it was elected by the people. That would be to assert that the electorate endorsed in advance the government's right deliberately to act against its interests, which is an impossible proposition. Thus the free will of every citizen is a premise of all the government's dealings with the people, and so conditions its duty to act in good faith towards them.[137]

Furthermore, Parliament was morally obligated to act for the public good.[138] That obligation could be realized through natural law and

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130. Paul Craig, *Prerogative, Precedent, and Power*, *in* THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS ON PUBLIC LAW IN HONOUR OF SIR WILLIAM WADE QC 65, 75 (Christopher Forsyth & Ivan Hare eds., 1998) [hereinafter *Prerogative*].

131. DICEY, *supra* note 3, at 82-84.

132. *Id.*

133. *Id.*

134. *Id.*; *Public Law*, *supra* note 54, at 227; *Comparative Perspective*, *supra* note 41, at 15-16.

135. DICEY, *supra* note 3, at 82-84.

136. To legislate in accordance with some conception of the public good could also be seen as a necessary element of the rule of law. The rule of law therefore encompasses the public good, and both interrelate to restrain Parliament morally. *Consent and Constitutionalism*, *supra* note 123, at 237. Thus, "Dicey's theory of the rule of law may best be understood as a model of governance in accordance with a determinate conception of the common good, whose concrete requirements in particular cases would be settled by judges in accordance with precedent, interpreted as a consistent body of legal principle." *Id.* at 243.

137. Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72, 83 [hereinafter *Law and Democracy*].

138. *Id.*

the requirements of representative democracy, depending upon either Blackstone's or Dicey's framework.[139] For Blackstone and Dicey, the revision process for laws that did not reflect public interest was a political process shielded from judicial evaluation.[140] Despite their attempts to equate positive act with fundamental principle, neither jurist could completely gloss over the gap that existed between the two concepts. While Blackstone and Dicey were reluctant to recognize it, their theories failed in the end to offer adequate protection against a real threat of Parliament contravening foundational principles of law.

C. *Judicial Review in Common-Law Thought*

The subordination of the judiciary to Parliament was a logical consequence of the doctrine of parliamentary sovereignty. Blackstone, while discussing at length the constitutional position of the legislature and the executive, offered no discussion of the judiciary as a distinct government institution. While the Crown, Lords, and Commons acted as checks and balances against each other, Blackstone's exclusive identification of the branches of government as the legislative and executive suggested that the courts had no institutional role or power of review in his constitutional model.[141] Dicey similarly declared that the courts could not question an act of Parliament as contrary to the public good,

> [J]udges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.[142]

In comparison to Blackstone's suggestion that laws contrary to those of nature were void, Dicey allowed "a very qualified interpretation" that supported only an approach to statutory interpretation.[143] Courts, therefore, could do no more than interpret and apply a statute without questioning its validity.[144] Dicey and Blackstone thus envisioned a constitutional order based upon the sovereignty of Parliament, without any legal limitations on its authority through judicial review.[145]

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139. *See* DICEY, *supra* note 3, at 82-84; 1 BLACKSTONE, *supra* note 3, at *53-57.
140. *See* DICEY, *supra* note 3, at 82-84; 1 BLACKSTONE, *supra* note 3, at *53-57.
141. 1 BLACKSTONE, *supra* note 3, at *146-47.
142. DICEY, *supra* note 3, at 74.
143. *Id*. at 62-63.
144. *See id*.
145. *See id*.; 1 BLACKSTONE, *supra* note 3, at *146-47.

Notwithstanding Dicey and Blackstone's conclusions, elements exists within the thoughts of each that support a constitutional model restraining parliamentary authority through judicial review. Those elements have also historically existed within common-law thought. Therefore, in order to limit legislative authority within a common-law framework, judicial review can rest upon the theoretical foundations of Blackstone and Dicey, along with historical precedent.

By speaking of both natural law and the sovereignty of Parliament in absolute terms, Blackstone created an inevitable tension between the moral and the strictly legal. In Blackstone's concept of the law, acts of Parliament reasonably promulgated natural law, which was the sole source of legal validity.[146] By paralleling positive and natural law, Blackstone neatly avoided any real discussion intended to resolve a direct conflict between the two. Even though Blackstone stated that an act of Parliament was supreme even if manifestly unreasonable, he seemed to regard such a contingency as remote at best.[147] He relied upon the balanced constitution, political accountability to the electorate, and rational legal process to produce legislation promoting the public good, thereby representing natural law.[148] By even recognizing the slightest possibility of disjunction between natural and positive law, Blackstone revealed the limitations of his characterization of natural law principles as simultaneously prescriptive of law and represented in turn by English law.[149] To admit the possibility of a rupture required a clear choice between parliamentary authority that is unlimited or legally restricted by foundational principles, whether they be expressed through the unwritten common law, statutes, or written documents.[150] Despite his fundamental reliance upon natural law as the fountainhead of legal legitimacy, Blackstone's final deference to the will of Parliament places him on the side of positivism. His position on natural law, however, cannot be undervalued based upon his acceptance of parliamentary supremacy. The principles of natural law still serve as an internal check upon the actions of legislators, while externally limiting Parliament by providing a moral standard for the subjects' obligation to obey. Blackstone's reliance upon natural law also lays strong foundations for a theory of judicial review intended to enforce foundational principles as legal limitations upon the legislative power. Blackstone's conclusion that parliamentary will prevails is not a necessary one, and counter-emphasis may be placed upon his natural-law theory to allow judicial review of primary legislation.

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146. 1 BLACKSTONE, *supra* note 3, at *146-47.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

The idea that courts through judicial review might restrain Parliament based upon first principles is not a novel inference from Blackstone's theory.[151] Judicial review had existed as a concept within English legal and political thought for some time before Blackstone penned his *Commentaries*.[152] Sir Edward Coke and American revolutionaries most notably supported this alternative view of English constitutionalism, itself firmly grounded in the unwritten common law.[153] Although the doctrine of parliamentary supremacy remains orthodox in contemporary law, these older common-law arguments for judicial review of parliamentary acts still provide foundations for the *ultra vires* doctrine, as well as a potentially broader power of review restraining parliamentary acts themselves.[154] Consequently, common-law judicial review premised upon either a written or unwritten constitution offers a solid basis for significant constitutional reform in the United Kingdom, while still maintaining direct continuity with British tradition. A brief discussion of judicial review in English legal history demonstrates the emphasis of Blackstone's natural law theory in supporting arguments for a limited Parliament.

The most famous statement of judicial review in English law was made by Sir Edward Coke in *Dr. Bonham's Case*, which was decided in 1610.[155] Legal scholars and historians have much debated the full significance and import of this case.[156] For this Article, a brief examination of the case is sufficient to illustrate the venerable roots of judicial review doctrine in the common-law tradition. In *Bonham's Case*, Thomas Bonham brought an action for false imprisonment against the Royal College of Physicians for having had him jailed for practicing medicine without a license.[157] The Royal College, founded under letters patent issued by Henry VIII and subsequently reaffirmed, claimed authority under those instruments to require a license of all medical practitioners in London.[158] The College also possessed statutory authority to fine and imprison those practicing

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151. *See, e.g.*, Dr. Bonham's Case, 77 Eng. Rep. 638 (1610).

152. *See id*.

153. *See id*.

154. For a good comparison of the two opposing visions of British constitutionalism as premised upon either a limited or omnipotent Parliament, see T.R.S. Allan, *Fairness, Equality, Rationality: Constitutional Theory and Judicial Review, in* THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS ON PUBLIC LAW IN HONOUR OF SIR WILLIAM WADE QC 15, 15-18 (Christopher Forsyth & Ivan Hare eds., 1998) [hereinafter *Constitutional Theory*].

155. *Dr. Bonham's Case*, 77 Eng. Rep. 638.

156. *See infra* note 185 and accompanying text; T.F.T. PLUCKNETT, STUDIES IN ENGLISH LEGAL HISTORY 45 (1983).

157. *Dr. Bonham's Case*, 77 Eng. Rep. at 642.

158. *Id*.

improperly or without a license.[159] Bonham—a doctor of medicine from the University of Cambridge—claimed an exception under the same statutes that exempted Oxford and Cambridge graduates from license requirement when practicing outside of London.[160] When Bonham refused to pay the fine levied by the Royal College, the College ordered his arrest and imprisonment.[161] The resulting legal contest hence centered upon the scope of the statutes.[162]

The Royal College claimed authority in all instances to license medical practitioners in London, notwithstanding their graduation from Oxford or Cambridge.[163] On the contrary, Bonham asserted that statutes excepting Oxford and Cambridge graduates practicing outside of London also applied to the capital city as well.[164] Thus, the correct interpretation of the statute seemed to be the main issue in the case. Coke, however, approached the case from an unexpected and significant angle, based upon the Royal College's jurisdiction to imprison and its authorization to take a share of the fines that it itself levied.[165]

Statutes authorized the Royal College to punish errant practitioners in two instances. First, they allowed the Royal College to impose fines on individuals practicing medicine without a license.[166] Second, they further allowed the Royal College to impose fines upon or order imprisonment of individuals improperly practicing medicine.[167] Contrary to the Royal College's position, Coke drew a clear distinction between those two grounds of punishment.[168] Coke concluded that the power to imprison for improper practice of medicine did not extend only to unlicensed practice.[169] Instead, improper practices essentially referred to malpractice.[170] The Royal College made no such allegation against Bonham, whom they only accused of not having a license.[171] Thus, the Royal College lacked the jurisdiction under the statutes to imprison Bonham under the circumstances.[172] This reasoning was clearly one of statutory

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159. *Id.* at 648.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 652.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

interpretation only, as Coke was relying upon the language of the acts themselves to discern their meaning.[173]

The second reason that Coke gave for denying the Royal College power to imprison Bonham was perhaps one of the most controversial statements made in the history of English jurisprudence. Having found that the statutes' language did not give the Royal College authority to imprison someone for practicing without a license, Coke went further into the substance of the legislation. The Chief Justice explained that the Royal College could not rightly judge causes from which it expected to take a share of the fines that it imposed.[174] To do so would violate one of the first principles of law, which was well established in the common law itself, that a party could not be a judge in its own cause. In cases where a statute and first principles conflicted,

> [The common law would] controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . . [175]

Coke seemed to suggest by this statement, which he supported through a recitation of some precedent, two concepts that would later greatly influence common-law theory.[176] First, higher law principles existed that were superior to Parliament's will.[177] Second, the judiciary wielded inherent authority to adjudge void parliamentary acts offensive to such principles.[178]

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173. In explaining this distinction between the clauses authorizing punishment, Coke set forth four canons of statutory construction:

> [T]he best *(a)* expositor of all letters patent, and Acts of Parliament, are the letters patent and the Acts of Parliament themselves by construction, and conferring *(b)* all the parts of them together, *(c) optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum*; and *(d) injustum est nisi tota legum inspecta una aliqua ejus particula proposita judicare vel respondere*.

Id.

174. *Id*.

175. *Id*.

176. PLUCKNETT, *supra* note 156. Plucknett examines in some detail the precedents cited by Coke and finds that they weakly support the proposition that the common law restrains Parliament. He concludes that "the theory which [Coke] believed to be their legal foundation must be credited to his own political thought rather than to that of his mediaeval predecessors upon the Common Bench." *See also* STONER, *supra* note 89, at 56-58. Stoner argues that any weaknesses in Coke's use of precedent, however, do not necessarily detract from his influence upon later legal developments. *Id.*

177. *See* Dr. Bonham's Case, 77 Eng. Rep. 638 (1610).

178. *Id*.

The full import of Coke's opinion in *Bonham's Case* is uncertain.[179] Although he saw a place for natural law reasoning and considerable judicial discretion in statutory interpretation, it is unclear how far his theory extends as a basis for judicial review of parliamentary acts. Coke may have been advocating that first principles be applied when interpreting ambiguous statutes, so as only to interpret them consistently with the common law.[180] As far as a general power to void legislation, Coke's own words are subject to this narrower understanding.[181] An act of Parliament "against common right or reason, or repugnant," might very well have referred only to manifestly absurd or self-contradictory laws.[182] In this instance, the common law would control.

As Coke analyzed the statutes in *Bonham's Case* in a very textual manner, the narrower interpretation of his words is arguably consistent with the reasoning throughout the remainder of his opinion.[183] It is also more compatible with later developments in English jurisprudence stressing judicial formalism, but allowing courts to interpret the will of Parliament as incorporating generally accepted legal values consistent with natural justice.[184] If one accepts this interpretation, Coke might likely have applied an unreasonable statute if Parliament's intent was stated expressly and clearly. Although refusing to acknowledge a full power of judicial review, this narrow interpretation of the *Bonham's Case* still leaves considerable room for judicial interpretation of parliamentary acts lacking express language showing intent to violate first principles.[185]

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179. J.W. TUBBS, THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS 160 (2000). Tubbs writes in regard to Coke's jurisprudence on the relationship between statute and common law that "scholarship may help us narrow the range and his possible meanings, but his language is so rich and ambiguous, and his writing so unsystematic, that he cannot be pinned down exactly." *Id.* For discussion of the varying interpretations of *Bonham's Case*, see *id.* at 154-60, 183-84; JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 111-12 (1999).

180. *Public Law*, *supra* note 54, at 213; LIEBERMAN, *supra* note 96, at 53.

181. *Public Law*, *supra* note 54, at 213; LIEBERMAN, *supra* note 96, at 53.

182. S.E. THORNE, ESSAYS IN ENGLISH LEGAL HISTORY 274-75 (1985).

183. *Id.* at 276; GOUGH, *supra* note 86, at 34-35.

184. J. Beatson, *The Role of Statute in the Development of Common Law Doctrine*, 117 LAW Q. REV. 247, 261 (2001).

> There is a presumption that parliamentary intention is primarily determined by the text and that a provision is prima facie to be given its literal meaning, taking into account its context. . . . [T]he traditional formulation of the rules is that only when the ordinary meaning leads to something unjust, anomalous, contradictory or is ambiguous can the courts say that Parliament intended a secondary meaning to be given to the provision.

Id.

185. THORNE, *supra* note 182, at 277-78; PLUCKNETT, *supra* note 156, at 50 ("Coke had claimed that the common law was fundamental, and it was an inevitable

It also remains consistent with Blackstone's own contradictory exposition of both natural law and parliamentary supremacy.[186] Judges were to consider all acts of Parliament as conforming to natural law, although the legislature might, albeit doubtfully, expressly decide to abrogate its principles.[187] Furthermore, the common law sought to express these higher principles and provided a strong benchmark for interpreting statutes.[188]

Regardless of Coke's actual meaning, many of his contemporaries and followers regarded *Bonham's Case* as supporting a power of judicial review capable of striking down acts of Parliament, as well as the Crown.[189] Thus, even assuming that Coke did not propose a full judicial power to invalidate primary legislation in all cases, subsequent interpretations, or misinterpretations, of his ideas nevertheless asserted the primacy of higher legal principles over contrary acts of Parliament.[190] Although English law ultimately embraced parliamentary supremacy, those strains of thought were significant enough to present a viable and alternative path of constitutional development. For instance, between the years of the English Civil War and the Glorious Revolution, royalists and radical Levellers advanced Coke's theory in its broader interpretation by seeking to fetter Parliament's authority.[191] As for the royalists, some

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corollary of this theorem that the bench, as the sole repository of this common law, should regard itself as thereby endowed with authority to treat statutes with the widest discretion."). Coke also may have seen Parliament as a high court rather than just a legislature and held a fundamentally different view of its acts than later jurists. Instead of being the dominant source of law as presently understood, statutes more simply declared or clarified the common law, or sought to "fill in the gaps." This closer relationship between common law and statute would give judges far more discretion in interpreting statutes, and might even allow them to refuse to apply acts of Parliament in certain cases. It might also explain Coke's own apparent inconsistency between supporting a fundamental law and a supreme Parliament. *See* DE SMITH & BRAZIER, *supra* note 7, at 73; GOLDSWORTHY, *supra* note 179, at 114-19; CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 147-49, 291-92 (1979); STONER, *supra* note 89, at 54, 57-58, 60-61.

186. See DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 160 (1938).

187. LIEBERMAN, *supra* note 96, at 54-55.

188. *See* STONER, *supra* note 89, at 60; THORNE, *supra* note 182, at 270-71.

189. STONER, *supra* note 89, at 60; TUBBS, *supra* note 179, at 158-59. As for Coke himself, he again suggested the primacy of common law over statute in the later case of *Rowles v. Mason*, 2 Brownl. & Golds. 192, 198 (1612), as well as apparently contradicting himself in later statements by asserting the supremacy of Parliament. TUBBS, *supra* note 179, at 183-84; GOLDSWORTHY, *supra* note 179, at 125-26, 142.

190. LIEBERMAN, *supra* note 96, at 53-54. *See* THORNE, *supra* note 182, at 278 ("Coke's ambitious political theory is found to be not his, but the work of a later generation of judges, commentators, and lawyers."). *But see* GOLDSWORTHY, *supra* note 179, at 122-24 (remarking, however, that those who did interpret *Bonham's Case* so broadly were few).

191. While the Levellers did not necessarily support the common law, nor equate it with natural law as Coke suggested, they nevertheless appealed to the

supporters of the prerogative argued that the Crown's powers were themselves an integral part of the common law.[192] Accordingly, Parliament was unable to trample upon the prerogative, and the judiciary possessed the power to maintain the balance between Crown and Parliament.[193] Of course, the possibility that the judiciary, as the guardian of the common law, might provide legal protection for the Crown against the legislature was unacceptable to Parliamentarians.[194] As for the Levellers, they remained as a radical and short-lived movement that could not counter the growing support for parliamentary power.[195] Representing the final triumph of Parliament over the Crown, the Glorious Revolution of 1688 effectively ended any attempts by royalists or radicals to rely upon Coke's doctrine of a fundamental law to control the legislature.[196]

The Glorious Revolution permanently altered the balance between Parliament and the Crown, establishing Parliament as the supreme law-making authority in the realm.[197] Consequently, the doctrine of parliamentary sovereignty and legislative supremacy became legal orthodoxy. It was against such unlimited legislative power that radical Whigs of the early 18th century appealed to natural rights and popular sovereignty as restraints upon government.[198] Despite some protests and reservations held by oppositionist thinkers, the doctrine of parliamentary sovereignty gained ascendancy because it proved to be a more politically palatable check against royal power and more accountable to the electorate than was the judiciary.[199] The English Constitution thus continued to develop along the path of parliamentary supremacy, rejecting any power of the judiciary to declare void acts of Parliament offensive to first principles of law.[200] The fact that English law embraced the doctrine of parliamentary sovereignty, however, could not wholly

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concept of a fundamental law to which Parliament was legally subject. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 244-45 (3d ed. 1990); GOLDSWORTHY, *supra* note 179, at 135-37; PLUCKNETT, *supra* note 156, at 52-54, 69; Winterton, *supra* note 8, at 594-96. *See* MCILWAIN, *supra* note 185, at 85-92. *See generally* GOUGH, *supra* note 86, at 105-11.

192. *See* Winterton, *supra* note 8, at 593-95.

193. *See id*.

194. GOLDSWORTHY, *supra* note 179, at 106-09. *See* GOUGH, *supra* note 86, at 145-47,158-59.

195. *See* GOLDSWORTHY, *supra* note 179, at 135-37.

196. *Id*. at 160-61, 173; DE SMITH & BRAZIER, *supra* note 7, at 70-75.

197. *See* GOLDSWORTHY, *supra* note 179, at 159.

198. While radical Whigs did propose that there were limits upon Parliament, they generally held the right of resistance or political opposition to reside in the people, rather than in any power of judicial review. GOLDSWORTHY, *supra* note 179, at 173-76; MARIE P. MCMAHON, THE RADICAL WHIGS, JOHN TRENCHARD AND THOMAS GORDON LIBERATARIAN LOYALISTS TO THE NEW HOUSE OF HANOVER 38-39 (1990).

199. *See* GOLDSWORTHY, *supra* note 179, at 200-01, 233-34.

200. *See id*. at 218-20, 233.

eclipse the influence of competing ideas of judicial review and limited legislative power. T.F.T. Plucknett writes,

> [Coke's] learning and prestige had made enough disciples on the bench to familiarize lawyers with the outlines of his thought, and eventually the strangeness wore off until it became evident that the new thought could be grafted on to the common law. The [Glorious] Revolution came only just in time to prevent the conversion, and to make it finally clear that there was no place for it in English constitutional law.[201]

Despite the victory of the concept of parliamentary sovereignty, the broad interpretation of Coke's theory of judicial review had gained enough momentum to integrate itself into common-law constitutional thought—enough so as to survive into contemporary times.[202]

In the 18th century, the doctrine of judicial review manifested itself most prominently in two places. First, Blackstone continued to support the concept of natural law morally binding upon Parliament and providing a basis for judicial interpretation of a statute.[203] He went so far as to echo Coke in *Bonham's Case*, stating that "acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void."[204] As previously mentioned, Blackstone was prepared to yield to Parliament's expressed will in such circumstances, and he made this reservation clear.[205] Blackstone expressed a position compatible with a narrower interpretation of Coke's theory in *Bonham's Case*.[206] Despite coming down on the side of parliamentary sovereignty, Blackstone's theory perpetuated the continuing tension between a supreme legislature and the idea of fundamental principles limiting its power. Hence, the theoretical foundations for a broad judicial review theory continued to exist in Blackstone's work, although he himself placed final emphasis upon Parliament's supremacy.[207]

Although the doctrine of parliamentary supremacy established itself as orthodoxy in 18th-century Britain, the tension evident in Blackstone resolved itself quite differently in the American colonies where an alternative theory of limited government prevailed.[208] As made clear in much colonial rhetoric in the years before the Declaration of Independence, Americans considered themselves to be

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201. PLUCKNETT, *supra* note 156, at 69.
202. *See generally* DICEY, *supra* note 3.
203. *See* GOLDSWORTHY, *supra* note 179, at 181-83.
204. 1 BLACKSTONE, *supra* note 3, at *90-91.
205. *Id*. at *91.
206. MCILWAIN, *supra* note 185, at 309; STONER, *supra* note 89, at 173-74.
207. *See* STONER, *supra* note 89, at 173-74.
208. *See* GOLDSWORTHY, *supra* note 179, at 204-15.

British subjects propounding established constitutional doctrines from which Parliament was departing.[209] Thus, American revolutionary thought represented a second crossroads in common-law constitutional development at which the colonies and Great Britain parted.[210] While Britain had already chosen the path of parliamentary supremacy, the American colonies decided upon the other course seeking to subject the legislature to binding foundational principles of higher law.[211] Therefore, American revolutionary ideas are an important part of common-law constitutional thought, and they remain relevant to contemporary constitutional debates in the United Kingdom regarding an alternative constitutional arrangement.[212]

Accustomed to home-rule and resenting parliamentary interference in domestic matters, as well as being informed by Cokian and Blackstonian ideas of limited and balanced government, American colonists championed common-law constitutional principles as restraining Parliament.[213] The situation in the colonies during the mid-1700s revisited constitutional issues debated in England throughout most of the 17th century. Plucknett states,

> The sovereignty of Parliament was by no means so obvious an implication of the [Glorious] Revolution to people who had not lived in London during the critical years from 1685 to 1688. It is a cardinal fact that to the eighteenth-century American the doctrine of a fundamental law was familiar, and regarded as quite consistent with the common law scheme of things.[214]

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209. *Id.*

210. The first crossroads was the struggle between the Crown and Parliament, culminating in the constitutional settlement of 1688.

211. *See* GOLDSWORTHY, *supra* note 179, at 204-15.

212. For a series of essays that illustrates just how fundamentally interrelated British and colonial American constitutional and political ideas were, see generally THREE BRITISH REVOLUTIONS: 1641, 1688, 1776 (J.G.A. Pocock ed., 1980). It is also interesting to note that there was some sympathy for colonial grievances in Great Britain. Of course, one must distinguish between British arguments in favor of fundamental principles offering moral limitations upon Parliament's authority in the colonies, as opposed to those Americans arguing for real legal restraints. GOLDSWORTHY, *supra* note 179, at 194-96; GOUGH, *supra* note 86, at 193-95; G.H. GUTTRIDGE, ENGLISH WHIGGISM AND THE AMERICAN REVOLUTION 63, 86-88 (1963); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 404 (1928).

213. The philosophical influences upon the advocates of independence were varied, and included not only common-law thought but such great political thinkers and natural law theorists as Locke, Puffendorf, and Montesqiueu among others. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-28 (enlarged ed. 1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-87, at 14-17 (1998).

214. PLUCKNETT, *supra* note 156, at 69-70; *see also* GOUGH, *supra* note 86, at 55-56 (describing how U.S. historians discussed the constitutional situation in England during the 17th century).

To Americans, Parliament required as much restraint as the Crown.[215] The colonists found this restraint in the ancient common law, which protected the traditionally held rights of Englishmen from arbitrary or unchecked government authority.[216]

Although the causes behind the American Revolution are complex, those colonists opposing British power generally had three main concerns relevant to the debate over limited government. First, the common law guaranteed liberty against arbitrary and discretionary encroachment by government.[217] Second, the common law dictated a constitutional order of balanced government, which was upset by the rise of parliamentary supremacy and ministerial authority.[218] Finally, colonists further asserted that the law also protected their tradition of internal self-government from interference by Parliament.[219] These grievances were more than political differences; dissident colonists insisted that they were fundamental principles of the English common law, and, besides restricting the Crown, restrained the authority of Parliament in America.[220] Thus, American revolutionary thought was firmly rooted in the English common law, but represented a different and competing development of it than had previously occurred in Great Britain.[221] In the American colonies, Coke's concept of judicial review grew in prominence and many Americans interpreted his decision in *Bonham's Case* as supporting the judicial invalidation of legislative acts contrary to first principles.[222]

The ideas of Whig writers also fundamentally shaped American views of British constitutional theory.[223] Blackstone's *Commentaries*,

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215. GOUGH, *supra* note 86, at 5-56.

216. *See* BAILYN, *supra* note 213, at 30-31.

217. *See id*. at 47.

218. *See id*. at 70, 76-77.

219. *See id*. at 124-25, 202-03.

220. *See id*. at 47, 70, 76-77, 124-25, 202-03; Corwin, *supra* note 212, at 401; WOOD, *supra* note 213, at 200-01, 352. Colonial arguments for home-rule, bound only together by Parliament's common imperial policies and allegiance to the Crown, arguably represent the first serious articulations of the later imperial system founded upon self-governing dominions. GOLDSWORTHY, *supra* note 179, at 207-08; MCILWAIN, *supra* note 185, at 358-60, 366-67; STONER, *supra* note 89, at 185-86.

221. WOOD, *supra* note 213, at 10 (writing that the Americans "revolted not against the English constitution but on behalf of it"). *See also id*. at 44-45; *Comparative Perspective*, supra note 41, at 5.

222. Corwin, *supra* note 212, at 394-95; GOLDSWORTHY, *supra* note 179, at 205-06; GOUGH, *supra* note 86, at 32; MCILWAIN, *supra* note 185, at 309-10.

223. BAILYN, *supra* note 213, at 30-31, 34-35, 43; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1128-29 (1987); *see also* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights?*, 69 N.C. L. REV. 421, 425-27, 447-48 (1991); Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J.

which was the preeminent legal treatise of the day, likely further educated American lawyers as to the concept of first principles restraining Parliament, regardless of his actual support of parliamentary sovereignty.[224] The apparent contradictions in his work and his own endorsement of a natural-law theory, combined with the colonists' acceptance of Coke and Whig ideology, invited an alternative interpretation of the common law that rejected parliamentary supremacy in favor of a constitution premised upon first principles.[225]

D. *The* Ultra Vires *Doctrine as Common-Law Judicial Review*

Notwithstanding the doctrine of parliamentary sovereignty, a limited form of judicial review exists in contemporary constitutional practice in the United Kingdom.[226] This method of review is limited in scope because it does not allow courts to invalidate primary legislation.[227] Instead, judicial review allows courts to review executive action to ensure its legality under act of Parliament and to strike down *ultra vires* acts.[228] This *ultra vires* power of review has increasingly allowed the judiciary to control the executive branch by keeping the executive within its statutorily granted limits of decision-

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POL. 51, 57, 62 (1986) (recognizing the influential role of Coke in American revolutionary thought, while at the same time noting a counter-movement favoring expansive legislative discretion as the best expression of popular will. This latter idea might arguably be similar to Dicey's later theory of parliamentary supremacy justified on democratic grounds, rather than on Blackstone's mixed constitution and natural law theories.); GOUGH, *supra* note 86, at 192; Corwin, *supra* note 212, at 4.

224. LOCKMILLER, *supra* note 186, at 169-70; STONER, *supra* note 89, at 162-63. It should be noted, however, that Blackstone was an opponent of American constitutional positions and clearly supported Parliament's right to legislate for the colonies as it pleased. His natural law theories in his widely read *Commentaries* were nevertheless subject to alternative interpretations. LOCKMILLER, *supra* note 186, at 172-74.

225. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5-6, 9-14 (1996); LIEBERMAN, *supra* note 96, at 51-52; *see also* Corwin, *supra* note 212, at 405, 407-08 (crediting Blackstone for also spreading the concept of legislative supremacy throughout the colonies). *But see* Ian Loveland, *Public Law, Political Theory and Legal Theory—A Response to Professor Craig's Paper*, 2000 PUB. L. 205, 205 (writing that "Blackstone's influence on the architects of the American revolution is well known, and it always struck me as anomalous that they would arrive at a political destination which granted legal protection from bare legislative majorities to basic moral values if that view had no root in Blackstone's own work").

226. *See* A.W. Bradley, *The United Kingdom, the European Court of Human Rights, and Constitutional Review*, 17 CARODOZO L. REV. 233, 233-37 (1995).

227. *See id*. at 233-34.

228. STANLEY DE SMITH ET AL., PRINCIPLES OF JUDICIAL REVIEW 95 (1999) ("In essence, the doctrine of *ultra vires* permits the courts to strike down decisions made by bodies exercising public functions which they have no power to make.").

making.[229] Therefore, the judiciary controls Parliament indirectly by interpreting enabling legislation that grants decision-making authority to the executive in a way compatible with fundamental principles.[230] The *ultra vires* doctrine simultaneously supports orthodox constitutional theory in two ways, and it contains elements conducive to developing itself further as a means to restrain Parliament. First, the *ultra vires* doctrine, formally at least, continues to emphasize parliamentary supremacy over fundamental principles, while reflecting Dicey's democratic norms and a narrower conception of Coke's and Blackstone's idea of judicial review.[231] Second, the doctrine is wholly judge-made, suggesting some degree of inherent, common-law power of review existing independently from parliamentary control.[232] This common-law power is subject to broader judicial development. The *ultra vires* doctrine thus illustrates the compatibility of the concept of judicial review with the common law, while containing, like Dicey's and Blackstone's theories, potential for far-reaching development placing restrictions upon Parliament.[233]

Over the years the *ultra vires* doctrine has become a fundamental part of British constitutional practice. By using the *ultra vires* doctrine, Courts have exercised significant control over executive acts and administrative discretion.[234] The purpose behind this brand of judicial review is rather straightforward—courts review executive actions to ensure that those actions remain within executive statutory authorization.[235] Any acts judged by the courts to go beyond such grant of power are consequently void as *ultra vires* the agency's or minister's legal powers.[236] Therefore, as Jeffrey Jowell states, "[u]ltra vires rests securely and wholly upon the supremacy of Parliament and leaves no doubt that the courts in [the] system are subordinate to the legislature."[237] The doctrine emphasizes the legality of government decisions, rather than the substantive content of either the decisions or the authorizing primary

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229. While there is a conceptual difference between secondary legislation which makes rules and administrative adjudication which settles particular claims, this discussion will refer to them both generally in the context of judicial review. DE SMITH & BRAZIER, *supra* note 7, at 337-38.

230. *See id*.

231. *Vires and Vacuums*, *supra* note 117, at 448.

232. DE SMITH ET AL., *supra* note 228, at 96.

233. *Id*.

234. In doing so, judges "stand in a very real sense as the ultimate arbitrator of the balance between the demands of effective government and individual interests." DE SMITH & BRAZIER, *supra* note 7, at 506.

235. *See generally* DICEY, *supra* note 3; 1 BLACKSTONE, *supra* note 3.

236. DE SMITH & BRAZIER, *supra* note 7, at 518.

237. *Vires and Vacuums*, *supra* note 117, at 448.

legislation, by seeking to determine and apply Parliament's intent.[238] By seeking only to give effect to Parliament's will, courts must necessarily forego such substantive review. As the *ultra vires* doctrine rests upon legislative intent and the question of legality, it promotes a manner of judicial review that is traditionally formalistic.[239] Consistent with such formalism, courts adjudicate in a manner intended only to interpret and apply the statute as written without assessing the value of its content.[240] To refuse to acknowledge or uphold government action, otherwise authorized by Parliament, would be to ignore the statute in question, and violate the doctrine of legislative supremacy.[241] This formalistic method of judicial review reflects Blackstone's and Dicey's preference for positive legislation over unwritten legal principles intended to bind the legislature.[242]

Ultra vires review supports the doctrine of parliamentary sovereignty by recognizing courts as obligated to uphold and apply parliamentary intent.[243] In Diceyan terms, courts could be said to defer to parliamentary democracy, thereby recognizing that the electorate, as political sovereign, possesses ultimate authority to determine the public good as expressed by the legally sovereign but representative Parliament.[244] Much criticism against the extension of judicial review actually relies upon such a democratic theory of parliamentary sovereignty. According to those concerns, giving full powers of review to the courts would be "countermajoritarian" or "anti-political," and elevate un-elected, elite, and democratically isolated judges over the will of the politically sovereign electorate.[245] This concept of *ultra vires* review fits well with Dicey's idea that the will of the electorate is the legitimizing force behind Parliament's actions.[246] As Parliament expresses the wishes of the electorate, at least ideally, the courts should therefore defer to it in determining the

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238. *See id.* at 449; Paul Craig, *Competing Models of Judicial Review*, 1999 PUB. L. 428, 428-29 [hereinafter *Competing Models*]; Mark Elliott, *The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review*, 115 LAW Q. REV. 119, 120 (1999) [hereinafter *Justifying Judicial Review*].

239. *Vires and Vacuums, supra* note 117, at 448.

240. DE SMITH & BRAZIER, *supra* note 7, at 516 ("[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation"); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467, 467 [hereinafter *Analytical Framework*].

241. *See generally* DICEY, *supra* note 3.

242. *Id.*

243. Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 1996 CAMBRIDGE L.J. 122, 136-37 [hereinafter *Fig Leaves*]; *Vires and Vacuums*, *supra* note 117, at 448-49.

244. *See generally* DICEY, *supra* note 3.

245. Richard Mullender, *Parliamentary Sovereignty, the Constitution, and the Judiciary*, 49 N. IR. LEGAL Q. 138, 146, 148 (1998); *Fig Leaves*, *supra* note 243, at 140.

246. DICEY, *supra* note 3, at 39-40.

public interest. Their role in interpreting and applying legislation as written by Parliament recognizes the public good as best determined politically, not judicially.[247] While *ultra vires* review is compatible with orthodox theory in that it gives effect to parliamentary intent, it still allows courts broad room to interpret legislation consistently with common-law and constitutional principles, such as the rule of law.[248] Although committed in theory to apply the will of Parliament, courts can take this interpretive license with statutes that are vague or do not expressly abrogate the common law or the rule of law. They can accordingly construe them strictly as to constrain executive decision-making that might violate fundamental norms. In the end, *ultra vires* review reflects Blackstone's and Dicey's preference for positive law should it conflict with higher principles. The doctrine remains compatible, however, with their invocation of higher principles—in the form of natural law or democratic accountability—as the legitimizing force behind man-made law, which courts can apply in the absence of express language to the contrary.[249] It also accommodates Dicey's imperative that court's presume Parliament to legislate in accordance with the rule of law and interpret legislation as to constrain executive discretion.[250] Courts have thus traditionally implied to Parliament the intent to legislate consistently with fundamental principles of law, as did Blackstone and Dicey.[251] This interpretive aspect of *ultra vires* judicial review is consistent with a narrow understanding of Coke's decision in *Bonham's Case*—an understanding where judicial reference to first principles is an interpretive tool, ultimately subordinate to Parliament's intent as expressed in statute.[252]

The interpretive process used by the judiciary in *ultra vires* review strains the boundaries between formalistic and substantive scrutiny of secondary and primary legislation. While courts invoke concepts such as natural justice, the rule of law, or the common law in interpreting legislation and reviewing administrative actions, they often do so to effectively manipulate Parliament's intent and to adjudicate upon substantive matters.[253] This tendency suggests two

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247. DE SMITH ET AL., *supra* note 228, at 20-21, 169-70.

248. *Fig Leaves*, *supra* note 243, at 134-35.

249. *Id*.

250. DICEY, *supra* note 3, at 413-14; Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 CAMBRIDGE L.J. 129, 142-45 (1999).

251. Elliot, *supra* note 250, at 143.

252. *See* Dr. Bonham's Case, 77 Eng. Rep. 638 (1610).

253. Natural justice, while an abstract concept, essentially requires "fair play" during the process of executive decision-making. DE SMITH ET AL., *supra* note 228, at 246-47, 275. As such, "'natural justice' is said to express the close relationship between the common law and moral principles. . . ." *Id.* at 249; DE SMITH & BRAZIER, *supra* note

other points. First, courts may exercise the power of *ultra vires* review, not from Parliament's implied intent that they do so, but from their own inherent and independent common-law authority. Second, by arguably exercising substantive review in the guise of the *ultra vires* doctrine, courts are effectively following an alternative common-law theory of a limited Parliament. The *ultra vires* doctrine is already developing in a manner potentially amenable to a more robust practice of judicial review that restrains Parliament, while maintaining continuity with the common-law constitutional tradition.

The justification for *ultra vires* review has significant implications for the British Constitution, by either supporting or weakening the doctrine of parliamentary sovereignty.[254] As already mentioned, the *ultra vires* doctrine claims that courts enforce Parliament's will as expressed in statute by ensuring that secondary legislation is legally made; they do not engage in substantive review of either.[255] This dedication to formalism touches upon the manner in which judicial review is exercised, but still leaves unclear the constitutional source of the courts' power. An emphasis upon parliamentary intent suggests that *ultra vires* review rests only upon an assumption that Parliament intends the judiciary, as a subordinate institution, to interpret legislation consistently with the common law and the rule of law to restrict executive discretion.[256]

In addition to the notion that *ultra vires* review serves to preserve parliamentary authority against executive as well as judicial encroachment, the underlying normative claim that Parliament is dedicated to the rule of law remains. T. R. S. Allan asserts,

> [T]he rule of law constitutes a bulwark against the deprivation of liberty through exercise of arbitrary power. It encompasses principles of procedural fairness and legality, equality and proportionality. Fully articulated, the rule of law amounts to a sophisticated doctrine of constitutionalism, revealing law as the antithesis of arbitrariness or the assertion of will or power.[257]

7, at 527-28. The two bedrock principles of natural justice, from which others stem, are that concerned parties have the opportunity to be heard and that the adjudicator should be unbiased. These principles are embedded in the common law. *Id.* at 250; *Vires and Vacuums*, *supra* note 117, at 452-53.

254. *Vires and Vacuums*, *supra* note 117, at 449.

255. *Id.* at 448.

256. DE SMITH, ET AL., *supra* note 228, at 18; *Justifying Judicial Review*, *supra* note 238, at 119-20; *Public Law*, *supra* note 54, at 236. This means, of course, that courts presume that Parliament does not intend to interfere with substantive or procedural common-law rights except where expressly indicated or arising by necessary implication. *Id.* at 187-91; T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 266 (1993) [hereinafter LEGAL FOUNDATIONS].

257. *Consent and Constitutionalism*, *supra* note 123, at 223.

Dicey proposed a similar concept to the rule of law as a guide to Parliament's exercise of otherwise supreme legislative authority.[258] In the context of judicial review, it is consistent with this view to assume that Parliament would intend the executive to exercise its grant of authority under the same constraint and subject to scrutiny by the courts.[259] Lord Woolf comments,

> The sovereignty of Parliament is but an important aspect of the rule of law. There are other principles which are part of the rule of law, for example, that the public are entitled to have resort to the courts; that the courts are for the resolution of their disputes; that it is the courts' responsibility to protect the public against the unlawful activities of others including the executive; and that it is the responsibility of the courts to determine the proper interpretation of the law. Just as the courts respect Parliament's sovereignty, so the courts are entitled to assume that, absent very clear language to the contrary, Parliament, having passed legislation, does not intend to interfere with the responsibilities of the courts under the rule of law. Accordingly, when interpreting and applying the legislation, the courts assume Parliament does not intent to interfere with the court's role in upholding the rule of law.[260]

The rule of law acts as a check upon Parliament, both internally as a guide to its members, and externally as a standard by which the public perceives its action; it also extends to limit executive action.[261] The rule of law thus interacts with parliamentary supremacy to justify the *ultra vires* doctrine. In the end, however, parliament's imputed delegation of review powers to the courts remains a political matter. If Parliament favored broad or unfettered executive discretion, it could theoretically legislate to strip the judiciary of any competence to declare secondary legislation void, although such a possibility is politically unrealistic to say the least.[262] Under this approach, the *ultra vires* doctrine rests upon no more than a judicial assumption that Parliament has a general and unstated intent for courts to apply it; it therefore exists only at the sufferance of Parliament.[263]

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258. DICEY, *supra* note 3, at 203.

259. *Id*. at 202-03, 406-14; *Comparative Perspective*, *supra* note 41, at 17.

260. Harry Woolf, *Judicial Review—The Tensions Between the Executive and the Judiciary,* 114 LAW Q. REV. 579, 581 (1998) (footnotes omitted) [hereinafter *Tensions*]; *Comparative Perspective*, *supra* note 41, at 17 (writing that "[t]he rule of law, and the values on which it is based, form a fundamental part of the constitutional environment within which the British doctrine of legislative supremacy subsists").

261. *See Comparative Perspective*, *supra* note 41, at 17.

262. *See* Sir Stephen Sedley, *The Sound of Silence: Constitutional Law Without a Constitution*, 110 LAW Q. REV. 270, 285 (1994) [hereinafter *Sound of Silence*]. For an example of how courts in the past have avoided Parliament's attempts to limit judicial review, see the case of *Anisminic v. Foreign Compensation Commission,* [1969] 2 A.C. 147 (H.L.).

263. DE SMITH ET AL., *supra* note 228, at 17, 115-16.

Although the political reality may be that Parliament would never seriously curtail or eliminate the power of *ultra vires* review, the position that the doctrine stems only from implied legislative intent presents serious obstacles for its further development. From this point of view, the judiciary already seems to have stretched its judicial review power to the constitutional limit. The grounds upon which a court may now declare an action to be *ultra vires* are nevertheless rather wide. Although a court can only declare an executive action to be outside of the statutory grant of authority, it may scrutinize both executive action and the statute in question in a manner bordering upon substantive review.[264] The *ultra vires* doctrine has developed in a manner so that courts may review executive actions on grounds other than legality, such as irrationality and procedural impropriety, thus delving into the decision-making process itself.[265] Irrationality includes decisions that are also unreasonable, while procedural impropriety includes a violation of both statutory requirements and natural justice. Violations of either of these grounds could include abuse of discretion, failure to consider relevant facts or evidence, or an absence of reasons.[266] In reviewing executive actions on these criteria, however, courts continue to elaborate upon a presumed parliamentary intent that executive action is authorized only if it conforms to such principles.[267] Again, such an assumption stems from a fundamental understanding by the judiciary that Parliament desires to legislate and constrain executive action in conformity with the rule of law. In theory, these inquiries continue to focus solely on Parliament's intent and not on motivating considerations or purposes. To pass substantive judgment upon executive actions permissible under statute, not to mention upon the primary legislation itself, would be to challenge the will of Parliament and require an independent constitutional footing from which to assert the power of review.

The gray area between the procedural and substantive aspects of irrational or unreasonable decision-making suggests that *ultra vires* review based upon parliamentary intent may not adequately explain judicial practice. An honest assessment of the substantive issues that arise under concepts such as unreasonableness and a belief that courts increasingly foray into a judicial approach, are antithetical to orthodox *ultra vires* theory, and potentially the doctrine of parliamentary sovereignty as well.[268] Another indication that the

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264. *Id.* at 130-42.
265. *Id.*
266. *Id.* at 147-48.
267. *Id.*
268. Of course, the question remains whether such judicial activity is inappropriate as contrary to Parliament sovereignty or represents a new direction in constitutional law that is to be accepted or embraced. *See Vires and Vacuums*, *supra*

parliamentary foundations of the *ultra vires* doctrine may be an inadequate justification for its existence is that courts exercise review over executive acts stemming from prerogative claims having no direct connection to statutory authorization.[269] Such judicial authority could only result from the common law itself. It also presents the question of how a review of prerogative actions could arise from the common law if *ultra vires* remains based upon parliamentary intent. The seemingly substantive elements hiding within the *ultra vires* doctrine, as well as with the review of prerogative executive actions, suggest that the power of review may very well exist independently of parliamentary intent.[270]

It is also clear that the *ultra vires* doctrine is a judicially created one. That Parliament desires judicial review of executive actions is an intention that has been wholly implied by the courts. The grounds of review have similarly developed through the judicial process alone and not through any parliamentary legislation.[271] Rather than invoking an imagined parliamentary authorization for *ultra vires* review, one could instead stress the doctrine's judicial origins as evidence of the courts' independence from Parliament. Even though courts still review secondary legislation only for compliance with Parliament's intent—rather than any inherent substance—increasingly creative methods of statutory interpretation that promote concepts such as administrative fairness and reasonableness further suggest an inherent judicial authority to practice a broader scope of review. *Ultra vires* review, as an original creation of the courts and having no express origins in legislative intent, could conceivably stand as a common-law restraint upon parliamentary authority. The fiction that the *ultra vires* doctrine derives from Parliament's intent consequently has been characterized as nothing more than a "fig leaf"; it nominally supports the doctrine of parliamentary supremacy while concealing the fact that it is an independent, common-law judicial power.[272] This common-law

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note 117, at 452-53; Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, 2000 PUB. L. 671, 673 [hereinafter *Constitutional Judicial Review*].

269. *See Constitutional Judicial Review*, *supra* note 268, at 673.

270. DE SMITH ET AL., *supra* note 228, at 62-63. *See also id.* at 175-82 (for a discussion of the review of prerogative powers); *Constitutional Theory*, *supra* note 154, at 20; Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review?*, 1987 PUB. L. 543, 546-51.

271. *Fig Leaves*, *supra* note 243, at 134-35; Andrew Halpin, *The Theoretical Controversy Concerning Judicial Review*, 64 MOD. L. REV. 500, 505 (2001).

272. In the context of discussing Coke, Blackstone, and Dicey, Allan writes,

> We should therefore concede to Parliament its law-making supremacy, but within the overall restraints of the constitutional scheme as a whole. Statutes, properly enacted, are entitled to great respect, but not unlimited deference: the warmth of judicial reception may legitimately vary with the gravity of their

position enhances the judiciary as an independent branch of government inherently capable of substantively scrutinizing executive acts, as well as the authorizing statute.[273]

A common-law justification for judicial review, however, does not necessarily entail the end of the doctrine of parliamentary supremacy. Just as Parliament has the authority to alter or abolish principles of the common law, the Parliament could also claim the right to modify or constrain judicial review based upon the same grounds. Therefore, an inherent and independently derived power of review might remain subject to Parliament in some degree.[274] This sort of review remains consistent with, if not nearly identical to, a narrow interpretation of Coke's judicial review theory and Blackstone's reconciliation of natural law with positivism. There is also nothing inconsistent between this position and Dicey's view that parliamentary sovereignty exists alongside the rule of law.[275] A common-law review power would have more in common with Coke and Blackstone than orthodox *ultra vires* doctrine, as it would recognize higher constitutional principles as an independent, even if subordinate, source of law. Courts might very well possess an independent power to review legislation based upon some higher legal standard, such as the rule of law or even a constitutional document, yet exercise that authority subject to ultimate legal sovereignty in Parliament. Although positive acts of Parliament would still prevail, courts might require express declarations to depart from constitutional principles, while even more strictly interpreting legislation so as to better protect procedural or substantive rights. This version of common-law review, compatible as it is with Coke, Blackstone, and Dicey, represents the resurgence of a theory of judicial review that has long roots in British legal history.

Without legislative intent as the sole benchmark for the legality of executive decision-making, courts could eventually turn to other

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> assault, if such it be, on settled rights and expectations. And the point at which restrictive interpretation in particular cases should be described as "disapplication" cannot be given philosophic precision.

LEGAL FOUNDATIONS, *supra* note 256, at 269-70 (footnotes omitted). *See id.* at 287; DE SMITH ET AL., *supra* note 228, at 112-13 (not actually premising *ultra vires* review on the common law, but basing it upon independent "principles of lawful or legitimate administration"); *Constitutional Theory*, *supra* note 154, at 23; *Fig Leaves*, *supra* note 243, at 122-23 (explaining well the arguments for a common-law power of review, and clearly supporting parliamentary sovereignty; this demands, in his view, the continued acceptance of the *ultra vires* doctrine based upon implied legislative intent); *Law and Democracy*, *supra* note 137, at 79.

273. *Vires and Vacuums*, *supra* note 117, at 449.

274. The practical ability of Parliament to restrict the *ultra vires* doctrine, however, would remain as slim as it now does, due to political barriers and widespread acceptance of the propriety of some degree of review. *Fig Leaves*, *supra* note 243, at 126-27; Halpin, *supra* note 271, at 501.

275. *Competing Models*, *supra* note 238, at 445.

fundamental constitutional principles, such as the rule of law, as substantive limitations that take precedence over Parliament's express intent. The grounds of review based upon procedural unfairness and unreasonableness already seem to possess some substantive content.[276] A development of this sort would not necessarily subvert democracy by restricting the will of the legislature. On the contrary, imposing substantive restrictions on parliamentary power can "vindicate the democratic ideal," which itself is premised upon individual liberty.[277]

The rule of law is also inextricably embedded in the common law. Lord Irvine suggests,

> [T]he line which distinguishes adjudication on the *validity* of legislation from questions of *interpretation* is not watertight. . . . The *interpretive* framework which exists in the U.K. legal order is based on a system of morality which can be traced back to the roots of the common law. . . .[278]

The continuity lends strong credibility to the recognition of a common-law basis for judicial review because it still represents a strain of English legal tradition, which is also an alternative that might have profound effects upon the Constitution.[279] Indeed, one might continue to debate whether the rule of law, for example,

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276. *Consent and Constitutionalism*, *supra* note 123, at 223; *Vires and Vacuums*, *supra* note 117, at 455-56.

277. Sir John Laws, *Wednesbury, in* THE GOLDEN METAND AND THE CROOKED CORD: ESSAYS ON PUBLIC LAW IN HONOR OF SIR WILLIAM WADE QC 195-96 (Christopher Forsyth & Ivan Hare eds., 1998); *Constitutional Judicial Review*, *supra* note 268, at 675.

278. *Comparative Perspective*, *supra* note 41, at 20. Allan recognizes an inherent tension in such a prospect between the judicial and policy-making roles. LEGAL FOUNDATIONS, *supra* note 256, at 205-06. He writes,

> [i]t would be a mistake to belittle the nature of this challenge since it strikes at the core of a liberal conception of the rule of law. It questions the extent to which a democratic polity, incorporating the basic elements of the separation of powers, can consistently permit considerations of justice and fairness . . . to govern the exercise of political power.

Id. It is because of this problem that common-law principles, along with their underlying moral foundations, remain essential to guide substantive adjudication and prevent inappropriate judicial discretion. *See id.* at 289-90.

279. Lord Irvine of Lairg, *Judges and Decision-Makers: The Theory and Practice of Wednesbury Review*, 1996 PUB. L. 59, 61 [hereinafter *Wednesbury Review*]. Lord Irvine writes in regard to an interpretation of Coke promoting full judicial review that "[s]uch notions form no part of the modern law. . . . They became obsolete when the supremacy of Parliament was finally established by the revolution of 1688." *Id.* However, the notion of a restrained Parliament subject to judicial review is far from obsolete; on the contrary, it seems to be increasingly relevant to contemporary developments, as evidenced by its resurgence within legal debates. The similarities between *ultra vires* doctrine and the ideas of Coke and Blackstone have already been noted above.

primarily guarantees only procedural due process, or has more substantive content constraining the scope or subject matter of government action.[280] In any case, an independent power of judicial review might allow courts to invalidate executive acts, while refusing to give effect to a clear intent of Parliament that violates fundamental principles of law.[281] Courts would thereby shift from a mere interpretive judicial approach, which is aimed simply at assessing the compliance of executive action with parliamentary intent, to one focused upon the substantive validity of the authorizing primary legislation.[282]

By basing judicial review upon the common law rather than on an implied parliamentary intent, courts should have more flexibility and confidence in expanding the *ultra vires* doctrine in the way discussed above. Common-law review should allow courts to feel more confident in scrutinizing secondary or even primary legislation against higher legal principles, even if Parliament still claims the theoretical authority to override judicial determination. On the other hand, a continued reliance on the doctrine upon implied legislative intent would limit courts' abilities to expand judicial review powers by mooring them to Parliament.[283] Therefore, under common-law review more opportunities for dynamic constitutional change may exist when courts confront legislative infringement of the rule of law, or the government's obligations under the European Union and the European Convention on Human Rights.[284] Cut loose from the

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280. The concept of the rule of law, while it certainly does mandate procedural standards of fairness, nevertheless likely suggests the adherence to certain substantive values. "[A] bare notion of formal legality cannot furnish a useful conception of the rule of law." *Consent and Constitutionalism*, *supra* note 123, at 222; *see also id.* at 231-34. Craig counters that "[t]he fact that a particular court has recourse to moral considerations or conceptions of justice or fairness when deciding a case tells one nothing . . . as to whether that court is reasoning in a manner consonant with a positivist or non-positivist view of adjudication." *Analytical Framework*, *supra* note 240, at 482-83. *See also* LEGAL FOUNDATIONS, *supra* note 256, at 209; *Wednesbury*, *supra* note 277, at 199 (writing that "[t]he common law's challenge is now to define the substantive content of the rule of law. . . ."). For a review of procedural and substantive notions of the rule of law, see generally *Analytical Framework*, *supra* note 240.

281. *Analytical Framework*, *supra* note 240, at 206 (writing that "[t]he scope of judicial review should be related to the evident risk of abuse of power"); *Fig Leaves*, *supra* note 243, at 128-29 (suggesting that "the abandonment of ultra vires inevitably involves the judicial review court in indirectly challenging legislative supremacy"). *Id.* at 123, 134.

282. This is the distinction between judicial review in the United States and the United Kingdom. "While the emphasis [in the United States] is on morality as a determinant of the *validity* of legislation, the emphasis in the United Kingdom is on morality . . . as a determinant of the *meaning* of legislation." *Comparative Perspective*, *supra* note 41, at 20.

283. *Justifying Judicial Review*, *supra* note 238, at 119.

284. Such change would likely occur through an evolutionary process. "Judicial review of legislation can be assumed by a more drawn-out series of developments that

limitations that a legislatively implied review power imposes, courts could continue to develop the doctrine in a way that does not worry about framing it in terms supportive of parliamentary supremacy. A greater institutional independence of the judiciary may be desirable considering the power of an executive backed by a majority in Parliament. To better resist the power of the executive, "[i]t can therefore be argued that it is even more important for the courts to develop the doctrines of judicial review on the common law model."[285] Thus, common-law review enhances the constitutional position of the judiciary.

The idea that courts have an area of legal competence arising independently of Parliament means that the judiciary is equal to Parliament. Sir Stephen Sedley has suggested that such a situation may already exist with "dual sovereignty" exercised through both Parliament and the judiciary.[286] This position resembles the constitutional arrangement suggested by a broad interpretation of Coke's opinion in *Bonham's Case* and a counteremphasis upon Blackstone's natural-law theory.[287] It can also be reconciled with Dicey by recognizing the rule of law as an aspect of democratic constitutionalism that takes precedence over parliamentary acts harmful to liberty. In this sense, the establishment of a common-law power of review furthers what Lord Steyn has pointed out to be three interacting constitutional principles: the separation of powers, the rule of law, and constitutionalism.[288] The judiciary could, for instance, restrain Parliament by substantively reviewing primary legislation for compliance with the rule of law, thereby ensuring that

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allows time for the readjustment of ideas, rather than by the single stroke of Chief Justice Marshall's pen as in the early years of the United States." Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL LEGAL STUD. 323, 328 (2001).

285. *Public Law*, *supra* note 54, at 237; Williams, *supra* note 284, at 337 (finding the lack of a clear separation of powers to be an impediment to judicial review: "Parliamentary sovereignty means, in essence, the supremacy of the executive under our government system, and the confusion of legislative and executive functions (especially when the senior judges are compromised) makes it all the more difficult for the courts to assert judicial review."). A common-law justification for judicial review should ameliorate this problem somewhat by giving the judiciary more independence from both the legislature and executive. Barendt, *supra* note 49, at 605.

286. Sir Stephen Sedley, *Human Rights: a Twenty-First Century Agenda*, 1995 PUB. L. 386, 388-89 [hereinafter *Human Rights*]; Lord Woolf, *Droit Public—English Style*, 1995 PUB. L. 57, 69 [hereinafter *Droit Public*] (also recognizing the courts and Parliament as "partners both engaged in a common enterprise involving the upholding of the rule of law").

287. *See* Mullender, *supra* note 245, at 143-44.

288. Lord Steyn, *The Weakest and Least Dangerous Department of Government*, 1997 PUB. L. 84, 86; *Vires and Vacuums*, *supra* note 117, at 457-58 (similarly suggesting that the concept of "*vires*" can rest upon broader democratic and constitutional principles providing a framework for government action).

legislation is compatible with democratic constitutional values. Common-law review allows for many options of interpretation and application, and arguably contains the theoretical seeds to grow into a full power to invalidate parliamentary statutes. For those reasons, common-law based judicial review offers great potential for constitutional growth and the effective enforcement of binding principles against Parliament.

E. *Summary*

The doctrine of parliamentary sovereignty has remained the foundation of the British Constitution in modern times. Growing out of the English Civil War, the doctrine established Parliament as the supreme legal authority in England.[289] Blackstone offered in his *Commentaries* what became the first authoritative justification for this doctrine. He articulated a balanced constitution, complemented by a separation between Parliament's legal authority and the moral authority of natural-law principles.[290] Acknowledging the supreme will of Parliament, against which no otherworldly power could legally prevail, Blackstone also stressed natural law as the morally supreme and legitimizing force behind man-made law.[291] Any law that did not conform to these higher principles was invalid.[292] Yet Blackstone's juxtaposition of these two positions created a tension that still exists in the unwritten Constitution between higher order law that morally limits a Parliament that legally has no restraint on its actions. Blackstone attempted to side-step this problem by finding that natural law not only prescribed positive law to meet its requirements, but also by suggesting that the English common-law and parliamentary act were actually descriptive of these higher principles.[293] This conformity resulted from the search for the public good, as it occurred not only in the judicial development of the common law, but also in the political process within Parliament. Furthermore, unlimited legal authority in Parliament was practically restrained through the competing interests of the Crown, Lords, and Commons. Blackstone therefore preferred to pursue the public good, and thus the search for first principles, through the political process.[294]

Still, the centrality of natural law to Blackstone's theory provided an alternative foundation for judicial power to limit Parliament legally based upon first principles. Such a power of

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289. DICEY, *supra* note 3, at 41.
290. *See supra* text accompanying note 11.
291. *See* source cited *supra* note 12.
292. *See supra* text accompanying note 78.
293. *See supra* text accompanying notes 80-84.
294. *See supra* text accompanying notes 95-96.

judicial review represented a competing view of the British Constitution. This alternative vision had been suggested earlier by Coke in *Bonham's Case*, and incited advocates within England as well as the American colonies who opposed unfettered parliamentary authority.[295] Blackstone, while ultimately preferring the supremacy of Parliament, nevertheless formulated an orthodox constitutional theory that contained within it the doctrinal foundations for some measure of judicial review that could conceivably restrain Parliament.[296]

Later, Dicey modified Blackstone's theory in two significant ways. While reinforcing the doctrine of parliamentary sovereignty, Dicey's recognition of the balanced constitution was in many ways hollow. The House of Commons had long since come to dominate the government, making any justification of parliamentary sovereignty based upon the balanced constitution realistically untenable. Dicey recognized the power of the Commons and emphasized its democratic origins.[297] Parliament was legally sovereign and all-powerful; however, it remained accountable to the electorate.[298] The electorate was the political sovereign even without legal authority, and the pursuit of its interest legitimized parliamentary acts.[299] Under Dicey's democratic constitutional model, the electorate became morally but not legally superior to Parliament.[300] Furthermore, Dicey departed from Blackstone by giving no place to natural law.[301] By elevating the electorate to a position of moral superiority to the legislature, however, Dicey effectively substituted democratic will for natural law.

Just as Blackstone assumed that parliamentary acts could satisfy natural law principles by acting for the public good, Dicey suggested that legislating for the public good presumptively coincided with electoral will.[302] Also, external political pressures and internal normative values realistically restrained Parliament so that judicial review remained subordinate to the political process. Dicey further justified unlimited parliamentary power upon its value as a democratic expression of electoral will.[303] Thus, Dicey remained reluctant to explore the possibility that Parliament might act against the public interest, although he briefly admitted that in such a case

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295. 1 BLACKSTONE, *supra* note 3, at *160-61.

296. *But see supra* text accompanying note 95 (for argument that parliamentary restraint would not be found in the courts).

297. *See supra* text accompanying note 101.

298. *See supra* notes 101, 107 and accompanying text.

299. *See supra* note 102 and accompanying text.

300. *See supra* text accompanying note 106.

301. *See supra* text accompanying note 102.

302. *See supra* notes 105-16 and accompanying text.

303. *See supra* notes 105-16 and accompanying text.

Parliament would prevail.[304] Dicey also implied that the interests of Parliament and the electorate might not necessarily agree, as indicated by his insistence that Parliament was in no way legally bound to act in trust for the electorate.[305] Dicey's democratic theory invites arguments that the normative significance of the public good and fundamental democratic ideals might indeed restrain Parliament from acting against them.

The works of Blackstone and Dicey, though contributing to the development of modern orthodox constitutional theory, nevertheless contain theoretical undercurrents supportive of an alternative constitutional order. The concept of a limited Parliament, subject to some review power in the courts, represents a distinct if non-dominant strain of common-law constitutional thought. The tensions found in Coke, Blackstone, and Dicey, however, continue to exist in the form of *ultra vires* judicial review. For years, courts have been reviewing and even invalidating secondary legislation as *ultra vires* a statutory grant of power. Ostensibly, the *ultra vires* doctrine supports parliamentary sovereignty by ensuring that executive actions do not go beyond the limits that Parliament intended. Yet courts regularly interpret statutes creatively, and review executive actions upon such abstract grounds as procedural unfairness and unreasonableness as to foray into substantive review. Such practices elevate the constitutional position of the judiciary and weaken the parliamentary sovereignty doctrine. Furthermore, the *ultra vires* doctrine is wholly judge-made. Some might argue that it nonetheless represents an implied intent of Parliament that courts promote the rule of law. However, a realistic assessment suggests that *ultra vires* review is a common-law doctrine. The implications of this common-law origin—even if powers of review initially remain subordinate to the express will of Parliament—is that the judiciary can better assert itself as an independent branch of government. The judiciary would also have more possibilities to develop review doctrines free from a theoretical reliance upon the legislature, and could potentially assert a right to invalidate acts of Parliament.

Ultra vires review, then, presently blurs the line between substantive and formalistic adjudication, and increasingly calls into question the institutional place of the judiciary and the continuing validity of parliamentary supremacy. The recognition of the common-law origins of *ultra vires* review and its potential for broader development is also consistent with some of the ideas of Coke, Blackstone, and Dicey. Just as orthodox constitutional theory contains within it theoretical elements supporting a limited

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304. *See supra* text accompanying note 115.
305. *See supra* text accompanying note 106.

Parliament subject to a common-law power of judicial review, it can likewise accommodate written constitutional norms.

III. THE CONSTITUTIONALIZATION OF WRITTEN TEXTS

A. *Characteristics of a Constitutional System*

As discussed in Part II, 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 is, therefore, not an originating source of either parliamentary limits or judicial review power. Rather, it is a means for expressing those principles of limited government. Constitutional texts 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 written and unwritten elements.

This Section suggests that constitutions differ in how strictly or exclusively they guide or limit government action. They can be paradigmatic through the assertion of legally non-binding, but generally observed, principles of good governance, or definitive in that they establish enforceable parameters beyond which government cannot act. They also exhibit varying degrees of rigidity and flexibility in their ability to change, whether through legislative measures, adjudication, or special amending procedures. Furthermore, these characteristics can equally describe written or unwritten constitutions. The defining feature of a written constitution, therefore, is its normative value as an instrument expressing and memorializing the institutional arrangements and their substantive boundaries, which exist as normative assumptions about government.

1. Paradigmatic and Definitive Constitutions

One of the fundamental purposes of a constitution is to order the political life of a society by providing a system of rules according to which government institutions function. This framework may include the determination of how laws are created; the relative

powers between legislative, executive, and judicial branches; or the recognition of certain fundamental rights possessed by individual citizens. A constitution may also provide general statements of principles establishing a context within which government and laws operate.[306] A constitution, then, speaks to the issues of both institutional arrangement and substantive governing principles. As Walter F. Murphy wrote, "[t]he goal of a constitutional text must . . . be not simply to structure a government, but to construct a political system, one that can guide the formation of a larger constitution, a 'way of life' that is conducive to constitutional democracy."[307] Murphy's definition includes two important observations concerning the nature of a constitution. First, a constitution has the dual purpose of both arranging government institutions and establishing their roles. In most western constitutions, this involves some notion of separation of powers between legislative, executive, and judicial branches.[308] Second, there is a distinction between a constitutional text and the constitution itself. This distinction, however, does not discount a functional relationship between the two, as an enduring constitutional text must correspond with or express underlying normative ideals about the nature of government. A constitution may also exist in unwritten form, as has traditionally been the case in the United Kingdom. Yet this unwritten nature may blur the line between more abstract constitutional principles and the formal articulation of rules.[309]

Generally, a constitution tends to be either paradigmatic or definitive in how strictly it orders the political system. To say that a constitution is paradigmatic suggests that it is a statement of principles to which government action should adhere, but which act as guidelines rather than legally enforceable rules.[310] A paradigmatic

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306. Walter F. Murphy identifies four possible functions of a constitution as a charter for government, a guardian of rights, a symbol of political or national consciousness, or as a means of "allowing a nation to hide its failures behind idealistic rhetoric." Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *excerpts reprinted in* COMPARATIVE CONSTITUTIONAL LAW 195, 197 (Richard C. Clark et al. eds., 1999) [hereinafter *Constitutions*].

307. Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 129 (1991) [hereinafter *Constitutional Democracy*].

308. While British political thought has long had the notion of a separation of executive and legislative functions, see JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 80-88 (Prometheus ed. 1986) (1690), Montesquieu offered one of the most notable and influential arguments for a tri-partite division that included the judiciary. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156-64 (Anne Cohler et al. trans., 1989).

309. PHILLIPS ET AL., *supra* note 1, at 8-9; A.W. BRADELY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 8 (12th ed. 1997).

310. The choice of the word "paradigmatic" for this characteristic is due to a constitution's "exemplary" nature. As conceptualized in this Article, the constitutional paradigm is not only representative of how government regularly functions in fact, but

constitution operates primarily upon the underlying normativity, finding salience in its continued representation of basic values held by both private citizens and members of government. It creates a pattern or an ideal model for the workings of government, including institutional arrangements, substantive government powers, and rights concepts. Whatever arrangements a paradigmatic constitution makes in this regard, they are nothing more than non-binding statements of principle guiding, but not legally requiring, government action or forbearance. The government remains free to disregard the principles promoted by the constitution. Therefore, government actions may be legal despite being unconstitutional in the sense that they are contrary to the constitutional paradigm.

Opposition to such unconstitutional government action must take the form of political pressure or resistance that may fail to prevent or correct the violation. Legal claims arguing for the invalidity or inapplicability of government actions due to their unconstitutionality cannot succeed. Dicey's conception of the British Constitution is perhaps the best example of a paradigmatic constitution, dependent as it is on parliamentary supremacy restrained only by external and internal limits. Political forces alone restrict government and the application of constitutional principles is, in the end, a political process, not a judicial one. The paradigmatic constitution constructs a value system, the success of which continues to depend upon its voluntary acceptance by members of government. It also easily permits exceptions or departures from its basic principles when the government feels it is necessary to pursue an overriding policy, whether supported or not by the general electorate.[311] The judiciary, without full authority to strike down legislation, nevertheless may continue to exercise wide latitude in the extent to which it refers to constitutional principles when interpreting or applying statutes and administrative regulations. In short, the paradigmatic constitution acts as a moral compass for the legislative, executive, and judicial branches and relies solely upon its normative hold upon government members for its continued observance, lacking any formal enforcement mechanisms in law.

The alternative nature of a constitution is one that is definitive. While such a constitution asserts general governing principles having normative force among both the population at large and government actors, its role is more formal and imposing. A definitive constitution

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is also aspirational in that it promotes particular ideals or rules to which government should conform. *See* THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993).

311. Part III.A.2, however, supposes a distinction between the occasional departure from a generally followed principle, and the habitual practice inconsistent with it or blatant changes in the rule itself that effectively amend the constitution thereafter.

establishes rules for the operation of institutional structures and their procedures, or sets out substantive government powers subject to some legal control. Government actions contrary to its provisions are either void and have no effect *ab initio*, or are provisionally effective subject to mandatory correction by the government.[312] A constitution is definitive because it attempts to circumscribe the limits of government actions beyond where they *cannot* stray, as opposed to where they *should* not stray. Government actors are motivated to conform to constitutional principles and rules not only from fidelity to their ideals, but also out of concern that conflicting actions will legally fail. For a constitution to be definitive, some effective measure of judicial review is probably best suited to articulate the metes and bounds of government authority and enforce compliance. Among constitutional democracies, judicial review and the invalidation of statutes is a preferred means for enforcing constitutional limits upon legislative and executive actions.[313] Canada and the United States are good examples of definitive constitutional arrangements in the common-law tradition, as their constitutions establish strictly enforceable procedural requirements in the making of law, its application according to the rule of law, and substantive limits grounded in federalism and a bill of rights.[314]

While it is useful to make a broad generalization as to whether a constitution as a whole tends to be paradigmatic or definitive in effect, these descriptive terms may be particular to specific written provisions or unwritten principles. Furthermore, the labels of "paradigmatic" and "definitive," for purposes of understanding, evoke a dichotomous vision of the constitution as either completely dependent upon the political will to abide by guiding principles or policed by a judicial power to invalidate legislation. In actuality, a

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312. The Canadian cases of *A.G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032 and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, illustrate the idea of provisional validity. In the first case, the Supreme Court of Canada ruled that all Manitoba statutes enacted only in English violated a provision of the provincial constitution requiring that legislation be in both English and French. Such English-only legislation was therefore unconstitutional and invalid. The subsequent decision found that, notwithstanding the unconstitutional promulgation of all English-only legislation in Manitoba, those laws would continue to be temporarily valid until constitutional requirements were satisfied by their translation to French.

313. *See* Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe, in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 41 (Donald W. Jackson & C. Neal Tate eds., 1992) [hereinafter JACKSON & TATE]; Dieter Grimm, *Constitutional Adjudication and Democracy, in* JACKSON & TATE, *supra,* at 103, 104-05. "Nevertheless, [judicial review] is not a universal or necessary element of a democratic constitution." Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L. REV. 1, 5 (2001).

314. *See generally* Peter H. Russell, *The Growth of Canadian Judicial Review and the Commonwealth and American Experiences, in* JACKSON & TATE, *supra* note 313, at 29.

constitution may consist of both paradigmatic and definitive elements subject to varying degrees of judicial review.

U.S. constitutional law offers some good examples illustrative of this phenomenon within the context of a constitutional jurisprudence usually considered as firmly anchored upon a written text. The U.S. federal judiciary, ever since the case of *Marbury* v. *Madison*, has claimed, and regularly exercised, a power to review congressional legislation, invalidating laws that it finds unconstitutional.[315] There are a few constitutional issues, however, termed "political questions," that the Supreme Court has deemed nonjusticiable and committed for resolution to Congress or the President.[316] Political questions present constitutional principles or written rules that cannot legally bind Congress or the President.[317] As the term indicates, these are issues left only to political resolution and have no legal enforcement, despite their constitutional status and purpose of guiding government action.[318] The determination of what constitutes a political question under the U.S. Constitution rests upon several considerations.[319] Justice Brennan, writing for the Court in *Baker* v. *Carr*, elaborated these factors,[320]

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identifies it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning

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315. Marbury v. Madison, 5 U.S. 137 (1803). The power of judicial review is not stated in the Constitution, but was inferred by Chief Justice John Marshall. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 71 (1985). Currie also remarks that "Marshall overstated his case badly by asserting that judicial review was 'essentially attached to a written constitution.'" *Id*. at 71 n.49.

316. *See* 1 RONALD E. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16 (3d ed. 1999).

317. *Id*.

318. *Id*.

319. *Id*.

320. Baker v. Carr, 369 U.S. 186 (1962). *Baker* concerned a challenge to the apportionment of election districts for Tennessee's General Assembly, which did not accurately reflect population distribution. *See id*. The Court dismissed a claim that the issue was a political question, breaking with contrary precedent. *See id*.; Colegrove v. Green, 328 U.S. 549 (1946). It instead found the claim justiciable under the Fourteenth Amendment's mandate that no state "deny to any person within its jurisdiction the equal protection of the laws." *Baker*, 369 U.S. at 200. In doing so, *Baker* elaborated upon the definition of a political question. *Id*.

> adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[321]

For instance, the Supreme Court has found that political questions encompass much of the conduct of foreign affairs, as well as Section 4 of Article IV's mandate that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[322] Congress or the President retains discretion to interpret the Constitution in these areas, free from judicial scrutiny and subject only to other political controls.[323]

The controversy over the adoption of the 27th Amendment is a good example of how Diceyan external limits can restrain political action in areas remaining nonjusticiable, even within a written constitutional system. This Amendment was originally part of the 12 proposed amendments drafted by James Madison, which the First Congress submitted to the states for ratification in 1789.[324] The provision, that would later become the 27th Amendment, mandated that "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."[325] In the package of proposed amendments, Congress did not provide a time limit for acceptance by the states. Nevertheless, the ten amendments that

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321. *Id*. at 217.

322. David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 133, 133-34 (1996). In *Mora v. McNamara*, 389 U.S. 934 (1967), for example, the Supreme Court denied a petition for certiorari in a challenge against the legality of the Vietnam War. In *Luther v. Borden*, 48 U.S. 1 (1849) and *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Court found that the determination of a legitimate or republican form of state government involved political considerations outside of the judicial role. *Baker* re-affirmed the nonjusticiability of political questions under the guarantee clause, although it characterized the apportionment of legislative districts as an equal protection problem. *Baker*, 369 U.S. at 186.

323. Justice Brennan's description in *Baker* of what issues constitute a political question, it should be noted, echo British justifications for a judicial formalism that denies the courts the power to invalidate legislation by Parliament or stray from its intent. *Baker*, 369 U.S. at 186. Arguments against judicial review of a substantive nature rest upon the assertion that judges are an appointed elite not democratically responsible to the electorate. These arguments also assert that the judiciary is institutionally ill-equipped to conduct the same fact-finding missions and weigh policy options, as can the legislature. Furthermore, the British notion of separation of powers has been different than that in the United States. Whereas the U.S. understanding places the judiciary in an independent position to check legislative action straying beyond constitutional limits, the British approach has been to characterize judicial review of statutes as an infringement upon the function of the legislation branch. *See* Mullender, *supra* note 245; Griffith, *supra* note 49**,** at 66.

324. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 498-99 (1992).

325. The ten proposals that did receive ratification constitute the Bill of Rights. Incidentally, under the U.S. Constitution, Article I, Section 2, elections for the House of Representatives take place every two years.

now comprise the Bill of Rights received ratification rather promptly by 1791, while the salary provision did not. Through the years, however, several states had occasionally ratified the proposed salary amendment out of frustration with perceived problems in Congress.[326] In 1992, over 200 years after the introduction of the original 12 proposed amendments, the state of Michigan ratified the salary provision, thus meeting the three-fourths requirement necessary for a federal constitutional amendment.[327] The incredibly long time-period between the Amendment's introduction and its passage raised questions as to whether Article V implied a reasonable period for ratification.[328]

The Supreme Court, however, had already adjudged that controversies under the Article V amending procedures might present political questions unsuitable for judicial review. In *Leser v. Garnett*, the Court refused to consider a claim that alleged improprieties in the ratification process of two states meant that the 19th Amendment failed to receive approval of three-fourths of the states as required under Article V.[329] The closest judicial precedent to the controversy over the 27th Amendment was the 1939 case of *Coleman* v. *Miller*, which concerned a challenge to Kansas' ratification of a proposed amendment 13 years after Congress had submitted it to the states.[330] The Court decided that whether the passage of time or changed circumstances meant that the proposed Amendment was no longer amenable to ratification was a nonjusticiable political question best left to Congress.[331] In regard to the 27th Amendment, several members of Congress publicly expressed reservations and suggested that the passage of time might indeed preclude ratification of the amendment.[332] No judicial challenge to the validity of the Amendment arose, however, and external political limits effectively controlled the congressional response to the controversy.[333] Considering the subject matter of the Amendment and the possible electoral consequences should Congress reject a widely popular

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326. Bernstein, *supra* note 324, at 537-38.

327. *Id*. at 539.

328. *Id*. at 542-43. *See* Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?,* 62 GEO. WASH. L. REV. 502, 503-05 (1994).

329. Leser v. Garnett, 258 U.S. 130 (1922). *Leser* departed from previous language in *Dillon v. Gloss*, 256 U.S. 368 (1921), that the U.S. Constitution, Article 5 implied a reasonable time period for ratification. The 19th Amendment provides that "[t]he right of the citizens of the United States to vote shall not be denied or abridged by the United States on account of sex." U.S. CONST. amend. XIX.

330. Coleman v. Miller, 307 U.S. 433 (1939). The proposed amendment would have overturned Supreme Court decisions interfering with congressional regulation of child labor. It never received ratification by three-fourth of the states.

331. *Id*.

332. Bernstein, *supra* note 324, at 540-42.

333. *Id*.

measure intended to limit its ability to raise the salary of its own members, it recognized the 27th Amendment.[334] This incident illustrates how significant constitutional issues can remain nonjusticiable and under the province of the legislature, even within a written constitution providing for full judicial review in most cases. It also reveals the restraining influence of political pressure upon a legislature that is acting under nonjusticiable constitutional provisions. Although the U.S. Constitution relies heavily on judicial review, the political question doctrine means that some constitutional rules or principles are essentially paradigmatic in that they suggest legally unenforceable government obligations or courses of action.

The Canadian Constitution strikes an interesting balance between political and judicial determination of constitutional issues in regard to its Charter of Rights and Freedoms.[335] 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 Charter.[336] Peter W. Hogg explains,

> [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.[337]

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334. *Id*. at 498, 542. Action by Congress followed that of the Archivist of the United States, who had promptly certified the amendment as valid pursuant to his statutory authority. *Id*. at 540.

335. 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].

336. Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, § 33(1). Section 33(1) states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter." *Id.* Section 33 therefore does not allow the override of guaranteed democratic rights (Sections 3-5), mobility rights (Section 6), language and education rights (Sections 16-23), and the enforcement provision (Section 24). 2 JOSEPH ELIOT MAGNET, CONSTITUTIONAL LAW OF CANADA: CASES, NOTES AND MATERIALS 204-05 (8th ed. 2001).

337. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 773 (2000). This interaction, sometimes maybe tension, becomes more apparent as the Section 52 of Constitution Act, 1982 expressly gives the judiciary authority to exercise review, as "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Constitution Act, 1982, *supra* note 336, § 52. While such review initially focused upon federalism concerns, while still respecting parliamentary sovereignty of the federal and provincial legislatures within their respective jurisdiction. In this sense, the existence of a "notwithstanding" clause in both the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms

Such a declaration automatically lapses in effect after five years, requiring Parliament or the assembly to consider its possible extension for another five-year period.[338] 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.[339] Section 33, however, does establish manner and form restrictions on the ability of Parliament or the assembly ability to contravene the Charter of Rights by requiring that

> [t]he declaration must be confined to the rights specified in s. 33; it must be specific as to the statute that is exempted from the Charter, and as to the rights that are overridden; and it may not be given retroactive effect. These requirements are mainly formal, and . . . are not very demanding.[340]

The implications of this for judicial review are that the courts can only review the constitutional validity of a § 33 declaration based upon its compliance with these formal criteria; they cannot scrutinize it upon substantive grounds.[341] This means that in the absence of an express declaration under § 33, the judiciary exercises review, including a power of invalidation, over primary legislation.[342] Nevertheless, 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.[343] It thereby accommodates the doctrine of parliamentary sovereignty.[344] The fact that Parliament has never invoked the notwithstanding clause, while provincial assemblies have done so in only a few instances, suggests the influence that Charter values and § 33 have in erecting political barriers to restrain legislative action.[345]

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represent restrictions, not enlargements or grants, of legislative authority. Canadian Bill of Rights, *infra* note 391, § 2; Charter, *supra* note 335, § 33(1).

338. Constitution Act, 1982, *supra* note 336, § 33(3)-(4).

339. However, MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 79 (1992), writes, "[s]ection 33 is not an override of the *Charter* at all, but is a refusal to let the legal profession have the final say in politics." *Id*.

340. HOGG, *supra* note 337, at 769, 771.

341. *Id*. at 771-72.

342. *See* PATRICK MONAHAN, THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA 99-100 (1987).

343. HOGG, *supra* note 337, at 773-74. "The power of override . . . makes judicial review suspensory only." *Id*. at 774.

344. *See* MONAHAN, *supra* note 342, at 118-20.

345. The Federal government has never invoked Section 33. Québec, however, has used it twice. After the enactment of the Charter, the governing Parti Québecois, which had been opposed to the Constitution Act, 1982, added a blanket

This unique hybrid of parliamentary sovereignty and U.S.-style judicial review demonstrates paradigmatic traits: the legislature, in the end, is legally competent to adhere to or disregard Charter rights and values at its discretion. The functional reality, however, is that courts in Canada regularly and aggressively review, and even invalidate, primary legislation upon substantive Charter grounds in the absence of a § 33 declaration.[346] In this sense, derogable Charter guarantees still operate in a definitive manner to restrain government action and encourage judicial review. It must be noted, too, that § 33 allows the override of most, but not all, provisions of the Charter.[347] Exempted rights remain completely entrenched against legislative encroachment and construct a strongly definitive constitutional model enforceable by judicial review. 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. Hogg nicely describes this anomalous situation as promoting "dialogue" between the legislative and judicial branches.[348]

The British Constitution, much more so than the U.S. or Canadian, 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 predecessors.[349] 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.[350] An action that fails to achieve this is

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notwithstanding clause to all existing provincial statutes. It also made such a declaration in regard to legislation requiring that all signs in Québec be in French. ROBERT J. SHARPE & KATHERINE E. SWINTON, THE CHARTER OF RIGHTS AND FREEDOMS 54-57 (1998). "The only province other than Quebec to invoke the override was Saskatchewan, in an effort to protect back-to-work legislation introduced during a labour dispute." *Id*. at 57.

346. Russell, *supra* note 314, at 37.

347. *See generally* Constitution Act, 1982, *supra* note 336.

348. HOGG, *supra* note 337, at 662; Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U.T.L.J. 91, 138 (2001) ("Under the modern court-parliament dialogue paradigm, neither courts nor legislatures are supreme, but both contribute ideas from distinctive perspectives to an ongoing discussion about the best normative structure for Canadian society.").

349. BRADLEY & EWING, *supra* note 309, at 58-59, 66.

350. *Id*.

not law and courts will give it no effect.[351] One might argue, however, that even this procedural requirement is ultimately a political question because courts will do no more than inquire whether the act in question appears on the rolls of Parliament. Courts will question neither the actual internal parliamentary process, nor the giving of the Royal Assent. Instead, courts will accept the rolls as conclusive evidence that the act has been constitutionally adopted.[352] Other than these two primary rules, Parliament may act freely, subject only to Diceyan internal and external limitations. Still, while courts cannot substantively review parliamentary acts and have traditionally followed a formalistic style of adjudication, they nevertheless exercise considerable control over government.

Part II discussed how 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,*[353] a case that challenged the Commission's decision to reject the claimed compensation.[354] In delegating authority to the Commission, Parliament had added a clause declaring that no decisions of that body were to be reviewed in court.[355] 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.[356] 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 necessarily an uncertain border between restrictive interpretation and non-application (in the particular case)."[357]

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351. There is some question as to how far Parliament can change the manner and form in how it makes law. Such changes, however, involve the law-making procedure and not substantive parliamentary powers. The Parliament Acts of 1911 and 1949, *infra* note 510, for example, disallowed the House of Lords its traditional right of veto, replacing it with a limited power of delay. The House of Lords Act of 1999 also restructured the composition of the upper House by limiting the right of hereditary peers to sit, but without otherwise majorly affecting its legislative function. BRADLEY & EWING, *supra* note 309, at 59-60.

352. BRADLEY & EWING, *supra* note 309, at 70-71.

353. Anisminic v. Foreign Comp. Comm'n, [1969] 2 A.C. 147 (H.L.).

354. *Id*.

355. *Id*.

356. LEGAL FOUNDATIONS, *supra* note 256, at 65-66.

357. *Id*. at 65; *See* MARK ELLIOTT, THE CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW 30-34 (2001) [hereinafter CONSTITUTIONAL FOUNDATIONS].

Regardless of the highly paradigmatic nature of the parliamentary sovereignty model, adjudicative measures in practical effect give some legal efficacy to constitutional principles. The more active courts behave in this regard, the more definitive the British Constitution will become.[358]

The above examples from British, Canadian, and U.S. law illustrate 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 generalization, wherein exist many shades of gray. 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.[359]

This "spectrum" allows room for different kinds and degrees of enforcement mechanisms within a constitutional model, and for sophisticated relationships between the judicial and political branches.[360] Accordingly, the political or legal protection available for constitutional principles does not necessarily add to or detract from their normative value within the community. It is instead such normativity, rather than any particular extent of judicial review, that is of paramount concern, and allows one to say that a nation has a

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358. Griffith recognizes such a conceptual shift from a political, or paradigmatic, regime to a legal, or definitive, one. Griffith, *supra* note 49, at 44. Griffith writes, "[Sedley] does not advocate a written constitution but re-asserts his claim that 'the common law itself has both the capacity and the obligation to move in the next generation towards a principled constitutional order.' This is to regard the Constitution as a legal rather than . . . a political construct." *Id.* (quoting *Sound of Silence*, *supra* note 262, at 273).

359. *Comparative Perspective*, *supra* note 41, at 7-8. While Lord Irvine comments in the context of human rights, his observation equally applies to other areas of public law, such as the rule of law, devolution, and the primacy of European Community law. *Id*.

360. *Id*. at 18.

constitution.[361] Similarly, the normative value of a written text in expressing these principles is the definitive consideration in characterizing it as a constitutional document, regardless of the extent of its legal enforceability.[362]

Just as the British and U.S. Constitutions rely upon judicial review differently, they also draw differently upon textual references. In either political culture, however, underlying normative values of constitutionalism precede constitutional form.[363] 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 articulating or following underlying constitutional principles.[364] 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.[365] Canada, having a constitution "similar in Principle to that of the United Kingdom" has, in contrast, long recognized that a

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361. GOLDSWORTHY, *supra* note 179**,** at 11 (commenting that "it may be going too far to regard judicial enforcement as a necessary condition for a norm to be classified as a law"); Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 226-27 (1999).

362. GOLDSWORTHY, *supra* note 179**,** at 11-12.

363. T.R.S. Allan, *Constitutional Rights and Common Law*, 11 OXFORD J.L. STUD. 453, 460-61, 468, 477 (1991) [hereinafter *Constitutional Rights*]; Constitutionalism is an abstract concept that, while open to differing definitions, is often taken to require democratic government, adherence to the rule of law, some form of separation of powers, and sometimes substantive restrictions on government authority. These basic values can lead to different conclusions about the form of the constitution, as illustrated by arguments both supporting and rejecting judicial review due to separation of powers. Murphy points out, however, that a constitution and constitutionalism are not necessarily linked, as a constitution might reject democratic or rights concerns. *Constitutional Democracy*, *supra* note 307, at 105-09. He further makes a distinction between constitutionalism as requiring substantive limitations upon government and democratic theory that relies only upon political checks. Gavison suggests such labels can be confusing, as democratic government is highly valued by those supporting either judicial or political checks. Gavison, *supra* note 361, at 223-24. This thesis rejects Murphy's distinction between constitutionalist and democratic thought, instead asserting that constitutionalism is simply the commitment to the basic ideals just described. The form of the resulting constitution, whether establishing legal or political limitations on government authority, is an instrumental means to the realization of constitutionalism. *Comparative Perspective*, *supra* note 41, at 2. Thus, the United Kingdom and the United States have shared values of constitutionalism, while having very different constitutions. Limbach makes the same point in comparing the United Kingdom and the Federal Republic of Germany. Limbach, *supra* note 313, at 51.

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

365. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 43-47 (1987); 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. . . .").

constitution can consist of both written and unwritten elements.[366] Courts of all three countries, however, do in fact refer to both written and unwritten sources of law when adjudicating constitutional issues.[367] In comparing Canada and the United States in this regard, Murphy remarked,

> [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.[368]

Written and unwritten constitutional principles, then, must not exist exclusively of one another.[369] 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 texts occupy different amounts of "constitutional space." Both constitutions also have different compositions in regard to the form of written texts that they primarily use. The U.S. Constitution is one coherent, integrated document, and the British textual sources exist as a conglomeration of treaties and statutes.[370]

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366. Walters, *supra* note 348, at 91-92, 97-100; Constitution Act, 1867, 30 & 31 Vict., c. 3, pmbl. (Eng.), *reprinted in* R.S.C. 1985, App. II, No. 5.

367. 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.

Strauss, *supra* note 365, at 890.

368. *Constitutional Democracy*, *supra* note 307, 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. . . ." *Id*. at 105. 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.

369. 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) (footnote omitted). 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.

370. Even though formal theory accords such documents no legal status different from ordinary statute, it still acknowledges their special role in influencing

These written constitutional principles also vary in the United Kingdom and United States in how far they are paradigmatic, or definitive in impact, to the extent that courts will actually rely upon them in reviewing legislative and executive actions.

2. Flexible and Rigid Constitutions

Just as constitutions vary in how strictly they limit government action through their reliance upon formal rules and enforcement mechanisms, so too can they exhibit different dynamics of change. Dicey recognized this important aspect of constitutions by characterizing them as either flexible or rigid.[371] These two ideas closely relate to whether a constitution is paradigmatic or definitive, although they remain distinct in conceptualization. While the terms "paradigmatic" and "definitive" refer to whether limitations upon government power rely upon binding legal rules or moral force for effect, "flexibility" and "rigidity" concern the ease with which such limitations can change. These concepts reflect institutional competencies within the system in regard to legislative and judicial powers to alter basic constitutional rules. They also touch upon the way in which the constitution fundamentally adapts to or accommodates shifting political normativity in society.

A flexible constitution, as the term implies, is one that is very amenable to change, having few or no special amending procedures.[372] One of the most obvious examples of flexibility is the British Constitution.[373] The Constitution is paradigmatic in that the Parliament can enact any law it wishes, whether or not it violates other constitutional principles.[374] Alternatively, it is also flexible because Parliament can alter constitutional principles themselves and establish new baselines for government action.[375] Parliament has done this in the past by establishing rules for the succession to the Crown, declaring union with Scotland, and extending the suffrage.[376] Recent constitutional changes have included the reform of the House of Lords, continuing integration into the European Union, devolution, and the passage of the Human Rights Act.[377] All

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British constitutional development. DE SMITH & BRAZIER, *supra* note 7, at 21-22; PHILLIPS ET AL., *supra* note 1, at 18-19.

371. DICEY, *supra* note 3, at 91, 127-28.

372. *Id*. at 127; DE SMITH & BRAZIER, *supra* note 7, at 10; PHILLIPS ET AL., *supra* note 1, at 6.

373. DICEY, *supra* note 3, at 91; DE SMITH & BRAZIER, *supra* note 7, at 15.

374. DICEY, *supra* note 3, at 91.

375. *Id*. at 88.

376. *Id*. at 41-44.

377. See A.W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 41-42, 119-20, 172-73, 479 (13th ed. 2003).

of these significant constitutional measures were achieved through the legislative process, requiring nothing more than a simple majority in Parliament.[378] Despite formally having no legally binding effect on Parliament, these acts have all had great impact upon the Constitution.[379] As Dicey pointed out, certain laws in the United Kingdom are constitutional as they "affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws."[380] There is, therefore, no distinction in form between a regular statute and constitutional enactment, although their normative value may vary greatly.[381] A partial reason for the lack of formal recognition of constitutional acts, as opposed to regular acts, is that Parliament is more than a legislative assembly; it is also a "constituent assembly" empowered to alter the Constitution.[382] Dicey justified such amendatory powers themselves, included within the doctrine of parliamentary sovereignty, by the democratic foundations of Parliament.[383] Restricting Parliament's power to change the Constitution would be to limit its ability to respond to the will of the politically sovereign electorate and its shifting values about constitutional government.[384]

So far, the idea of a flexible constitution would seem to entail nothing more than parliamentary sovereignty and the paradigmatic form of constitution. Dicey himself confused these notions. "A 'flexible' constitution," he wrote, "is one under which every law of every description can legally be changed with the same case and in the same manner by one and the same body."[385] To Dicey, "[a] 'rigid' constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."[386] Dicey made no distinction between Parliament's role in legislating *against* constitutional principles and changing the principles themselves. There is nevertheless a conceptual difference between a paradigmatic and flexible constitution. As Part II suggested, it is conceivable that in the near future a British court might directly overrule or no longer apply an act of Parliament that clearly conflicts with the guarantees of the Human Rights Act. Such a situation would be a judicial attempt to make the principles upon which the Act relies more definitive in

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378. *See* DICEY, *supra* note 3, at 91.

379. *See* Robert Hazell, *Reinventing the Constitution: Can the State Survive?*, 1999 PUB. L. 84, 84-87.

380. DICEY, *supra* note 3, at 127.

381. *Id.* at 89; *see also* PHILLIPS ET AL., *supra* note 1, at 9-10; GOLDSWORTHY, *supra* note 179, at 11-12.

382. DICEY, *supra* note 3, at 89.

383. *See id.* at 73.

384. *See id.* at 72-76; *see also* GOLDSWORTHY, *supra* note 179, at 228.

385. DICEY, *supra* note 3, at 127.

386. *Id.*

nature. Parliament could still preserve the sovereign power to amend or repeal these principles themselves, however, altering the boundaries within which the judiciary might otherwise restrain it. A situation would then arise in which Parliament is legally bound to the restrictions it places upon itself as long as they remain in force, but can alter that framework on a fundamental and lasting basis, rather than acting in violation of it.

The Canadian Constitution demonstrates this approach in some instances, as well as its counter-example, where Parliament *cannot* change the constitution but can legislate against it. Section 44 of the Constitution Act, 1982, provides that, "Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."[387] Parliament has used this procedure only once to adjust the number of seats in the House of Commons and allocate them among the provinces.[388] While the unilateral amending authority of the federal Parliament is very narrow in scope, § 45 provides that "the legislature of each province may exclusively make laws amending the constitution of the province."[389] Both §§ 44 and 45, giving Parliament and the provincial assemblies, respectively, narrow and broad authority for unilateral constitutional amendment, reflect the flexibility found in the British Constitution under the doctrine of parliamentary sovereignty.[390] Despite this flexibility, the existence of judicial review in Canada means that federal and provincial courts can nevertheless review and strike down primary legislation that offends constitutional provisions otherwise subject to unilateral legislative amendment.

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387. The scope of this provision is expressly limited, however, by Sections 41 and 42. These sections respectively require unanimity among provinces on certain matters and general amending procedures regarding proportional representation in the House of Commons, as well as the powers and selection of senators. *See* Stephen A. Scott, *The Canadian Constitutional Amendment Process, in* RESHAPING CONFEDERATION: THE 1982 REFORM OF THE CANADIAN CONSTITUTION 249, 277-78 (Paul Davenport & Richard H. Leach eds., 1984).

388. Constitution Act, 1985 (Representation), R.S.C., App. II, No. 47 (1985) (Can.). Section 44 of the Constitution Act, 1982 replaced Section 91(1) of the Constitution Act, 1867, which gave similar amending power to Parliament. Constitution Act, 1982, *supra* note 336, § 44; Constitution Act, 1867, *supra* note 366, § 91(1). *See* HOGG, *supra* note 337, at 89-90.

389. This authority, like that of the federal Parliament pursuant to Section 44, is expressly circumscribed by the general amending procedures of Section 41. *See* Scott, *supra* note 387, at 278-79.

390. The unilateral amending powers of the Parliament and provincial assemblies are also limited in so far as that must conform to the Charter of Rights pursuant to Section 32. The Charter does not restrain amendment under the other amendment procedures requiring a combination of federal and provincial approval. HOGG, *supra* note 337, at 74, 703-04.

An even clearer situation where Parliament is legally subject to self-imposed restrictions, which it may alter at anytime, arises with the Canadian Bill of Rights.[391] The Bill of Rights guarantees protection against federal infringement of several substantive and procedural rights.[392] Section 2 requires that courts construe and apply all other laws consistently with the rights and freedoms contained in the Bill, unless Parliament expressly declares in a statute that it should have effect notwithstanding.[393] This clause is certainly a rule of construction, mandating that courts interpret statutes according to its principles as far as it is possible to do so. In contrast, the Supreme Court of Canada has read § 2 to have a broader application. In the case of *R.* v. *Drybones*, the Supreme Court found that § 2 was more than a rule of construction, but required courts to declare that inconsistent acts of Parliament are "inoperative."[394] *Drybones* was a case appealing the conviction of an aboriginal man found guilty under the Indian Act of being intoxicated off a reserve.[395] The Supreme Court found that the law in question violated § 1(b) of the Bill of Rights, which guarantees equality before the law.[396] Because § 2 of the Bill required that Parliament give an express declaration to override, which it had failed to do, and the particular provision of the Indian Act could not be construed as compatible, it became inoperative.[397] Writing for the majority, Judge Ritchie explained this effect, "I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined

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391. Canadian Bill of Rights, R.S.C., ch. 44, App. III (1985) (Can.) [hereinafter Canadian Bill of Rights].

392. The Canadian Bill of Rights protects such rights as freedom of religion, freedom of speech and the press, fair trial, equality before the law, and protection against self-incrimination. *Id.* The provisions in the Bill of Rights were mostly superceded by the Charter of Rights, except for the Bill's guarantees of due process for the taking of property, and a fair hearing for the determination of rights and obligations. The Bill also only limits the federal, but not provincial, government, whereas the Charter applies against both. HOGG, *supra* note 337, at 640, 647-48.

393. The Bill of Rights states,

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe, or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.

Canadian Bill of Rights, *supra* note 391, § 2.

394. R. v. Drybones, [1970] S.C.R. 282.

395. Indian Act, R.S.C., ch. 149, § 94 (1952) (Can.).

396. *Drybones*, [1970] S.C.R. at 294.

397. *Id.*

to the particular circumstances of the case in which the declaration is made."[398]

The Bill therefore constructed a definitive legal model of rights protection, and still does so in a couple of instances not covered by the Charter of Rights.[399] Parliament nevertheless remains free to amend or even repeal the Bill of Rights at will, as it technically remains a regular statute.

Both the unilateral amending procedures and the Bill of Rights highlight the conceptual distinction between constitutional principles that are strongly definitive of practice yet highly flexible in their susceptibility to change. The Canadian Constitution provides other examples, where it is not so easily amended but still permits legislative override. While § 45 grants sweeping authority to provincial assemblies to amend the provincial constitutions, the federal Parliament can only do so within the very narrow confines of § 44.[400] Otherwise, formal modification of the Canadian Constitution must proceed along three other avenues that raise a considerable barrier to formal amendment. Section 38(1) of the Constitution Act, 1982, requires that a proposed amendment on a matter not reserved for a stricter process receive authorization by resolutions of both Houses of Parliament and two-thirds of the provinces having at least 50 percent of the national population.[401] Additionally, any proposed amendment that would affect only a particular province or provinces, but not all of them generally, requires under § 43 the approval of only those provinces concerned, along with Parliamentary approval.[402] Section 41 sets forth the most arduous amendment process by requiring unanimity of the provinces, along with resolutions by both Houses of Parliament.[403] This almost impossible standard applies to matters dealing with the Queen, the Governor General, and the provincial Lieutenant Governors.[404] It also encompasses minimum

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398. *Id*. It would seem conceivable, then, that courts could "disapply" a law in one instance as in violation of the Bill of Rights, but give it full effect under a different set of circumstances. This situation, however, has never arisen before the Canadian courts. *See id*.

399. *See supra* note 392. In the cases following *Drybones*, however, the Supreme Court took a very narrow interpretive approach to the provisions of the Bill of Rights and never again found federal law to be incompatible and hence inoperative. Nevertheless, in *Hogan v. R.* the Court did characterize the Bill as "quasi-constitutional" in nature. Hogan v. R., [1975] 2 S.C.R. 574 at 597. SHARPE & SWINTON, *supra* note 345 at 15-16.

400. *See* Constitution Act, 1982*, supra* note 336, c. 11, §§ 44, 45.

401. The remainder of Section 38 tailors this general amending procedure for proposals that would alter provincial powers or rights, and offers provinces the choice to "opt out" of any such amendment. *See* HOGG, *supra* note 337, at 74-84.

402. *Id*. at 83.

403. *Id*. at 80-81.

404. *Id*.

provincial representation in the House of Commons, the use of the English or French language, the composition of the Supreme Court of Canada, as well as a change of § 41 itself.[405] As for the Charter of Rights, its alteration must proceed according to the general amendment procedures of § 38.[406] The "notwithstanding" clause gives Parliament and the provincial assemblies authority to declare an express derogation from the Charter.[407] They possess the authority to legislate contrary to the Charter, though they cannot amend it. Therefore, Parliament and the assemblies in some instances have sole authority to amend the federal and provincial constitutions, while otherwise are bound to act consistently with them subject to judicial review. In contrast, the Charter allows Parliament and the assemblies to legislate blatantly against its guarantees despite denying them the unilateral ability to amend it permanently.[408] The Canadian Constitution illustrates the conceptual difference between a constitution's paradigmatic or definitive nature in imposing rules, and its flexibility or rigidity regarding change.

The distinction between the process of permanently changing constitutional provisions and legally enforcing them also exists in U.S. constitutional law. The U.S. Constitution can only be amended formally under the strict procedures of Article V.[409] The U.S. Constitution is rigid in that constitutional changes come about in a manner different from that of ordinary legislation. Such change requires the participation of state legislatures or special ratifying conventions in addition to participation by Congress.[410] Although the U.S. Constitution is generally definitive in setting legal boundaries on government action, some aspects like political questions, remain nonjusticiable and paradigmatic in nature. Even those provisions or principles that are nonjusticiable are still subject to formal, rigid

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405. *Id.*
406. *See id.* at 794.
407. *See* Constitution Act, 1982, *supra* note 336, § 33.
408. *Id.* §§ 33, 38.
409. Article V of the U.S. Constitution requires:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

U.S. CONST. art. V.
410. *See id.*

amendment procedures in contrast to the greater flexibility of the British Constitution.[411]

The concepts of flexibility and rigidity, however, are more complex than what their basic definitions might suggest. Informal methods of constitutional change can be just as significant and influential, perhaps even more so, than formal modifications of rules and principles.[412] One way in which informal amendment can come about is through changing judicial interpretations.[413] This interpretive aspect may make a constitution less rigid than it appears to be through the formal-amending process, just as political pressures may erect strong barriers to change within a very flexible system. The constitutional jurisprudence of the United States is replete with examples of significant judicial modification. The U.S. Supreme Court has, for example, changed the constitutional landscape by expanding the interpretation of the Commerce Clause, as well as the taxing and spending power, striking down segregation laws, and broadening the scope of the Bill of Rights.[414] Through adjudication, the Supreme Court has allowed the U.S. Constitution to remain responsive to ever-changing societal needs and political values.[415] Judicial "amendment" makes the U.S. Constitution much more flexible than it would seem from an exclusive focus upon Article V amending procedures.

Similar to the United States, the British Constitution has also evolved outside of direct parliamentary reform by statute. Conventions have developed over long periods of consistent political practice and reflect normative ideas about how the Constitution should function in fact, if not in law.[416] Also, the judiciary has impacted the workings of the Constitution, if not its formal theory, through its articulation and increasing use of *ultra vires* review.[417] As discussed in Part II, *ultra vires* judicial review allows courts to effectively control Parliament and the executive, while intense political pressures would make the revision, or curtailment, of the

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411. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 21-22 (2001).

412. BRADLEY & EWING, *supra* note 309, at 5.

413. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267-68 (2001).

414. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 233-38, 275-84 (1993); Strauss, *supra* note 365, at 884, 905.

415. There are many critics of "judicial activism" or broad interpretation, particularly among those advocating strict adherence to the original intent of the framers. Such criticisms, however, highlight the extent to which the judiciary has impacted constitutional change. *See* James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 6-7 (1991).

416. BRADLEY & EWING, *supra* note 309, at 26.

417. *See* Laws, *supra* note 137, at 78-79.

judicial review process inflexible. In addition, political pressures may restrict parliamentary "amendments" of other basic constitutional principles, just as they prevent or restrain its periodic departure from those that have already been established. One final example of the complexity of the concepts of flexibility and rigidity is the doctrine of parliamentary sovereignty itself: the one fundamental constitutional rule impervious to formal change by Parliament. Parliament cannot substantively restrict its own future exercise of sovereign powers, and courts cannot attack them under orthodox theory.[418] Therefore, the persistence of parliamentary supremacy remains entrenched in theory, although it appears to be eroding in practice.

Although Dicey did not draw the more subtle distinction between a constitution's dynamic of change and its imposition of rules, he commented on the connection between its rigidity and written form. Dicey made two observations in this regard. First, concerning the British Constitution, he remarked that the lack of a written form resulted from its susceptibility to legislative alteration. He emphasized that this causal relationship was very different from the contrary argument—that the British Constitution was highly flexible because it was unwritten.[419]

Dicey's assertion is important because it identifies the primary role of normative foundations from which a written or unwritten constitution develops. The form of the constitution does not give rise to ideals of limited government, judicial review, or extra-legislative amendatory procedures. Instead, normative assumptions about these matters precede the formal constitution. A written constitution is just an expression of already existing principles. Dicey wrote,

> When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing. . . . Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution.[420]

A constitution comes after certain principles about the nature of government have arisen within a political culture. Thus, Dicey was correct in conceptualizing constitutional principles as antecedent to constitutional form. Yet he erred when he asserted that a written document "necessarily" results from a rigid constitution.[421] A constitution may be definitive in how strictly it binds ordinary

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418. GOLDSWORTHY, *supra* note 179, at 15.
419. DICEY, *supra* note 3, at 89-90.
420. *Id*. at 90.
421. *See id*. at 89-90.

legislation, or rigid in its resistance to change, but remains unwritten in form. Part II discussed at length this possibility by suggesting that the United Kingdom's unwritten constitution can reject parliamentary sovereignty and accommodate more extensive judicial review in continuity with its common-law roots. While it might be fair to say that a written document "tends" to result from a rigid or definitive constitution, as its written form better memorializes and provides surer guidance as to its principles, such a relationship is not necessary.

Although Dicey was incorrect in believing that a written document was a necessary component to a rigid constitution, he correctly suggested that a highly flexible constitution could take written or unwritten form. Even the British Constitution, based upon Dicey's model of parliamentary sovereignty, could hypothetically be a written one. He stated,

> But it is a mistake to think that the whole law of the English constitution might not be reduced to writing and be enacted in the form of a constitutional code. . . . *[T]he constitution of England might easily be turned into an Act of Parliament without suffering any material transformation of character, provided only that the English Parliament retained . . . the unrestricted power of repealing or amending the constitutional code.*[422]

Dicey's example characterizes a written constitution as a means to expressing governing principles, even though it may lack legal enforcement or special amending procedures.

The separation of form from function was so different that Dicey could imagine the United Kingdom as having a written constitution.[423] The fact that the British Constitution, as described by Dicey, did not distinguish between especially constitutional or regular laws, went to their nature as being paradigmatic and flexible.[424] It did not prevent the recognition of laws as being constitutional in the sense that they reflected fundamental political normativity in a way that most other statutes did not.[425]

The concepts of a flexible or rigid amending process is more complex than the terms suggest on their own, even though general characterizations remain useful and convenient for analyzing constitutional systems. Definitive constitutions may indeed tend to be more rigid, and paradigmatic ones more flexible, although the

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422. *Id*. at 90 (emphasis added).

423. When considering many of the Commonwealth nations, such as Canada and Australia, it appears that "the Westminster system of government is not inherently incompatible with a written constitution." BRADLEY & EWING, *supra* note 309, at 6.

424. *See* DICEY, *supra* note 3, at 91.

425. *See id*. at 127.

relationship between the enforceability of rules and their dynamic of change is not a necessary one. Prior discussion on paradigmatic constitutions touched upon the role of a written or unwritten constitution in imposing enforceable parameters upon government. Yet it is helpful to briefly reconsider such a relationship in light of rigidity and flexibility.

While the flexible British Constitution is traditionally subject to legislative alteration, its foundational, and by far most important principle—the doctrine of parliamentary sovereignty—ironically remains so rigid as to have ossified. The only avenue open to modify the doctrine of parliamentary sovereignty is that which Dicey foresaw for overly rigid constitutions: revolution.[426] Dicey, of course, was apprehensive of "violent subversion," but revolution may also occur in a more peaceful and surreptitious manner.[427] The revolution necessary to change the doctrine of parliamentary sovereignty would be a quiet one, brought about by a shift in the rule of recognition, and the acceptance of a competing common-law model of limited government.[428] Accompanying such constitutional transformation could also be reliance upon written expressions of the principles underlying it and defining Parliament's new limits. U.K. courts have increasingly relied upon higher written law, such as the regulations of the European Community and its founding treaties, in interpreting legislation and exercising *ultra vires* review. Other texts, such as the Human Rights Act and devolution statutes, will also likely have such prominence. These documents arguably have already become foundations of contemporary constitutional practice and widely reflect values about the nature of British government. Those statutes and their roles are indicative of a change already taking place regarding the exercise of parliamentary sovereignty.

B. *Positivist Foundations for a Written Constitution*

Because a constitution may exhibit mixed characteristics, a text's normative value in expressing its underlying principles is determinative of its recognition as a constitutional document. That

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426. *Id*. at 129-30.

427. *See id*. at 129.

428. *See* GOLDSWORTHY, *supra* note 179, at 242-45. Mullender writes that "[t]o move from our present constitutional order to one in which the judiciary occupied such a position of constitutional primacy would . . . involve a 'break in legal continuity' to which the term 'revolutionary' could properly be applied." Mullender, *supra* note 245, of 144 (quoting SIR WILLIAM WADE, CONSTITUTIONAL FUNDAMENTALS 36 (1980)). Mullender is correct that such change would be revolutionary, but only in the limited sense that it would sever continuity with the doctrine of parliamentary sovereignty. However, it would break with neither the common-law tradition nor the suppressed elements of its theory that actually support such a constitutional arrangement. *See* GOLDSWORTHY, *supra* note 179, at 245-46.

understanding of a written constitution raises questions as to the origins and authority of its values. It is the democratic foundation of these governing principles that partly distinguishes constitutionalism from arbitrary rule.[429] Even under the doctrine of parliamentary sovereignty, the legally unfettered authority of Parliament is subject to moral restraints resulting from its democratic accountability. Dicey's justification for parliamentary sovereignty accepts that fundamental values of constitutionalism and the rule of law promote the public good and give context to Parliament's exercise of authority. The recognition of fundamental principles that restrain Parliament, either morally or perhaps legally, however, goes back further than Dicey as shown by Blackstone's theory of natural law and Coke's opinion in *Bonham's Case*. The reconciliation of such higher law notions with a democratic justification for legislative power results in a conception of the public good that has a moral claim superior to and binding upon Parliament. When constitutional principles derived from this notion of the public good are memorialized in writing, that text becomes a positivist expression of popularly-sovereign will that courts may apply in restraining Parliament.

1. An Alternative Positivist Model

Within the alternative common-law constitution, paramount principles cannot only exist in unwritten form, but they may find expression in written texts as well. The entrenchment of documents is compatible with the U.K.'s embrace of positivism, despite the fact that this school of thought underlies the doctrine of parliamentary sovereignty.[430] The alternative common-law constitution can incorporate written documents based upon three positivist premises. 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.[431] 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

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429. *See supra* note 363.

430. *See* ATIYAH & SUMMERS, *supra* note 365, at 225-29; *Comparative Perspective*, *supra* note 41, at 10.

431. *Comparative Perspective*, *supra* note 41, at 10.

electoral restraints upon legislative action, translating popularly-sovereign will into a form of enforceable state action upon Parliament. 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.

Constitutional texts are subject to judicial interpretation and application in much the same way as, say, an enabling statute authorizing an administration to promulgate secondary legislation. Courts can review primary legislation to ensure that Parliament has acted within its grant of power and not *ultra vires*.

The doctrine of parliamentary sovereignty represents a form of positivism as set forth by John Austin.[432] Austin's version of positivism, upon which more sophisticated theories remain based, has three basic propositions.[433] First, there must be an identifiable sovereign, whose command is authoritative.[434] Second, these commands impose general, sanctionable obligations upon the populace or certain of its segments and receive habitual obedience from them.[435] Finally, there is no necessary connection between promulgated law and moral standards or content.[436] 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 realm.[437] 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.[438]

Although Blackstone 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 power.[439] Also, these natural law standards were abstract and required "discovery" through the reasoning process in the courts or Parliament.[440] The

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432. *See* GOLDSWORTHY, *supra* note 179, at 4.

433. 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).

434. JOHN AUSTIN, THE PROVINCE OF LEGISLATION DETERMINED 5 (2d ed. 1861); Sebok, *supra* note 433, at 2064-65.

435. AUSTIN, *supra* note 434, at 8-11; Sebok, *supra* note 433, at 2064-65.

436. AUSTIN, *supra* note 434, at 113; Sebok, *supra* note 433, at 2063-64.

437. GOLDSWORTHY, *supra* note 179, at 9.

438. *Id*. at 9-11.

439. 1 BLACKSTONE, *supra* note 3, at *160-61; Frederick Schauer, *Legal Positivism and the Contingent Autonomy of Law*, *in* JUDICAL POWER, DEMOCRACY AND LEGAL POSITIVISM 215, 217 (Tom Campbell & Jeffrey Goldsworthy eds., 2000).

440. *See supra* notes 81-84.

positivist notion of law as the command of the sovereign rejected Blackstone's approach, rather than emphasizing the morally independent will of the legislature.[441] That was the British conception of the constitution that most influenced Dicey and now underlies modern orthodox theory.

The Austinian positivist doctrine of parliamentary sovereignty resists any attempt to circumvent it and place limits upon the legislative power.[442] The imposition of legal restraints upon Parliament, however, does not entail a return to natural law theories or require a rejection of positivism. Rather, limited government can also rest upon positivist foundations that legitimize written constitutional documents as commands of another, but popular, sovereign.

The central point for constitutional change in the United Kingdom, and the reliance upon written documents, is a rejection of Austin's basic model in favor of one like that of H. L. A. Hart. 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 federalism.[443] At the center of Hart's theory is his distinction between primary and secondary rules.[444] Primary rules consist of the rights and duties between individuals, and secondary rules describe the means by which primary rules come into being, change, or are extinguished.[445] Certain types of secondary rules, however, do not owe their existence or validity to any other higher, defining rules.[446] Such a "rule of recognition" is the ultimate rule of the legal system from which all others derive validity.[447] 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 community.[448] The rule supplants Austin's more

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

442. *See* R.W.M. DIAS, JURISPRUDENCE 348-51 (5th ed. 1985).

443. *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.

444. *Id*. at 90.

445. *Id*. at 91-92.

446. *Id*.

447. *Id*. at 97, 102, 105-06.

448. *Id*. at 98-99; GOLDSWORTHY, *supra* note 179, at 13-14.

basic notion of law as the command of a single sovereign.[449] Accordingly, the law is more than a simple command enforceable by the power of its issuing sovereign.[450] Rather, the authority of law derives its validity from the peoples' perception.[451] 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 recognition.[452]

The rule of recognition itself, while existing as a fact, may rest upon complex normative values about the nature of government.[453] It must not necessarily be a blind and substantively unconsidered assumption.[454] On the contrary, it may take various forms that reflect considerable normative content.[455] For instance, the rule of recognition might simply remain the unwritten doctrine of parliamentary sovereignty.[456] Alternatively, it might place limits on legislative authority, grant review powers to the judiciary, and recognize a written text as the expressive instrument of popular will.[457] 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.[458]

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. 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

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449. HART, *supra* note 443, at 64-67, 92, 97, 102.

450. *Id.*

451. *Id.*

452. *Id.* at 75.

453. *Id.*

454. *Id.*

455. Jules Coleman, *Authority and Reason*, *in* THE AUTONOMY OF LAW, *supra* note 441, at 302 (summarizing that rule of recognition as "a *normative* social practice among officials. Its authority among them derives from patterns of convergent behavior." (emphasis added)); *Id.* at 297; MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM LAW WITHOUT TRIMMINGS 115 (1999).

456. *See generally* KRAMER, *supra* note 455.

457. HART, *supra* note 443, at 69, 70-71, 103.

458. *But see* GOLDSWORTHY, *supra* note 179, at 256-59 (emphasizing the separability of the formal rule of recognition itself from the possibly multiple and conflicting normative justifications for it throughout the community. While such separability, as a basic tenet of positivism, is possible under Hart's theory, it is not necessary.); *Public Law*, *supra* note 54, at 225-28. The rule of recognition may promote a certain "internal perspective" based upon motivating values.

officials and the people coalesce and reinforce each other.[459] The constitution might evolve, resulting in a weakening of the doctrine, 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. 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, human rights, and acceptance of competing sources of law such as that of the European Community or regional assemblies.[460] 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.[461] Failure to do so might result in overt revolution of the constitutional order, even though it be peaceful, and the establishment of more pronounced and radical changes than would have occurred through the legal system's gradual accommodation of new rules of validity or widely-held norms.

Orthodox British theory already recognizes that the legitimacy, not legality, of parliamentary action depends upon its democratic accountability.[462] Rather than balancing a potentially conflicting division of political and legal sovereignty, that theory can recognize the normative claim that popular sovereignty restrains government power. Modern notions of democracy arguably demand that government be more responsive to the electorate than Dicey thought. This suggests that the will of the political sovereign should be regarded as fundamentally superior to Parliament.[463] This normative, democratic principle suggests and supports a new rule of recognition that limits legislative authority, which is enforceable by judicial review.[464]

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459. GOLDSWORTHY, *supra* note 179, at 245.
460. *Id*. at 244-46; *see also* HART, *supra* note 443, at 116-20.
461. HART, *supra* note 443, at 114-15.
462. *Id*.
463. *Public Law*, *supra* note 54, at 221-22, 228.
464. *See id*. at 228.

2. Written Constitutions as Expressions of Popular Sovereignty

A division of sovereign legal powers can result in judicial review that limits the legislature, ensuring that the legislature stays within its constitutional boundaries.[465] By fulfilling this role, the judiciary promotes democratic values despite not being an elected body, and it enforces constitutional principles on behalf of the popular sovereign.[466] This democratic foundation is straightforward, as the rule of recognition from which it receives its authority originates in the general political community. Judicial review also emphasizes the democratic basis of the constitution that Dicey recognized by entrenching principles, such as the rule of law, in order to ensure that Parliament does not act contrary to the wishes of the political sovereign.[467] Dicey, as previously discussed, described the difference between internal and external checks as that between the fundamental values of the rules and the limits to which subjects will tolerate government action.[468] His acceptance of parliamentary supremacy resulted in his description of these external limits as being solely political in nature, and manifested only in the attitudes and actions of the general public.[469]

Dicey acknowledged that "political" as opposed to "legal" sovereignty rests in the people.[470] His belief that "judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament" rejected the idea that the courts channel popular will and give it legal force.[471] Yet Dicey was shortsighted by characterizing "external" to mean completely outside of institutional government and emanating directly from the subjects themselves. This understanding of "external" excludes the notion that government might include an institutional check like the judiciary, other than the legislative body itself, which speaks for the people. In this sense, the judiciary can itself democratically represent or express the citizens' normative assumptions as to the appropriate limitations of legislative or executive powers.[472] The recognition of

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465. Sir Stephen Sedley, *Governments, Constitutions, and Judges*, *in* ADMINISTRATIVE LAW AND GOVERNMENT ACTION: THE COURTS AND ALTERNATIVE MECHANISMS OF REVIEW 36 (Genevra Richardson & Hazel Genn eds., 1994) [hereinafter *Governments*].

466. Roger Cotterrell, *Judicial Review and Legal Theory*, *in* ADMINISTRATIVE LAW AND GOVERNMENT ACTION: THE COURTS AND ALTERNATIVE MECHANISMS OF REVIEW 13, 17-18 (Genevra Richardson & Hazel Genn eds., 1994).

467. *See* LEGAL FOUNDATIONS, *supra* note 256, at 284.

468. DICEY, *supra* note 3, at 76.

469. *See id*. at 77-79.

470. *Id*. at 73.

471. *Id*. at 74.

472. *See* EISGRUBER, *supra* note 411, at 62, 211.

the judiciary as a "proxy" for the citizenry gives the popular sovereign a stronger position in opposing excessive government actions, and mitigates or replaces the need for popular disobedience. "External" limits upon the legislature's law-making powers can therefore exist within the formal organizational framework of the government. The electorate acts positively through legislative representatives exercising individual judgment when enacting laws, while it acts negatively through the judicial check of government actors overstepping their discretionary boundaries.[473] This results in a duality of representation that departs from the orthodox doctrine of unitary, parliamentary sovereignty—that sovereignty is divided between the legislature and judiciary. Sir Stephen Sedley suggests that such a concept might have already developed in the British constitution through the judicial exercise of *ultra vires* review.[474] T.R.S. Allan follows Sedley in his comments on the judicial implementation of the European Convention on Human Rights. Allen writes that "the British constitution embraces a dual sovereignty: in the interpretation and application of law the courts have, and rightly have, the last word."[475] This judicial role, based in democratic theory, legitimizes its function in restraining the legislature and assessing popular attitudes.

Judicial review as a means of enforcing popular sovereignty might result, as in the United States, from direct popular ratification of a written constitutional document.[476] Such a document might explicitly recognize judicial review over legislative and executive acts.[477] 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 thought.[478]

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473. *Sound of Silence*, *supra* note 262, at 271. There are, therefore, "distinct but interlocking spheres of constitutional competence." *Id.*

474. Sedley rejects the notion that the executive has any share of sovereignty, but remains answerable to both Parliament and the courts. He suggests that "public law now has both the doctrinal strength and the public support to say that this is a matter on which there is no longer a constitutional silence and that the rule of law recognises two sovereignties, not one and not three." *Id*. at 291.

475. *Response*, *supra* note 118, at 381.

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

477. 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. Charter, *supra* note 335, § 24(1); Constitution Act, 1982, *supra* note 336, § 52(1).

478. *See* Marbury v. Madison, 5 U.S. 137; *see also* SCHWARTZ, *supra* note 414, at 39-43.

In the Federalist No. 78, Alexander Hamilton noted both the significance of a written constitution as an expression of popular will and fundamental governing principles, and characterized the judiciary as the instrument for its realization in law,

> If there should happen to be an irreconcilable variance between [the constitution and legislative act], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agent. . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.[479]

Implicit in Hamilton's remarks are three points supporting a positivist foundation for a written constitution. First, the legislature is the "agent" of the people, whose intentions are superior to it. As an agent, then, the legislature must abide by the will of the popular sovereign. This obligation, as well as the constitution's "validity," is rooted in a democratic theory that transforms the moral imperative of responding to the electorate into a corresponding legal obligation. The constitution is the expression of this popular will, functionally similar to a statute expressing the command of the legislature. Second, in recognizing the moral and legal superiority of the popular sovereign's will, the judiciary must enforce constitutional provisions against the legislature. The role of the courts in this regard is essentially little different from its role in interpreting and applying statutes, with the exception that it is deferring to the people over their agents. Hamilton, however, makes it clear that the judiciary is not superior to the legislature.[480] These branches occupy different but equal institutional positions intended to give effect to electoral will.[481] In that sense they exercise dual sovereignty, delegated to them by the ultimate popular sovereign. Finally, in addition to recognizing a constitution as representing the democratic will of the people, Hamilton described the constitution as "fundamental laws."[482] Characterizing a constitution as fundamental evokes an understanding that its principles and rules have special status in the foundation of the political system. Distinct from laws that "are not fundamental," or those being regular acts of the legislature, the constitution expresses normative assumptions about government.

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479. THE FEDERALIST No. 78, at 435-36 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

480. *Id.*

481. *See id.*

482. *Id.*

These assumptions are bound with the popular sovereign's democratic will, from which they gain their moral legitimacy.

A written constitution has normative value as a means of expressing pre-existing governing principles. An alternative common-law model that limits Parliament and accepts judicial review as a popularly endorsed means of enforcement can exist solely in unwritten form. This constitution, however, can subsequently accommodate a written text as a means of better articulating and expressing its foundational principles. Because those principles are normative assumptions about government that inform the rule of recognition, the written constitution acts as a "statute"; the written constitution represents the popular-sovereign's commands, which are binding on the legislature and enforceable by the judiciary.

C. *Common-Law Adjudication and the Constitutionalization of Written Texts*

Just as Coke regarded statutes as statements by the high court of Parliament in declaring, clarifying, or altering the common law, 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 fashion. 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.[483] Those texts "fill in the gaps" of the unwritten common-law constitution.[484] 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.

While positivism has generally struggled to reconcile statute and common law, older common-law theory, as understood by Coke, supported a more ambiguous, and arguably harmonious, relationship between the two.[485] As a high court, Parliament articulated principles of law conducive to the public good. Legislative process was different than judicial process, but statutes declared, refined, or

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483. *See generally* Human Rights Act, *supra* note 1; TREATY OF ROME, *supra* note 1.

484. *See* sources cited *supra* note 483.

485. *See* Sebok, *supra* note 433, at 2062-65. *See generally* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77 (A.W.B. Simpson ed., 2d ser. 1973) (discussing the tensions resulting between positivism and traditional common-law theory).

otherwise developed the common law.[486] Coke supported a judicial power to void statutes against "common right and reason" because of this interaction between statute and common law.[487] 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.[488] 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. As explained in Part II, Coke's theory, like explanations by Blackstone and Dicey, is adjustable to support a constitutional arrangement where fundamental common-law principles promoting democratic conceptions of the public good take precedence over contradictory statute. 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.

The relationship between statutory law and common law becomes more complex when a statute purports to change constitutional principles.[489] Courts must then give special consideration when attempting to reconcile a particular statute with binding common law or subsequent contradictory statutes. A court 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.[490] Even without the adoption of a comprehensively written and popularly ratified constitutional document, texts graft onto the underlying common-law framework and become normative in their own right as positivist expressions of popular will. Texts in this sense do not "trump" or stand apart from the common-law constitution, but become

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486. *See supra* note 129.

487. *See supra* note 181.

488. GOLDSWORTHY, *supra* note 179, at 250-52.

489. *See* Eskridge & Ferejohn, *supra* note 413, at 1266.

490. The Supreme Court of Canada has once hinted of a similar process for the Canadian Constitution. Section 52(2) of the Constitution Act, 1982, provides that, "The Constitution of Canada includes (a) the Canada Act 1982, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)." Constitution Act, 1982, *supra* note 336, § 52(2). In *New Brunswick Broadcasting Co. v. Nova Scotia Speaker of the House of Assembly*, [1993] 1 S.C.R. 319, the Supreme Court found that this Section was not exhaustive and included within it the unwritten doctrine of parliamentary privilege. It therefore followed a reverse process of formally incorporating an unwritten principle into a predominantly written constitutional framework. Hogg muses on the possibility that the Supreme Court could also add, and thereby judicially constitutionalize, other written documents, although to do so a Canadian court "would be very bold indeed. . . ." HOGG, *supra* note 337, at 7-8.

intertwined with it.[491] Such fusion of common law and statutory law has occurred on a lesser 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 elaboration, common law-style."[492] These "statutes," originally enacted by Parliament during the respective reigns of Henry VIII and Charles II, illustrate how closely text can intertwine with common law.[493] 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; 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.[494] 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 institutional culture in a deep way."[495] 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 Act.[496]

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491. *See* LEGAL FOUNDATIONS, *supra* note 256, at 11-12.

492. Eskridge and Ferejohn, *supra* note 413, at 1219. 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.

493. *See* Statute of Uses, 1535, 27 Hen. 8, c. 10 (Eng.); Statute of Frauds, 1677, 29 Car. 2, c. 3 (Eng.).

494. LEGAL FOUNDATIONS, *supra* note 256, at 93-94; Beatson, *supra* note 184, at 250 (asking, "Why, if they are relevant, should a common law system not also snap up well considered trifles of statute law enacted by its own legislature?").

495. Eskridge & Frerejohn, *supra* note 413, at 1215.

496. *Id*. at 1231, 1237, 1257 (citing 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

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 times 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. . . .[497]

The concept of the super-statute provides a model by which certain statutes or even treaties can become constitutional documents through an evolutionary and judicial process. The first part of the above characterization 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.[498] Eskridge and Ferejohn describe these exceptional statutes as "quasi-constitutional" in status.[499] As they write within the context of U.S. law, however, those statutes remain subordinate to the Constitution. In the alternative British model, super-statutes would instead become the paramount laws themselves, in conjunction with fundamental common-law principles limiting Parliament, and enforceable through judicial review.[500] 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

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21 U.S.C. § 301 (1994)). Another super-statute would be the British Human Rights Act, *supra* note 1.

497. Eskridge & Ferejohn, *supra* note 413, at 1216.

498. *Id*. at 1216-17, 1229-30, 1266-67, 1273-74.

499. *Id*. at 1216-17, 1266-67.

500. *See id.* at 1265 (characterizing both the Canadian Bill of Rights, *supra* note 391, and the British Human Rights Act, *supra* note 1, 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 the alternative common-law model.

participates in the "amending process" by originally passing a super-statute. Common-law adjudication thereafter constitutionalizes the statute through an evolutionary process reacting to shifting norms.[501] Ways that super-statutes and unwritten constitutional principles are enforceable and hierarchical, and unilaterally changeable by Parliament, can vary depending on two factors: (1) political developments, and (2) 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. The variance depends upon the normative values, purposes, and functions of higher laws as they become apparent through the on-going judicial process.[502]

As texts co-mingle with the common law to form a changing constitutional landscape, the interpretive approach taken by courts will vary. Unwritten and written principles require broader, more purposeful construction, sensitive to their relative moral force, as well as their legal effects in restraining Parliament.[503] Indeed, the common law has long provided not only formal rules but also abstract principles of good governance, especially with regard to individual rights and due process concerns.[504] The example of the *ultra vires* doctrine, with its requirement of rationality in the administrative decision-making process, shows how abstract principles can be judicially developed and applied to limit government action depending upon circumstantial considerations. Just as the entrenchment of super-statutes results from the common-law process, so does their subsequent interpretation and application as higher law binding upon Parliament. Courts should, therefore, construe them

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501. *See* Eskridge & Ferejohn, *supra* note 413, at 1268-71; *see also* GOLDSWORTHY, *supra* note 179, at 240-46 (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." Eskridge & Ferejohn, *supra* note 413, at 1273.

502. The possibility also arises that, just as they constitutionalize certain significant texts, courts can *de-constitutionalize* them in a like manner should they lose their normative value in society.

503. LEGAL FOUNDATIONS, *supra* note 256, at 87-88.

504. *Id*. at 136-37; BRADLEY & EWING, *supra* note 309, at 17-18.

"liberally and in a common law way, but in light of the statutory purpose and principles as well as compromises suggested by statutory texts."[505] Through their judicial entrenchment as expressions of overriding norms emanating from the popular sovereign, constitutional texts are loosened from parliamentary intent. For these reasons, courts' interpretive approach to constitutional texts is likely to be more purpose-searching than formalistic.[506] Thus, judicial interpretation and application should be more forward-looking and considerate of results consistent with both the text's underlying principles and broader systemic integrity. This contrasts with a commitment of strict obedience to Parliament's intent when enacting the super-statute. 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 further, even if indirect or attenuated, influence in the development of constitutional jurisprudence.

The alternative constitution can come to include both written and unwritten elements, constitutionalized, 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 and legislative branches, is a gradual, evolutionary means of constitutional development that maintains continuity with Britain's common-law and 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 parliamentary sovereignty and increased authority in the judiciary. Such a situation heralds the resurgence of a common-law constitutional model that limits Parliament through judicial review. The next and final Section of Part III briefly examines this transformation process by identifying significant British constitutional documents. It argues that the judiciary has already effectively relied upon some of those texts to limit Parliament and has begun gradually constitutionalizing them.

D. *Overview: The United Kingdom's Quasi-Written Constitution*

While the British Constitution has traditionally been regarded as unwritten, it is wrong to conclude that it contains no written elements. At different moments throughout its history, certain

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505. Eskridge & Ferejohn, *supra* note 413, at 1247.

506. *See* LEGAL FOUNDATIONS, *supra* note 256, at 93-94, 143-45, 156; Beatty, *supra* note 322, at 142-43; Beatson, *supra* note 184, at 249, 251, 260.

documents 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.[507] 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.[508] In this Century, Parliament began the abdication of its imperial authority with the Statute of Westminster in 1931.[509] 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.[510] The most significant and far-reaching acts are the European Communities Act 1972; the Human Rights Act 1998; and the statutes devolving law-making authority to Scotland, Northern Ireland, and Wales.[511] These latter documents are particularly important in that they place direct pressures on Parliament's exercise of sovereignty, requiring that it defer to other sources of law and respect human rights.[512] These ambitious statutory regimes further exist within the context of aggressive *ultra vires* review by the judiciary and seriously undermine the doctrine of parliamentary sovereignty. Increasing judicial authority, competing with Parliament's weakened, but still extant, claim to supremacy, results in complex judicial and legislative interaction that makes the Constitution very fluid in regard to its definitive or paradigmatic, and rigid or flexible natures. Judicial reliance upon and political deference to European Community law pursuant to the European Communities Act, the European Convention on Human Rights as incorporated by the Human Rights Act, and the devolution statutes have increasingly constitutionalized these written and unwritten sources of law to form a "quasi-written" constitution. This Constitution, an alternative common-law framework comprised of

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507. Magna Carta, 1215, 9 Hen. 3, c. 1 (Eng.); Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.); Act of Settlement, 1700, 12 & 13 Will. 3, c. 2 (Eng.); Union with Scotland Act, 1706, 6 Ann., c. 11 (Eng.); Act of Union with England Act, 1707 (Scot.); Representation of the People Act, 1832, 2 & 3 Will. 4, c. 45 (Eng.).

508. BRADLEY & EWING, *supra* note 309, at 14-17.

509. The Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4 (Eng.), declared that Parliament would thereafter no longer legislate for the Dominions without their request and consent.

510. Parliament Act, 1911, 1 & 2 Geo. 5, c. 35 (Eng.); Parliament Act, 1949, 12, 13 & 14 Geo. 6, c. 103 (Eng.); House of Lords Act, 1999, c. 34 (Eng.).

511. *See supra* note 1.

512. Hazell, *supra* note 379, at 86-87.

both written and unwritten elements, is supplanting the doctrine of parliamentary sovereignty in fact, if not yet in theory.

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. This Section briefly examines some illustrative 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.[513] 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 legislation.

1. The Human Rights Act 1998

The Human Rights Act 1998 came into force in October 2000, incorporating most sections of the European Convention into domestic U.K. law, subject to any reservations or derogations made by the United Kingdom.[514] 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.[515] 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."[516] Courts, as a matter of practice, have

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513. Beatson writes, for example, "the Human Rights Act 1998 envisages the development of a new form of common law by reference to the text of the European Convention of Human Rights—a legislative instrument." Beatson, *supra* note 184, at 251.

514. Section 1 of the Human Rights Act, *supra* note 1, incorporates Articles 2 to 12 and 14 of the European Convention, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the European Convention. The United Kingdom has so far made one derogation to the European Convention, declaring a public emergency under Article 15(1) in response to the situation in Northern Ireland. It also made a reservation to sentence 2, Article 2 of the First Protocol respecting the right of parents to ensure education and teaching in conformity with their own religions and philosophical conventions. In incorporating the European Convention, the Human Rights Act omits Article 13, which states that anyone whose rights and freedoms under the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation was committed by persons acting in an official capacity. This Article might likely violate the doctrine of parliamentary sovereignty by allowing private persons to seek damages in the courts against public authorities for their acts clearly permitted by Parliament, or perhaps even against Parliament itself.

515. Section 2 of the Human Rights Act directs courts to "take into account" the decisions and opinions of the European Court of Human Rights, the Commission, and the Committee of Ministers. Human Rights Act, *supra* note 1, § 2.

516. *Id.* § 3(1)

generally applied this rule of interpretation some time before the passage of the Human Rights Act, just as they have with common-law rules.[517] 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.[518] 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.[519] This Section prevents courts from claiming under the Act a power to strike down primary legislation. Although § 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.[520] To remedy such a declaration, § 10 allows for a Minister or the Queen in Council to order amendments to the legislation removing the defect.[521] Although incompatible legislation remains in effect, this fast track amending procedure allows the government to take expeditious remedial measures and will likely put it under considerable political pressure to take action. Section 19 also gives a pre-enactment role to Crown ministers to ensure a statute's compliance with the European Convention.[522] This Section requires the responsible minister, before the second reading of a bill, to make a statement that it either is or is not compatible with the European Convention.[523] If the minister cannot declare the bill compatible, he or she may nevertheless urge Parliament to pass the legislation because Parliament retains full authority to do so.[524]

The Human Rights Act recognizes a dual role for the courts when adjudicating issues of fundamental human rights. First, courts must endeavor to reconcile primary legislation with the European Convention through the interpretive process, but if unable to do so,

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517. LEGAL FOUNDATIONS, *supra* note 256, at 13-15, 250-53; *see* MCILWAIN, *supra* note 185, at 259-61 (noting that the judiciary's attempts to interpret statutes compatibly with the common law trace back to Coke's time).

518. Human Rights Act, *supra* note 1, § 3(1).

519. *Id.* § 3(2).

520. *Id.* § 4(6)(b) (stipulating that a statement of incompatibility also has no effect on the parties to the proceedings).

521. *Id.* § 10 (addressing a similar declaration by the European Court of Human Rights).

522. *Id.* § 19.

523. *Id.*

524. *Id.*

they can openly declare it incompatible.[525] As for the interpretive approach, courts already have been doing this for some time with regard to parliamentary acts.[526] This interpretive function continues under the Human Rights Act, but 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.[527] Lord Hope, in his opinion in *R. v. Lambert*, explained how the European Communities Act had affected U.K. law,[528]

> As to the techniques that may be used, it is clear that the courts are not bound by previous authority as to what the statute means. It has been suggested that a strained or non-literal construction may be adopted, that words may be read in by way of addition to those used by the legislator and that the words may be "read down" to give them a narrower construction that their ordinary meaning would be bear. [citation omitted] It may be enough to say what the effect of the provision is without altering the ordinary meaning of the words used. [citation omitted] In other cases . . . the words will require to be expressed in different language in order to explain how they are to be read in a way that is compatible. The exercise in these cases is one of translation into compatible language from language that is incompatible. In other cases . . . it may be necessary for words to be read in to explain the meaning that must be given to the provision if it is to be compatible. But the interpretation of a statute by reading words in to give effect the presumed intention must always be distinguished carefully from amendment. Amendment is a legislative act. It is an exercise which must be reserved to Parliament.[529]

This passage makes 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

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525. *Id*. §§ 3-4.

526. Recognition of the doctrine of parliamentary sovereignty, however, meant that executive actions lawfully taken pursuant to clearly offending statutes remained *intra vires*. See for example the opinion of Gibson L.J. in *R. v. Secretary of State for the Home Department*, ex parte *Brind*, 1 A.C. 696, 726-27 (H.L. 1991).

527. *See* Re K., 2 All E.R. 719, para. 41 (C.A. 2001).

528. R. v. Lambert, 3 All E.R. 577 (H.L. 2001).

529. *Id*. para. 81. Indeed, in the same case, all but one of the judges applied such broad interpretive powers. At issue was the Misuse of Drugs Act, 1971, c. 38, § 28(2), (3) (U.K.). This act made possession of a controlled substance a criminal offense unless the accused proved that he did not know the substance in his possession was controlled. Appellant claimed that this burden of proof on him at trial violated the presumption of innocence mandated by the European Convention. European Convention, *supra* note 2, art. 6(2). Lord Hope therefore read the word "prove" as used in the act to mean "give sufficient evidence." *Id*. para. 94.

compatible with those principles.[530] 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.[531] 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.[532] Instead, courts can only make a declaration of incompatibility and must apply the will of Parliament.[533] It is unclear how far courts will be willing to go before finding the line between mandated interpretation and impermissible amendment.[534] 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 implication."[535] 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 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."[536]

It is true that the provisions of the Human Rights Act very clearly allow a court in such instances of clear incompatibility to issue only a legally non-binding declaration of such.[537] Lord Steyn wrote in *ex parte Kebeline* that "[i]t is crystal clear that the carefully and subtly drafted 1998 [Human Rights] Act preserves the principle of

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530. LEGAL FOUNDATIONS, *supra* note 256, at 267.

531. *Lambert*, 3 All E.R. 577, para. 81.

532. *Id.*

533. *Id.* para. 80.

534. Sir Andrew Morritt postulates that the court can seek "some interpretation of the words used which is legally possible. The court is required to go as far as, but not beyond, what is legally possible." Wilson v. First County Trust Ltd. (No. 2), 3 All E.R. 229, para. 42 (C.A. 2001). Still, the attempt to find a compatible reading of a statute can likely lead to "instances where this has involved straining the meaning of statutory language." R. v. London North and East Region Mental Health Review Tribunal, 3 W.L.R. 512, para. 27 (C.A. 2001).

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

536. *Id.*

537. Human Rights Act, *supra* note 1, §§ 3(2), 4.

parliamentary sovereignty."[538] Two reservations make such express retention of orthodox theory rather attenuated. First, Parliament's authority to legislate against human rights can be confined to the Human Rights Act itself.[539] Conceivably, judicial review in other areas, such as European Community law, may limit Parliament's powers. Canada again provides a pertinent example in regard to Parliament's ability to legislate notwithstanding the Charter of Rights, but not in contravention of entrenched principles of federalism. Parliament's need to "carefully and subtly" draft the Human Rights Act to prohibit courts from striking down primary legislation is also evidence of the sovereignty doctrine's growing weakness, not its continuing strength.[540] Under this view, the Human Rights Act's "preservation" of parliamentary sovereignty constitutes 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 Parliament.[541]

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538. R. v. Dir. of Pub. Prosecutions, *ex parte* Kebeline & others, and R. v. Dir. of Pub. Prosecutions, *ex parte* Rechachi, 4 All E.R. 801, 831 (H.L. 1999).

539. *See generally* Human Rights Act, *supra* note 1.

540. 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* note 542. 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).

541. Lord Hope, for instance, writes,

> In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention. . . . It will be easier for such an area of judgment to be recognised where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognized where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

Kebeline, 4 All. E.R. at 844. *See also* Griffith, *supra* note 49**,** at 50, 60; Beatty, *supra* note 322 at 134-35.

2. The European Communities Act 1972 and European Community Law

R. v. *Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* presents another poignant illustration of how courts limit Parliament by effectively abrogating primary legislation in violation of European Community law.[542] After acceding to the Treaty of Rome, Parliament enacted the European Communities Act 1972.[543] Section 2(1) of this act gave all European Community laws effect within the United Kingdom and declared them legally enforceable.[544] In addition, § 2(4) mandated that courts construe all secondary legislation as compatible with it.[545] 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.[546] Some companies, having previously registered vessels as British, were unable to satisfy the new requirements as their majority owners and shareholders were

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

543. TREATY OF ROME, *supra* note 1; European Communities Act, *supra* note 1.

544. Section 2(1) of the European Communities Act provides:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

European Communities Act, *supra* note 1, § 2(1).

545. Section 2(4) of the European Communities Act states:

> The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.

Id. § 2(4). Section 2(2) grants authority to the executive to make secondary legislation for the purpose of implementing Community Law. *Id.* § 2(2). *See* Joseph Jaconelli, *Constitutional Review and Section 2(4) of the European Communities Act 1972*, 28 INT'L & COMP. L.Q. 65, 67 (1979).

546. R. v. Sec'y of State for Transp., *ex parte* Factortame Ltd. (No. 1), 2 A.C. 85 (H.L. 1990); Merchant Shipping Act, 1988, c. 12 (Eng.).

Spanish. The complainants argued that the U.K. law in question violated European Community law, which the U.K. government was obligated to obey as a signatory of the Treaty of Rome.[547] They further sought an injunction against the enforcement of the challenged statute pending a reference to the European Court of Justice, claiming that they would suffer irreparable harm from the interruption of their business should they succeed on the merits.[548] The House of Lords decided that interim relief could not be granted against the Crown, but requested a ruling from the European Court of Justice on the question of whether the lack of such recourse was itself a violation of European Community law.[549] The Court of Justice held that it was a violation.[550] 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.[551]

The decision in *Factortame (No. 2)* raised concerns about the nature of sovereignty in the United Kingdom and the constitutional role of the judiciary.[552] 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.[553] In his opinion in the case, Lord Bridge clarified the constitutional status of European Community law and the judicial approach to its enforcement.[554] While he asserted that the European Communities Act impliedly repealed the statutory prohibition of interim injunctive relief against the Crown with regard to Community law, he ventured further by stating,[555]

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547. Complainants specified the Treaty of Rome, Articles 7, 52, and 221. TREATY OF ROME, *supra* note 1, arts. 7 (establishment of an internal market), 52 (free movement of persons), 58 (treatment of companies as persons), and 221 (equal participation in the capital of companies). For a brief synopsis of the facts underlying the *Factortame* case, see *After* Factortame, *supra* note 542, at 244-45.

548. Under Article 177 of the Treaty of Rome, domestic courts of Member States can request the Court of Justice to give a preliminary ruling on Community law. TREATY OF ROME, *supra* note 1, art. 177.

549. *See Factortame (No. 1),* 2 A.C. 85.

550. R. v. Sec'y of State for Transp., *ex parte* Factortame Ltd., 3 C.M.L.R. 867 (1990); *After* Factortame, *supra* note 542, at 244-46.

551. H.W.R. Wade, *Sovereignty—Revolution or Evolution?*, 112 LAW Q. REV. 568, 568 (1996) [hereinafter *Revolution or Evolution*]; LORD NOLAN & SIR STEPHEN SEDLEY, THE MAKING AND REMAKING OF THE BRITISH CONSTITUTION 4 (1997).

552. *Sovereignty of Parliament*, *supra* note 540, at 3.

553. *Revolution or Evolution*, *supra* note 551, at 568.

554. R. v. Sec'y of State for Transp., *ex parte* Factortame Ltd. (No. 2), 1 A.C. 603, 658 (H.L. 1991).

555. The doctrine of implied repeal, based upon the doctrine of parliamentary sovereignty, holds that acts of Parliament inconsistent with earlier acts prevail. Of course, courts maintain considerable room in interpreting conflicting statutes and

> If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty [citation omitted] it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.[556]

Three assumptions about the constitutional status of Community law lie within Lord Bridge's statement. 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 Act.[557] Second, there was "nothing in any way novel" in regarding Community law as supreme, and the authority of courts to override incompatible domestic law was "always . . . clear" under the Act.[558] 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 Community.[559] 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 arisen.[560] The above passage shows that the 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

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requiring that Parliament either expressly or impliedly intended a later act to repeal the former. *See After* Factortame, *supra* note 542, at 248.

556. *Factortame (No. 2)*, 1 A.C. at 658-59.

557. *Id*. para. 14-16.

558. Jaconelli had some time earlier characterized such judicial authority under the European Communities Act as "*constitutional* review." Jaconelli, *supra* note 545, at 65.

559. *Factortame (No. 2)*, 1 A.C. 603, para. 6.

560. *Id*. para. 25.

Community membership, the results of which were in favor.[561] Such popular approval lends added support to the binding supremacy of Community law upon Parliament. 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.

While *Factortame (No. 2)* does not necessarily mean that Parliament has permanently surrendered its sovereignty, it indicates a constitutional practice analogous to the Canadian Bill of Rights as interpreted by the Supreme Court of Canada in the *Drybones* decision.[562] Under this approach, Parliament remains free to repeal the European Communities Act, and to withdraw from the Community. Yet, in the meantime, Parliament has constructed a legal regime to which it must abide.[563] *Factortame (No. 2)* thus stands for the propositions that Community law is (1) paramount within the United Kingdom, (2) limits Parliament's exercise of sovereignty, and (3) is legally enforceable against Parliament.[564] This situation is a political fact as seen over time through the actions of the judiciary, Parliament and other government actors, and the electorate.[565] 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,

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561. KING, *supra* note 364, at 55-56.

562. *See* R. v. Drybones, [1970] S.C.R. 282; Jaconelli, *supra* note 545, at 68-69.

563. As Craig describes it,

> A Parliament is perceived as having made a choice, to join the Community in 1972. The implications of this choice have repercussions for later Parliaments, in the sense that the consequence of membership is, for the reasons given by Lord Bridge, to afford supremacy to Community law. This 'consequence' can of course be changed by later Parliaments, either by withdrawing from the [European Community], or perhaps by expressly stating in a certain context that national law is departing from Community norms. In the absence of either of these developments the implications of the legislative choice made in 1972 stand, in much the same way that the provisions of an earlier statute requiring particular majorities can only be altered by a later statute passed in conformity with those procedural requisites.

After Factortame, *supra* note 542, at 252-53. *See also Revolution or Evolution*, *supra* note 551, at 571; *Sovereignty of Parliament*, *supra* note 540, at 3.

564. "Acts of Parliament are now subject to a higher law, and to that extent they now rank as second-tier legislation." *Sovereignty of Parliament*, *supra* note 540, at 3.

565. The status of Community law now in the United Kingdom contrasts sharply with more skeptical attitudes upon accession in 1972. *See* F.A. Trindade, *Parliamentary Sovereignty and the Primacy of European Community Law*, 35 MOD. L. REV. 375, 381 (1972); Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 352-55 (1994).

and, through it, the Treaty of Rome. In time, it may similarly incorporate other written texts.

E. *Summary*

Common-law theory contains embedded within it elements that support a constitutional model of a limited Parliament subject to judicial review. The British judiciary already exercises considerable review over executive action through the *ultra vires* doctrine–a basis for a claim of independent common-law derived powers of review that may extend to cover both primary and secondary legislation. The rule of law and democratic values can also justify arguments for the restraint of Parliament. Constitutional change in the United Kingdom adopting these ideas would still parallel the common-law tradition, albeit by following a path thus far considered unorthodox. This alternative arrangement of the British Constitution fits within its characteristic of being an unwritten framework. Nevertheless, although a judicial power of review that controls Parliament can exist independently of a textual source, these institutional structures can easily lead to the adoption of constitutional writings.

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. Constitutions in general, whether written or unwritten, may be evaluated in terms of whether they are paradigmatic or definitive in establishing the principles and rules intended to guide the exercise of government powers, particularly in their reliance upon judicial review. Furthermore, they may be flexible or rigid in their means of amendment depending upon the legislature's ability to unilaterally alter them, or the necessity of following special procedures. These descriptive values are not themselves absolute or exclusive in how they reflect actual constitutional practice. Rather, they represent a sliding scale upon which a constitution may generally lie towards one or the other end, while still exhibiting mixed characteristics. The way in which written documents interact with the constitutional system can vary greatly and maintain normative force as expressions of governing principles. Thus, a final reliance upon political restraints by certain fundamental documents within U.K. law, such as the Human Rights Act, does not exclude their understanding as constitutional texts.

Although a constitution must not necessarily provide for direct or full judicial invalidation of legislation contrary to its provisions, the recognition of its supremacy is suited to support some form of judicial

control. Effective judicial review of some degree supports the constitution's moral and legal supremacy, itself deriving from the positivist nature of its authority. Certain documents, whether they originate as treaties or statutes, may be more than promulgations of the Crown or sovereign Parliament; those that have normative value within the community receive the popular sovereign's endorsement as constitutional principles. The founding of those constitutional texts upon the will of the sovereign people can be made compatible with the common law by building upon the ideas of Coke, Blackstone, and Dicey. The public itself may determine its own good in the form of constitutional principles, expressed in either unwritten or written form, binding upon Parliament.[566] In turn, courts can develop and interpret those principles in common-law fashion. This positivist approach rejects Austin's notion that all legal rules must proceed from one sovereign entity issuing commands, such as Parliament. Instead, the attribution of written or unwritten constitutional norms to expressions of popular will stems from Hart's rule of recognition. This positivist foundation for constitutional texts encourages courts to restrain primary legislation in much the same way that it currently exercises *ultra vires* review by acting as a "proxy" for the popular sovereign. In this sense, it exercises dual sovereignty with Parliament in giving effect to popular will. The review power can still function in many forms, such as a full power of statutory invalidation or reliance upon vigorous interpretive measures. Furthermore, Hart's theory permits informal and organic constitutional change depending upon gradual, but major, shifts in political norms rather than formal amending procedures.

The process by which certain texts can become 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 "organic" or gradual constitutionalization, slowly and cautiously determined through adjudication. Therefore, some constitutional principles originate in "super-statutes" that are the products of interaction between legislative and judicial processes in elevating written principles to a status of higher law. Consequently, evolving

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566. If democracy is rightly understood as a scheme of governance for the common good, rather than a means for the most efficient attainment of whatever objectives a present majority desires, there is no opposition between democratic government and the rule of law: each is a necessary and equally valuable "higher-order" principle whose ultimate goal is a justice that all can recognise and, in its main lines, endorse.

Response, *supra* note 118, at 382-83.

normative assumptions dictate if or when, and to what extent, the judiciary should incorporate certain texts into the common-law constitutional framework.

When evaluating constitutional developments in the United Kingdom, it is clear that written documents, such as Magna Carta and the Act of Union, have played significant roles in the process. Recent statutes, particularly the Human Rights Act, the European Communities Act, and the devolution statutes, have also greatly impacted the British Constitution and weakened Parliament's sovereignty. The fundamental role of these texts in guiding both adjudication and political action suggest that they reflect norms in the constitutional system. Recent cases on the Human Rights Act and the decision in *Factortame (No. 2)* illustrate ways the judiciary can scrutinize primary legislation based upon those and other written documents. A review power can effectively limit Parliament through a variety of means, such as creative interpretation consistent with broad constitutional principles, declarations of incompatibility placing political pressures upon government, or by not applying an offending statute. While limitations upon Parliament may take different forms, they all depend upon a basic recognition that certain laws are supreme and suited to some form of effective judicial review. In applying these laws, the judiciary must realize that it has a cooperative role with Parliament, which sometimes requires deference to the legislative process. Courts must also be sensitive to long-continuing practices of government actors and political attitudes among the electorate that indicate shifting normative assumptions. Courts may, therefore, effectively control Parliament according to both paramount unwritten and written principles that comprise for the United Kingdom a patchwork, "quasi-written" constitution.

IV. CONCLUSION

The British Constitution is in the process of transformation, departing from the doctrine of parliamentary sovereignty in favor of a legislature effectively limited by unwritten and written constitutional principles enforceable by judicial review. This new framework is evolutionary in that it represents the resurgence of an older, alternative common-law theory that maintains continuity with the British constitutional tradition. The theories of Coke, Blackstone, and Dicey, despite their contributions to the doctrine of parliamentary sovereignty, have embedded within them arguments that support a limited constitution based upon democratic legitimacy. These same considerations underpin the judiciary's inherent, common-law authority of *ultra vires* review of executive actions, and

opens the possibility that courts may extend their scrutiny to primary legislation itself based upon unwritten constitutional principles.

Because a constitution may vary greatly in how strictly it restrains the legislature and allows change in its provisions, its existence depends upon its normative value in ordering government. Written constitutional texts have a positivist aspect because they express underlying, paramount principles. A change in the rule of recognition may also reject parliamentary supremacy in favor of dual sovereignty exercised by both the judiciary and legislature. Hence, judicial review has democratic legitimacy as a means of enforcing the popular sovereign's will, expressed in written constitutional texts, against Parliament. Through common-law adjudication, courts may gradually constitutionalize those statutes and treaties that come to reflect shifting or emerging normative assumptions within the political community. Furthermore, constitutional development is a cooperative and interactive process between the courts, Parliament, and the electorate. The resulting "quasi-written" constitution accommodates the co-existence of unwritten and written principles, varying degrees of their entrenchment, and judicial enforcement that might range from creative interpretation to the outright invalidation of primary legislation.

Constitutional transformation is already occurring in the United Kingdom. This is shown by limitations effectively placed upon parliamentary sovereignty, which results from judicial review under the Human Rights Act and the European Communities Act. While profound in its impact upon U.K. constitutional practice, this alternative constitutional model–rooted in past theories and sensitive to British political culture–nonetheless maintains continuity with the common-law tradition. However, the following point must be emphasized: discussion of constitutional change in the United Kingdom should not overly focus upon the issue of parliamentary sovereignty, which has long been the bogeyman haunting potential reform.

This Article demonstrates that: (1) constitutions may be made of a mix of characteristics, and (2) effective limitations upon the legislature may consequently rely upon complex interaction between the judicial and legislative branches. U.K. courts may play an aggressive and significant role in employing various legal mechanisms in controlling Parliament, without necessitating a complete and categorical rejection of the parliamentary sovereignty doctrine. Though it is conceivable that constitutional theory may one day abolish the doctrine, the parliamentary sovereignty doctrine might well remain if it were exercised sparingly and carefully in deference to the judiciary as a dormant reserve power, not unlike the Royal Assent. In any case, the open recognition and imaginative accommodation of such possibilities can be the unique and defining

feature of future British public law while reinvigorating an alternative, but still vibrant, common-law constitutional theory.