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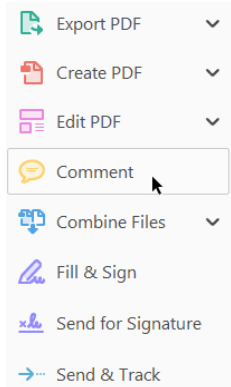
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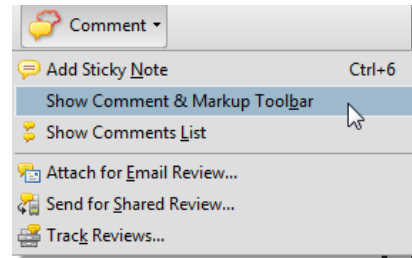
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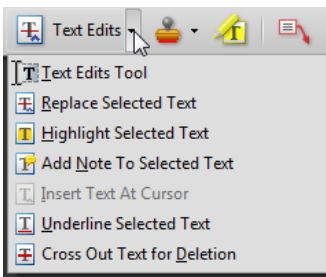


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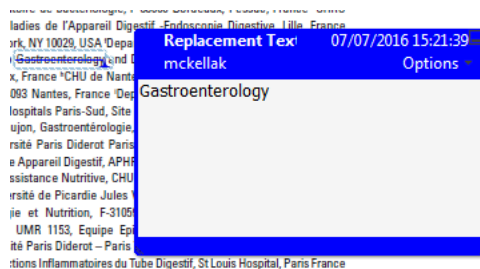
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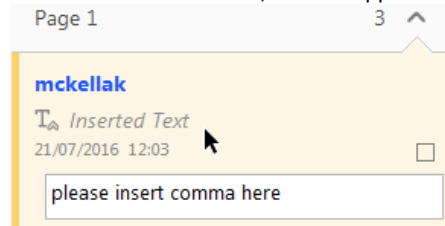


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# The Democratic Case for a Written Constitution

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5 **Abstract:** Written constitutions have often been viewed as a bridle for unchecked political majoritarianism, as a restraint on government, and hence as a limiting device rather than form of democratic political expression. Breaking with that tradition, this article sets out a democratic case for a written constitution and contrasts it with the rights-based and clarity-based cases. It then proceeds to show why the case against written constitutions – which are broadly located in a conservative critique, an anti-rationalist critique and an anti-judicialisation critique – are misguided. Nevertheless, a  
10 democratic case for a written constitution necessarily raises challenging questions about how the constitution would be enacted, and how rigidly entrenched it should be. In relation to the former, the author argues for a constituent assembly consisting of party and direct citizen representation. As for the latter, he defends a model of entrenchment that permits amendment through a simple majoritarian parliamentary procedure in conjunction with a referendum, and, most controversially, a provision requiring a new constitutional convention about once in a generation. This is the type of democratic constitution, in the author’s view, that accommodates the need  
15 for the United Kingdom constitutional order to take both rights and democracy seriously.

20 **Key words:** Written Constitution; Democracy; Rights; Clarity; Judicialisation; Entrenchment; Constituent Assembly; Constitutional Amendment; Constitution-Writing; Pluralism

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‘The English Constitution’, wrote Lytton Strachey in his biography of Queen Victoria, ‘that indescribable entity – is a living thing, growing with the growth of men, and assuming ever varying forms in accordance with the subtle and complex laws of human character. It is the child of wisdom

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and chance.<sup>1</sup> My view is that the United Kingdom constitution has lately been more the issue of chance than of wisdom, and that, at any rate, neither chance nor wisdom produce legitimate constitutional children in a democratic society. Only people can do that, and they can only do it by producing a written constitution.

This kind of argument is one steeped in principle, and it butts up immediately against a deep, almost visceral British suspicion of grand principle in politics. For instance, Edmund Burke railed against natural rights thinking which attempted to derive a ‘geometrical and arithmetical constitution,’ from abstract principles.<sup>2</sup> From a quite different political viewpoint, the LSE’s John Griffith derided the work of the ‘natural lawyers, the metaphysicians and the illusionists’ whose work he called mere ‘sleight of hand.’<sup>3</sup> This distrust of idealism and rationalism has deep national roots. Constitutional thinking is intimately related to national character. In this respect, it resembles philosophy, which we can consider for a moment in that light. It seems to be no surprise that idealism reached its apotheosis in Germany, existentialism in France, and that pragmatism hails from America. Britain’s comparable contribution is empiricism – a theory of knowledge that tells us to base belief only on what is immediately observable, and to doubt everything else. That no-nonsense, ever-practical impulse travels well beyond philosophy, too. So, Adam Smith told us why the state should just let people get on with their own business; Edmund Burke that we should only change things with remorse; Charles Darwin that the mere passage of time leads to natural improvements; the Suffragettes that what matters is ‘deeds not words’; and John Maynard Keynes that ‘in the long run we’re all dead.’

However much it cuts against the grain of this very pragmatic thinking, the argument of this article is very much one of principle and one which has grand repercussions. In Part 1, by far the longest, I will set out my idea of a democracy and then explain why I think the best case for a written constitution is the right of citizens to participate in the writing of the fundamental law. This idea revolves around a metaphor of authorship. There are a number of arguments against a written constitution, and a selection of these is the subject of Part 2. I argue that neither conservatism, nor anti-rationalism, nor concerns over judicial supremacy defeat the case I have set out in Part 1. I turn in Part 3 to clarifying what it means for the

<sup>1</sup> L Strachey, *Queen Victoria* (Harcourt, Brace and Company 1921) 153.

<sup>2</sup> E Burke, ‘Reflections on the Revolution in France’ parts of which are reprinted in J Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge 1987) 91.

<sup>3</sup> JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 6.

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people to participate in the writing of the fundamental law – namely, the process of constitution-writing. In Part 4, I turn to the pressing question of how difficult it should be to amend the constitution, and, indeed, and more deeply, when the authorship I will speak of in Part 1 expires and there is a need to revisit the entire constitution. At the journey's end, much ground will be covered. It is after that journey that I will have, by way of conclusion, the appropriate occasion to address how the democratic case for a written constitution relates to the profound political challenges presently faced by the United Kingdom.

1. *The Democratic Case*

A. *What Kind of Democracy?*

I do not think Churchill was right when he said 'democracy is the worst form of government, except for all the rest.' I take the view that it is rather beautiful, and that we should normally prefer it over other forms of government even if those might deliver better results.

When I refer to democracy, I take the foundational value to be that of political equality: equal respect and equal status. However, this raw value can have a multitude of institutional implications, so any theory of democracy must carefully consider the role of persons, of institutions and of joint decision-making. I adhere to a tradition of liberal egalitarian democratic theory which to me reaches the high-water mark in the work of John Rawls,<sup>4</sup> but which shares a family resemblance with the work of Jürgen Habermas,<sup>5</sup> the deliberative democrats and to a large extent the republicanism of Philip Pettit.<sup>6</sup> This is not the place for an exposition of these theories. It will nevertheless help to draw attention to four features they possess which are salient to my view of democracy and to the approach to democracy and constitutionalism that is evident in this article. The first is that these theories seek to integrate our deep commitments to rights, distributive justice and democracy. That is no mean feat, for such values have been at war with each other for much of European political history. Classical liberals saw rights as opposed to redistribution driven by the masses; radical socialists saw rights and bourgeois legislatures as

<sup>4</sup> J Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999); J Rawls, *Political Liberalism* (rev edn, Columbia University Press 2005); J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001).

<sup>5</sup> J Habermas, *Between Facts and Norms* (William Rehg tr, MIT Press 1996).

<sup>6</sup> P Pettit, *On the People's Terms: a Republican Theory and Model of Democracy* (CUP 2012).

impediments to economic nationalisation; and the utilitarian-cum-democrats, and their political economy offspring, were committed to a policy of economic growth that was in important ways indifferent to both rights and inequality. The second salient feature is the distinction between justice and legitimacy. Justice concerns what is *right*, which is true independently of anyone's particular beliefs; legitimacy, on the other hand, is concerned with when it becomes oppressive to use coercion to impose one's view on another, even if there is good reason to think they are wrong. The importance of this distinction is founded on a recognition of what Rawls called the 'fact of reasonable pluralism' about justice.<sup>7</sup> The existence of reasonable pluralism entails an important role for deliberation and listening in politics, a respect for difference that is opposed to both liberal elitism and populism. A third salient feature is the conception of the citizen and social cooperation that lies at the heart of such theories. The citizen is a reasonable rather than narrowly selfish person, seeking to engage in good faith social cooperation. This emphasis on social cooperation – a sharp break from classical liberalism – recognises both the value of the state and of the machinery of democratic politics. The state is more a 'we' than a 'they' in this conception, and political representation and political parties play an indispensable role as conduits for collective agreement. Lastly, each of these theories affirms the value of public deliberation and of rational argument in public affairs. They subject old conservative myths to the method of Cartesian doubt, which was at the heart of the Enlightenment enterprise. They place great value on deliberation, listening, education and progress - an approach that is entirely unrecognisable in the politics of populism.

My claim is accordingly that these four features – the integration of rights, democracy and social justice; the recognition of pluralism; the affirmation of the state and of representative politics; and the importance of deliberation – squarely reject conservatism, liberal elitism and populism. And that matters significantly, *because those approaches are all political orientations that exert great pressure on constitutional thinking*. And neither should these liberal egalitarian theories be seen as tumbling out of the windows of an ivory tower. They merely systematise the otherwise loose collection of intuitions and tenets lying deep within the traditions of UK parliamentary democracy, the core principles of the European Union, the international human rights law framework, and the traditions of both the Christian and social democratic parties of Europe.

<sup>7</sup> For an exploration of this turn in Rawls' thought, see B Dreben, 'On Rawls and Political Liberalism' in S Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2003) 316; P Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 *Current Legal Problems* 67-69; Pettit, *On the People's Terms* (n 6) ch 3.

B. *The Democratic Case*

The democratic case for a written constitution is simple: the people's representatives should participate in the writing of the fundamental laws of the community. This idea flows from the principle of equal basic liberty.<sup>8</sup> That should be so obvious that I want to take up the two objections that claim to expose it as simplistic.

The first objection suggests that what matters is not so much where a constitution comes from, but what it does for us right now. On this view, consequences matter, not pedigree. I hope I do not sound too backward looking in saying that I think the past very much does matter. Suppose one had two identical statutes, one which is issued from the German Bundestag and the other from the Westminster Parliament. With all else being equal, should we be indifferent to which of these governs us? Of course, those living in Britain are typically not indifferent, and indeed would normally prefer the Westminster law even if it were, as is likely, worse law. It is *their* law, adopted by *their* representatives, and so one in which *they* had a say.<sup>9</sup> That is the force behind the idea of *self*-government.

The second objection concedes that pedigree matters, but throws down a different glove. It maintains that under current political arrangements, the people *have*, as a matter of fact, accepted all of the constitution. Consider this claim, by Sir Ivor Jennings, one of the very deepest commentators on the British constitution:

The outpourings of enthusiastic reformers must not be mistaken for the complaints of a frustrated people. If the people of this country want to overthrow capitalism, the public school system, the House of Lords or the monarchy, they have the power in their hands. If they have not done so, the explanation is that they have not wanted to do so.<sup>10</sup>

<sup>8</sup> See Rawls, *A Theory of Justice* (n 4) 194-200, read in conjunction with 200-206 (limitations on the principle of participation). See e.g. 200: 'The principles of justice are among the main criteria to be used in judging a representative's record and the reasons he gives in defense of it. Since the constitution is the foundation of the social structure, the highest-order system of rules that regulates and controls other institutions, everyone has the same access to the political procedure that sets it up. When the principle of participation is satisfied, all have the common status of equal citizen.'

<sup>9</sup> There is nothing in this idea to suggest that laws emanating from the European Union are lacking appropriate democratic pedigree. Whether they do or not depends on whether the existing channels of input through national governments, and through elected representatives to the European Parliament, and the principles of subsidiarity and practice of cooperative federalism, achieve the task of legitimation in the way this argument suggests is material.

<sup>10</sup> I Jennings, *The British Constitution*, (5th edn, CUP 1966) 211.

Similarly, we can look to JAG Griffith's famous aphorism in his 1979 Chorley Lecture, entitled 'The Political Constitution', when he observed that 'everything that happens is constitutional. And if nothing happened that would be constitutional also.'<sup>11</sup> His idea here, and that of Jennings,  
5 was that quite often *nothing happens for a reason*.

Now, I think this line of argument is seriously mistaken. The straightforward mistake is one of fact. Opinion polling consistently shows that people want a reformed House of Lords, a different voting system,<sup>12</sup> and a written constitution.<sup>13</sup> Nearly 90 percent of the population are against  
10 the House of Lords remaining in its current state.<sup>14</sup> Inertia, rather than choice, tends to dictate the status quo.<sup>15</sup>

But the argument is also mistaken for a deeper reason. It fails to see any significant difference between the legitimacy of *acquiescence* and

<sup>11</sup> Griffith (n 3) 19. Another illustration of the same argument can be found in D Hume, 'Of the Coalition of Parties' in his *Essays, Moral, Political and Literary* (EF Miller ed, Liberty Classics 1985 [1758]) 499. In his attempt to demonstrate that there was some foundation to the Cavalier cause in the English Civil War, Hume addressed some of the weaknesses of the Whig claims to monarchical despotism in the period of Charles I and previous: 'Was not the present monarchical government, in its full extent, authorized by lawyers, recommended by divines, acknowledged by politicians, acquiesced in, nay passionately cherished, by the people in general; and all this during a period of at least a hundred and sixty years, and till of late, without the smallest murmur of controversy? This general consent surely, during so long a time, must be sufficient to render a constitution legal and valid. If the origin of all power be derived, as is pretended, from the people; here is their consent in the fullest and most ample terms that can be desired or imagined.'

<sup>12</sup> Most recently, polling in 2017 by ICM on behalf of Make Votes Matter found widespread support for proportional representation, with 67% agreeing that share of seats should closely match vote share and only 12% disagreeing: See Make Votes Matter, 'New poll finds overwhelming support for Proportional Representation' (Make Votes Matter, 5 May 2017) <<https://www.makevotesmatter.org.uk/news/2017/5/5/new-poll-finds-overwhelming-support-for-proportional-representation>> accessed 1 June 2018.

<sup>13</sup> As noted in the Blackburn Report (Political and Constitutional Reform Committee, *A New Magna Carta?* (HC 2014-15, 463) para 175), the level of support for a written constitution varies depending on the phrasing of the question. The Blackburn Report refers to polls conducted by the Ministry of Justice in 2010 (44 per cent for, 39 against and 17 per cent didn't know in response to 'should the UK have a written constitution'), by YouGov in 2009 (59 per cent agreed, 15 per cent opposed and 26 per cent were undecided on a proposal to 'devise a written constitution to replace the current unwritten constitution which has evolved gradually over the past 1000 years') and by ICM in 2010 (74 per cent agreed, 8 per cent opposed and 19 per cent were undecided on whether 'Britain needs a written constitution providing clear legal rules within which government ministers and civil servants are forced to operate').

<sup>14</sup> A poll conducted by BMG Research on Behalf of the Electoral Reform Society in October 2017 indicated that 63% wanted a fully elected upper house, while 27% thought it should be abolished; only 10% thought it should remain as it is.

<sup>15</sup> Failure to agree on an alternative form of government is another reason for lack of change. While this can sometimes be a valid reason for inaction, in the British constitutional setting it is more evidently a lack of political will.



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*authorship*. Indeed, I want to suggest that a very important distinction exists between the legitimacy of *acquiescence*, *ratification*, and *authorship*. Let me explore each in brief detail to illustrate why.

*Acquiescence* means passive acceptance, without overt endorsement. We sometimes have good reasons to acquiesce even where we do not consent. Until the twentieth century, most of the adult population of Britain acquiesced in constitutional arrangements they were unable to change democratically. Indeed, many around the world continue to live more or less peacefully under similar arrangements. Sometimes we also acquiesce if we have the power to change the norm, as we do under most of the common law. Nevertheless, my view is that acquiescence, even accompanied by the effective democratic power to change the norm, is almost always a suboptimal form of legitimation. The passivity of acquiescence means that the reasons for it are rarely clear. On any understanding, they are usually diverse. And some of the reasons, as behavioural psychologists point out,<sup>16</sup> just involve *not deciding*. In such situations, inertia and paralysis can do more than considered choice to drive the failure to act.

*Ratification* is therefore a step forward. Ratification occurs where there is an affirmative decision in favour of the proposal or instrument through a formal procedure. In a political setting, such a procedure provides an opportunity for debate on the merits. But, and crucially, it does *not* normally provide an opportunity to amend the details of the proposed measure. Ratification is usually a thumbs up or down affair without conditions attached. A referendum is a classic example. Delegated legislation before Parliament is another. The 'take it or leave it' approach is a shoddy way of accommodating disagreement where the scheme is particularly fundamental or complex, because the choices are too stark (or 'binary' in the current discussion), forcing a politics of brinkmanship rather than one of accommodation.

That is why the distinction between *ratification* and *authorship* is important. Authorship means, in this context, participation of oneself or one's representatives in the writing of the laws, or in the process of arriving at the political decision embodied in the law. It is affirmative, constructive, and legislative in character, and hence highly proceduralised. The legislative process exemplifies this. The extent of parliamentary

<sup>16</sup> Sunstein notes in CR Sunstein *Why Nudge?* (Yale University Press 2014) 151-153 that people are often unlikely to opt out of the status quo even when easy to do so. Behavioural economists have long noted the human tendency towards inertia in decision-making. For a recent study, see C Alós-Ferrer, S Hügelschäfer and J Li, 'Inertia and Decision Making' (2016) 7(169) *Frontiers in Psychology* 1.

input into Government bills in the Westminster Parliament is far more extensive than standard constitutional thinking has taught us to believe. Meg Russell and Philip Cowley have explored and rejected the view that Parliament is side-lined in the law-making process. Taking 12 statutes as a core case study, these authors showed that there were 4,361 amendments proposed, 886 of which were made by the Government. 117 of those government amendments embodied concessions to other parties or committees on issues of substance.<sup>17</sup> On the whole, in a proper legislative process, there are manifold ways for voices to be heard on the record and, more importantly, legislatively accommodated in this process.

I think there is a clear legitimacy progression from acquiescence to ratification and then to authorship. The last of these – authorship – gives best expression to respect for equal basic liberty. It does so because it represents the finest procedure for the proactive accommodation of difference, and most accurate record of genuine collective approval or disapproval, accompanied by reasons. Now, it is in one sense obvious that the citizens themselves do not actually write the laws in either a legislature or a constituent assembly. In either place, it would be their representatives, and in most situations a committee or the Government would steer or instruct the writing itself. For some sceptics the claims about authorship here therefore risk misrepresenting what happens during the law-making process. One perceived mistake would be to invoke the idea of popular sovereignty by the people, a sovereign collective identity whose pronouncements for the people can persist over time.<sup>18</sup> Another challenge is that the idea suggests that, absent a sophisticated constitutionalist reading of Rousseau’s ideas, legislative outputs represent some form of unified general will or, more crudely, a distinct and unitary Will of the People determined by majoritarian voting procedures.<sup>19</sup> I do not intend either of these when I refer to the idea of authorship, nor that the citizens themselves do the writing. It is a metaphor, but one that finds appropriate application in this context. The normative salience of the metaphor is that

<sup>17</sup> M Russell and P Cowley, ‘The Policy Power of Westminster Parliament: The “Parliamentary State” and Empirical Evidence’ (2016) 29 *Governance* 121. Note that the (unelected) House of Lords played a significant role in this process. At 129, the authors show that there were 23 Lords’ defeats in the drafting of the 12 bills.

<sup>18</sup> For a thoroughgoing and very subtle critique of this approach, see FI Michelman, ‘Constitutional Authorship by the People’ (1999) 74 *Notre Dame L Rev* 1605.

<sup>19</sup> For a persuasive critique of this view, see A Weale, *The Will of the People: A Modern Myth* (Polity Press 2018) and his *Democracy* (2nd edn, Palgrave MacMillan 2007) ch 7. For a sophisticated constitutionalist reading of Rousseau, see S White, ‘Rousseau and the Meaning of Popular Sovereignty’ in D Satz and A Lever (eds), *Ideas that Matter: Democracy, Rights and Justice* (OUP, forthcoming).

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it illustrates the egalitarian merits of pro-active line-by-line participation in collective law-making, and its superiority over ratification and acquiescence. And the procedural salience of the metaphor is evident because (1) participation in a legislative drafting exercise, including the power to move amendments, entitles one to claim something akin to collective co-authorship of the resulting product, and (2) participation in this fashion by genuine representatives of the people provides a legitimate attributive link between representatives and the people themselves. The representatives participate in the joint-authorship exercise, in other words, *in the name of* their constituencies. The obvious limitations are that the people who elect the representatives tend over time to be a fraction of those governed by the resulting rules; and that co-authorship can result in a product that contains statements that some of the authors actually disagree with but had to accept in defeat. Hence the final product is not indicative of unanimous actual authorial intention. It is rather the product jointly endorsed as being adopted under the most legitimate procedure. Provided we are mindful of these differences – as is the analysis in Parts III and IV of this article – the metaphor is apt. At any rate, if one doubts the term then one may simply substitute the more cumbersome phrase of ‘participation of one’s representatives in the exercise of drafting’ for the idea of ‘authorship’ in order for the rest of the same argument to follow.

On any view of authorship, however, there remains a problem here. While authorship in this sense may facilitate the egalitarian pedigree of presently enacted law, that source of legitimacy will erode over time. Where that occurs, either the law must be justified or accepted on grounds other than authorship, or the law can be revised or reconsidered to renew its democratic credentials. This is a problem for all law, not just constitutions. We might codify the common law, but we cannot realistically renew all the old statute law regularly. Due to scarcity of time and resources we are frequently confined to acquiescence or ratification of the old laws. *But we are not required to do that for all of the old laws and rules.* That practical impediment does not mean we cannot or should not subject to this kind of process of authorship *the very most important laws and rules.* It is possible to democratise the constitution by subjecting its terms to this kind of comprehensive authorship process. I think equal basic liberty gives people the right, and the state the duty, to do so.

*C. Consequentialist Justifications for Authorship*

My argument thus far has been a rights-based or deontic rather than a consequentialist argument for authorship of the constitution. The right

to participate in writing the fundamental law flows from a more general right to self-government under the principle of equal basic liberty. I think the case for a written constitution could rest on that right alone.<sup>20</sup> But other, more consequentialist benefits also follow from the authorship exercise.<sup>21</sup> One is that it forces parties to clarify their position on fundamental matters. Is the Labour Party for or against Lords reform and proportional representation? Does the Conservative Party believe that social rights are human rights and does it genuinely back an enforceable bill of rights? This kind of clear, principled stance is what was attractive about the Clause IV debate in the Labour Party and also about Prime Minister Thatcher's strident 'there is no such thing as society' political clarity.<sup>22</sup> The clarity was attractive irrespective of the content of the message, because it exposed the decision to a very clear form of political accountability, since people had a clear message on which they could vote for or against.

Another merit to written constitutionalism is that a written document – indeed an Enlightenment approach to constitutionalism generally – compels a certain respect for coherence or what Dworkin called integrity.<sup>23</sup> The positive and canonical statement in charter form commends, in its modern form at least, a degree of completeness, non-arbitrariness, and over time experience has commended a standard range of features. As a social practice, it has its own internal logic and integrity. It is a bit like the value of the rule of law. EP Thompson, the Marxist historian, famously broke rank with his Marxist contemporaries by declaring in 1975 that the rule of law is an 'unalloyed good.' He thought British social history demonstrated that, in spite of having himself shown how much of it

<sup>20</sup> This is true of the United Kingdom. However, the right based on the democratic case will not be conclusive where other rights might be violated by the authorship or revision exercise. As noted in the discussion in part 4, there may be good rights-based arguments for deeper entrenchment than this case will normally allow. In such a case, the rights-based democratic case is a *prima facie* right that must be reconciled with other rights-claims before being conclusive in favour of reform.

<sup>21</sup> The consequentialist drawbacks of the exercise are largely addressed in part 2 and the legitimacy concerns in parts 3 and 4.

<sup>22</sup> For opposing views see, for instance, N Barber, 'Against a Written Constitution' [2008] PL 11, 15. Barber notes that if a constitution were to reform the constitutional settlement rather than merely codify existing arrangements, the 'package' of reforms would be a broad collection of unrelated changes, with the inevitable result that there would be insufficient opportunity to debate each individual element. More importantly, he argues that some constitutional vagueness is useful, 'particularly... in parts of constitutional law and practice where uncertainty may mask, and allow us to avoid, a costly and unnecessary political choice'. As examples, Barber lists the jurisdiction to determine the scope of parliamentary privilege and the legal relationship between Britain and the European Union.

<sup>23</sup> R Dworkin, *Law's Empire* (Hart Publishing 1998).

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had been used as an instrument for extending class domination. Among his reasons were that

5 the law, like other institutions. . . , has its own characteristics, its own independent history and logic of evolution. [...] It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity. [...] The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and  
10 criteria of equity; indeed, on occasion, by actually *being* just.<sup>24</sup>

Of course, Thompson's Marxist colleagues turned on him for this – as is their way. Though their intellectual torchbearers might turn on me for saying so, I want here to argue that constitutionalism – not just the austere analytical category of constitutions, but *constitutionalism* itself – has  
15 something of the same tendency. Modern constitutionalism, with its commitments to equality, rights, and self-government, does tend in practice to generate a common list of commitments. These ideas commend a commitment to parliamentarism, democracy, the rule of law, a clear policy on central and local relations, respect for individual liberties,  
20 and multiple forms of political accountability. Writing the constitution down nudges drafters towards completeness and non-arbitrariness, making arcane compromises not impossible, but certainly more difficult. Even where these written commitments are ignored in practice – in other words there is a 'sham constitution'<sup>25</sup> – they at least serve to expose the  
25 outright hypocrisy of the government. More often, the constitutions expose quasi-democratic governments to a degree of accountability that is altogether new – a real political and sometimes legal pressure to try to justify actions as compliant with the principles recognised in the constitution. Nearly all of Latin America, much of Africa, and much of Eastern  
30 Europe is in this situation at the time of writing. Constitutional rules matter, and when they threaten power the leaders have now tended to seek a popular mandate to amend rather than ignore constitutions. However

<sup>24</sup> EP Thompson, *Whigs and Hunters: The Origins of the Black Act* (Pantheon Books 1975) 262-263 [emphasis in the original]. But hearing this from a Marxist social historian is extremely significant. It is no less significant that George Orwell and Clement Atlee took a similarly sanguine view about the rule of law being of significance to the common man. See G Orwell, 'The Lion and the Unicorn: Socialism and the English Genius' in S Orwell and I Angus (eds), *The Collected Essays, Journalism and Letters of George Orwell, Volume 2* (Secker & Warburg 1968); J Bew, *Citizen Clem: A Biography of Atlee* (Riverrun 2016).

<sup>25</sup> DS Law and M Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

common it is at the moment to take note of this kind of ‘abusive constitutionalism,’<sup>26</sup> we would do well to remember the historical significance of the fact that the leaders of countries that were mostly ruled by dictatorship a few decades ago, are now taking the route of obtaining a popular mandate to replace an existing constitution to effect their political goals.

Perhaps the greatest consequential advantage is that the acts of writing, deciding and legislating provide the opportunity – a ‘moment’ if I can borrow some of Bruce Ackerman’s imagery – to confront big constitutional questions and decide. Admittedly, much of the existing British constitution could be applied in its current state without reform. But we can rest assured that a range of issues would be up for discussion: Lords reform, reconsidering the voting system, deciding on whether social rights go into the constitution, putting controls on the executive and military, reforming the role of Parliament in treaty-making and so on. Most important of all, the constitution can finally provide what we do not now have – an established process for reforming and amending the constitutional framework. By any defensible metric, that would be good.

#### D. *The Rights-Based Case*

In a recent book, the philosopher AC Grayling declares that ‘a constitution not at the whim of any current administration is sterner guardian of rights and liberties than a constitution malleable to partisan and passing interests.’<sup>27</sup> Lord Scarman made the same point in 1992 even more eloquently: ‘A written constitution embodying a Bill of Rights is needed if defenceless and grossly under-represented groups are to have their human rights and their freedoms safeguarded.’<sup>28</sup> In both cases the rights argument is a central feature of their case for a written constitution. I unequivocally believe that a constitutional bill of rights would be a good thing, but this argument is far weaker than these statements suggest.

My straightforward misgiving about this argument is that the instrumentalist assumption that an entrenched charter will substantially improve real rights protection is by no means established. Of the quantitative data, to take one example, the Freedom House Report of 2018 shows that in ranking respect for civil and political liberties, seven of the top ten countries have no strong constitutional judicial review

<sup>26</sup> D Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis Law Review 189.

<sup>27</sup> AC Grayling, *Democracy and its Crisis* (updated edn, Oneworld 2018) 178.

<sup>28</sup> Lord Scarman, ‘Why Britain needs a Written Constitution’, (The Fourth Sovereignty Lecture, London, Charter 88 Trust Publications 1992) reprinted in (1993) 19 Commonwealth Law Bulletin 317, 322.

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of statutes.<sup>29</sup> If we add Canada to the list, as we must, eight of the top ten countries do not meet the Grayling/Scarman criteria of the necessary insurance. Furthermore, Australia, which has no federal charter of rights at all, ranks eighteen spots ahead of Germany and forty-six ahead of the United States.<sup>30</sup> If we look to qualitative data on particular countries, the well-studied picture is also rather complex. Roughly speaking, views range from those who say judicial review can often make things worse,<sup>31</sup> to those who purport it does nothing significant,<sup>32</sup> to those arguing that it can be helpful if coupled with political advocacy.<sup>33</sup>

I am in the final camp, which may well be the biggest, but that chastened conclusion doesn't help much in this case. There is *no* evidence, so far as I am aware, showing that *entrenched* charters make all the difference. And the UK has a Human Rights Act already.

There is another reason for caution about the rights-argument. We must be careful not to stray into liberal elitism. By 'elitism' I mean any political theory which downgrades the importance of representative legislative institutions and more generally seeks to strongly limit the influence of the public on policy-making. AC Grayling does not cross this line – he has a lot to say about voting and representation. But let's face it – the

<sup>29</sup> Freedom House, 'Freedom in the World 2018' <<https://freedomhouse.org/report/freedom-world-2018-table-country-scores>> accessed 1 June 2018.

<sup>30</sup> Other indices show a similar cluster, though individual country rankings can vary. World Justice Project. In the category of 'Fundamental Rights' 9 of the top 13 nations do not have strong form judicial review: the four Scandinavian countries have a very weak form of review in practice; the Netherlands and Australia do not permit judicial review of statutes in rights cases; the UK and New Zealand have declaratory powers but leave the law in force; and the Canadian constitution permits parliament a legislative override.

<sup>31</sup> R Dahl, *A Preface to Democratic Theory* (expanded edn, University of Chicago Press 1956) 111 who writes with reference to the *Lochner* era in the United States, that the Supreme Court was obstructive to a law-making majority for as much as a quarter of a century. See further R Titmuss, 'Welfare "Rights", Law and Discretion' (1971) 42 *Political Quarterly* 113; J Mashaw, *Bureaucratic Justice* (New Haven: Yale University Press 1985) 7; M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000) esp 168-169.

<sup>32</sup> See for example G Rosenberg, *The Hollow Hope* (2nd edn, University of Chicago Press 2008); M Klarman, *From Jim Crow to Civil Rights* (OUP 2006) ch 7 (focusing on civil rights litigation in the United States).

<sup>33</sup> M McCann, 'Reform Litigation on Trial' (1992) 17 *Law and Social Inquiry* 715; M McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (University of Chicago Press 1994); C Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (2nd edn, University of Chicago Press 1998); M Feeley and E Rubin, *Judicial Policy Making in the Modern State: How the Courts Reformed America's Prisons* (CUP 2000) For a partly UK-based study in this tradition, see L Vanhala, *Making Disability Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP 2011). See for further relevant discussion, see J King, *Judging Social Rights* (CUP 2012) ch 3.



people are not very popular at the moment. In private conversation, there is a lot of disdain due to the swell of populism in North American and Europe, and a recent issue of Foreign Affairs asks, 'Is Democracy Dying?'<sup>34</sup> Liberalism has a questionable history here. Many Whigs, and notably the liberal unionist constitutional lawyer Albert Venn Dicey, resisted the expansion of the franchise. Dicey was a champion of liberty, but just not for Ireland;<sup>35</sup> and of Parliament, provided it excluded women.<sup>36</sup> John Stuart Mill favoured giving more votes to the educated (plural voting).<sup>37</sup> Friedrich Hayek was contemptuous of legislation and constructed a model constitution with a highly restricted franchise.<sup>38</sup> William Riker's *Liberalism Against Populism* claimed to show that voting cannot produce representative legislation.<sup>39</sup> In more recent years, Joseph Raz's monumental *The Morality of Freedom* has almost nothing to say about democracy,<sup>40</sup> and the theme is neglected though ignored in Ronald Dworkin's broad corpus of work.<sup>41</sup> It gives pause for thought that this is no minor selection of liberal thinkers and traditions. I depart from these views for reasons I explored at the outset of the discussion in Part 1.

Ultimately, my view is that judicial review is an instrument of public policy that has an intimate but not a necessary connection to the underlying human rights. The same is true of particular voting systems, models of federalism, and the jury trial. It follows that there is no human right to the constitutional judicial review of statutes. But on the other hand, just as particular voting systems and models of federalism have huge implications for the weight of the franchise, egalitarians don't tend to rule them out up front as inconsistent with democratic principles. They are frequently components of a broader plan for a liberal egalitarian democratic

<sup>34</sup> G Rose, 'Is Democracy Dying' (2018) 97(3) Foreign Affairs 8 (editorial).

<sup>35</sup> See eg AV Dicey, *England's Case Against Home Rule* (John Murray 1887).

<sup>36</sup> AV Dicey, *Letters to a Friend on Votes for Women* (John Murray 1909).

<sup>37</sup> JS Mill, *Thoughts on Parliamentary Reform* (JW Parker 1859).

<sup>38</sup> The model constitution is discussed in FA Hayek, *Law, Legislation and Liberty Vol.3: The Political Order of a Free People* (University of Chicago Press 1979) ch 17. It is suggested at 113 that only citizens aged forty-five should vote, and should vote for a person of the same age, to serve for fifteen years and retire in financial comfort, and hence with one-fifteenth of the Legislative Assembly to be replaced each year. While a Governmental Assembly would be elected on a wider franchise, it would be bound by the Legislative Assembly's rules.

<sup>39</sup> W Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (Waveland Press 1982).

<sup>40</sup> J Raz, *The Morality of Freedom* (OUP 1986).

<sup>41</sup> See eg Dworkin, *Law's Empire* (n 23) 370-371; R Dworkin, *Sovereign Virtue* (Harvard University Press 2000) 208-209; R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 392-399.



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order. Some electoral systems might be better than others for particular polities, but there is nothing about some of the alternative modes of democratic expression that renders them anti-democratic in principle. So too with the judicial review of statutes. Whether it is democratic depends to an important extent on whether the practice supports or detracts from a given state's capacity to secure equal participation and equal status for its citizens in political decision-making. It can also depend on whether the practice compensates for egalitarian deficiencies resulting from unequal influence in the ordinary legislative process. And in some countries, it can be valuable even if it fails to be vindicated in such democratic terms, but nevertheless can secure other human rights, or political stability, or some other value of similar or greater value than that of democracy itself. Whether a particular polity should adopt it for any of the above reasons, ultimately, is a complex question of institutional design to be answered by the people. And above all, their answer to that question is what goes the furthest towards giving that practice its democratic legitimacy. For that very reason, the rights-based case and the democratic case come together when the former is put most persuasively.

*E. The Clarity-Based Case*

Sydney Lowe observed in 1904 that 'British government is based upon a system of tacit understandings. But the understandings are not always understood.'<sup>42</sup> A number of scholars and statespersons over the years have made much of the need for clarity, and the role of a written constitution in providing it.<sup>43</sup> Here again, I am attracted to the argument, but its connection to the case for a written constitution can at times be obscure.

First, the extent to which a written constitution would provide greater clarity is often exaggerated. A huge amount of the UK constitution is written down and known, in authoritative treatises, law reports and elsewhere. The US constitution probably generates much more uncertainty because laws on minor things such as the national medical care (Obamacare), gun control and campaign finance aren't secure until the five of nine judges of the Supreme Court have spoken. Second, the

<sup>42</sup> S Lowe, *The Governance of England* (T Fisher Unwin 1904) 12, which came to my attention in SE Finer, V Bogdanor, and B Rudden, *Comparing Constitutions* (OUP 1995) 100.

<sup>43</sup> V Bogdanor, T Khaitan and S Vogenauer, 'Should Britain Have a Written Constitution' (2007) 78 *Political Quarterly* 499; R Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36 *Statute Law Rev* 1; A Blick, 'The Merits of a Written Constitution' (2016) 21 *Judicial Review* 49.

argument talks up the benefits of clarity, but is quiet about the costs of a written constitution. If the resulting constitution is protected by a rigid amending procedure, if it substantially increases judicial power via interpretation, if it locks in sub-optimal policy innovations, then the extra clarity will be purchased at a high price. Third, if clarity is all that is at stake, a non-binding declaratory code could be adopted. That would not be much of a moment. We should aim for renewal rather than documentation.

Ultimately the issue of clarity is bound up with the issue of democracy, because it is the lack of clarity on constitutional fundamentals that should be decided by citizens that is the deep issue. The lack of clarity surrounding the status of the legislative supremacy of Parliament is the key case in point. It should be answered by a legislative process, not firmed up by judicial drift, as is now happening under the swelling common law constitution. The orthodox doctrine concerning the legislative supremacy of Parliament holds that what the Queen enacts in Parliament is law; that Parliament can make or unmake any law whatsoever; that there is no hierarchy between constitutional and non-constitutional statutes; and that there is no body that can set aside an Act of Parliament. The doctrine of parliamentary sovereignty is not laid down in any source. It is derived by doctrinal writers who study the decisions of courts and attitudes of the judges.<sup>44</sup> It embodies what HLA Hart and many judges refer to as the (supreme) rule of recognition – the rule used by law-applying officials to identify what constitutes the highest source of valid law. (One can say that it is the supreme rule of recognition, because judges employ a different rule of recognition to say that the common law is a valid source of law – the supreme rule is the one that specifies which norms enjoy supremacy over any competing norm). A rule of recognition like this is adopted as a customary behaviour. We study what law-applying officials actually do when adjudicating between competing norms.

Since the basis of this rule of parliamentary sovereignty is customary, there has been a significant degree of uncertainty about its scope and certainty, as evidenced in the *Factortame* case (the subject of wide disagreement at the time of its adoption), the *Jackson* case (in which three judges declared the rule of law to take priority over the doctrine in the event of a fundamental conflict), and the emergence of a doctrine of constitutional statutes.<sup>45</sup> Henry VIII clauses, which enable governments

<sup>44</sup> The great and classic example is AV Dicey, *An Introduction to the Law of the Constitution* (10th edn, Palgrave Macmillan 1959) 39ff.

<sup>45</sup> *Rv Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 AC 603 (HL); *Jackson v Attorney General* [2005] UKHL 56 (Lords Hope, Steyn and Lady Hale).

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to amend or repeal statutes, are in plain tension with the doctrine, and yet they abound.<sup>46</sup> The European Communities Act 1972 empowered courts to disapply UK legislation that conflicts with EU law given direct effect under the 1972 Act. Section 3 of the Human Rights Act  
5 1998 is understood to empower judges, to read a statute compatibly with the ECHR, to read words into or out of a statute that were plainly not intended to form part of the original law. Now, what is interesting about these two examples of departures from the traditional doctrine is that the evident tinkering with traditional sovereignty can be explained – I think is  
10 best explained – as a knowing decision of Parliament. It was Parliament that proposed to modify the rule of recognition here, and the courts accepted it.

But now we are in the situation where it is the courts that have modified the rule. In recent years, three different judges of the Supreme Court have  
15 not only suggested in obiter that they may enjoy a power to disapply a statute because it infringes the rule of law in a fundamental way (as in *Jackson*), but the entire Supreme Court has now embraced a doctrine of constitutional statutes. The idea of constitutional statutes at first looks like a good idea. It arises because of the doctrine of implied repeal: the rule  
20 in UK constitutional law that if any two statutes conflict, the later one repeals the earlier one. But what if the Dangerous Dogs Act 1991 inadvertently amended the Magna Carta 1215? The motivation for the doctrine of constitutional statutes invites us to contemplate that scenario, with the implication that it would be absurd if such an inadvertent consequence would be upheld by a court of law. Hence in the case of  
25 *Thoburn*, Lord Justice Laws held in obiter that constitutional statutes would be immune from implied repeal. He gave a rather vague analytical definition of what they are, and listed various examples.<sup>47</sup> The Supreme

<sup>46</sup> See e.g. the Committee on Ministers' Powers, *Report* (Cmd 4060, 1932) 59 (the Report of the Donoughmore Committee): 'Even though it maybe admitted that Parliament itself has conferred these powers upon Ministers, and must be presumed to have done so with the knowledge of what it was doing, it cannot but be regarded as inconsistent with the principles of Parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute which has been passed by the superior authority.'

<sup>47</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [62]: 'In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are Magna Carta 1297 (25 Edw 1), the Bill of Rights 1689 (1 Will & Mary sess 2 c 2), the Union with Scotland Act 1706 (6 Anne c 11), the Reform Acts which distributed and enlarged the franchise (Representation of the People Acts 1832 (2 & 3 Will

Court in the *Miller* case,<sup>48</sup> as well as in the *HS2* case,<sup>49</sup> essentially confirmed that the doctrine is part of our law. They did not confirm or reject Lord Justice Laws' analytical definition, but were happy to lead from example. It is now part of the law.

5 While this all might seem quite reasonable, what has not been sufficiently appreciated is that the courts have now authorised the judicial disapplication of statutes under the common law. This is the case because if an advocate can show that a later statute is incompatible with any  
10 the later statute was intended to prevail, the court will be invited to disapply that later statute. Under the doctrine as accepted by the Supreme Court thus far, this is basically what follows. This is arguably a more potent remedy than what is available under either section 3 (a strong presumption of compatibility with Convention rights) or section 4  
15 (a declaration of incompatibility) of the Human Rights Act 1998. The moves until now have seemed pretty innocuous. In *Thoburn* Lord Justice Laws upheld the authority of regulations approved by Parliament in disapplying the Weights and Measures Act 1985 for its incompatibility with EU law.<sup>50</sup> In *HS2*, the Supreme Court held in obiter that they would be  
20 prepared to give priority to UK constitutional statutes over EU law norms that flowed in through the mechanism of the European Communities Act. In both cases, the moves were in substance *not* hostile to the sovereign Westminster Parliament. And many would think that the idea is democratically defensible because Parliament always retains the power to  
25 amend any provision that stands in its way. In fact, this argument wrongly supposes that the Parliament sitting when the Act is disappplied by the court has the same identity or interests as that Parliament which passed the Act. At any rate, having come garbed in sheep's clothing, the position now is that a judge is entitled to disapply or read down a provision of an  
30 Act of Parliament if a claimant can convince the judge that it infringes on the provisions of a previous constitutional statute. That is constitutional

4 c 45), 1867 (30 & 31 Vict c 102) and 1884 (48 & 49 Vict c 3)), the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 [European Communities] Act clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute.'

<sup>48</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>49</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3. See also the decision of Lord Hope in *H v Lord Advocate* [2012] UKSC 24.

<sup>50</sup> *Thoburn* (n 47).

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judicial review and, at some point or other, it will offend not only the form, but also the substance of parliamentary sovereignty.

5 One might think the problem is more apparent than real, because the doctrine makes perfect sense. As a matter of fact, I agree that constitutional statutes should not be overridden accidentally. But the move being made here is very significant constitutionally. Authority for the new doctrine should issue from Parliament (as with the powers under section 3 of the Human Rights Act 1998 and section 2 of the European Communities Act 1972) or from the people directly under a written constitution, rather than through *ad hoc* recognition under the common law.

2. *The Case Against a Written Constitution*

There are many arguments opposing a written constitution, but this Part focuses on three.

A. *The Conservative Arguments*

15 There is a set of arguments that are conservative in the small ‘c’ sense, in which they all assume the status quo has special and presumptive weight, perhaps owing to a belief that the past arrangements have met with general acceptance. One of them is the view contained in the maxim that ‘if ain’t broke, then don’t fix it’. Well on one view, the fact that the people have been excluded from writing their own fundamental law can itself be counted as ‘broken.’ Moreover, and for the pragmatists’ bullet list, consider the composition of the House of Lords, the voting system, the weak state of the union, the overwhelming power of the executive, the uncertain status of rights, and the absence of an amending formula. These all count as something between embarrassments and travesties, between fissures and fault-lines.

25 Turning to the argument that all written constitutions abroad are preceded by national crises like revolutions, war or breakdown, even assuming it were true, the answer here can also be brief: prevention is better than cure. One may recall the memorable comment Lord Peter Hennessy made in the House of Lords after the Brexit vote: ‘We may pride ourselves on being a back-of-the-envelope nation, but this was excessive. Never have I encountered so many people with so few ideas about what to do in the face of a first order crisis.’<sup>51</sup> The same is as true of the

<sup>51</sup> HL Deb 5 July 2016, vol 773, col 1963.

constitutional questions brought out by the Brexit process as it is of the purely political ones.

At the common core of these arguments is, in my view, an instinctive attraction to Edmund Burke's conservatism. In constitutional affairs, to say that some norm has been respected by rulers for hundreds of years is a mark of its good sense, whereas in moral philosophy it should be a cause for alarm. I agree with Prime Minister Pitt the Younger's quip that Burke's *Reflections on the Revolution in France* contained 'rhapsodies in which there was much to admire, but nothing to agree with.'<sup>52</sup> Burke did have a way with words. For instance, he wrote that educating the masses would result in learning being 'thrown into the mud and trodden down under the hoofs of a swinish multitude.' When he wrote, recall, less than three percent of the adult population of Great Britain and Ireland could vote in parliamentary elections.<sup>53</sup> That was not really a problem for Burke. On the subject of creating government by consent, he was rather cynical:

The very idea of the fabrication of a new government is enough to fill us with disgust and horror. We wished at the period of the Revolution, and do now wish, to derive all we possess as an inheritance from our forefathers. Upon that body and stock of inheritance we have taken care not to inoculate any scion alien to the nature of the original plant. All the reformations we have hitherto made have proceeded upon the principle of reference to antiquity; and I hope, nay, I am persuaded, that all those which possibly may be made hereafter will be carefully formed upon analogical precedent, authority, and example.<sup>54</sup>

This reverence for antiquity as a form of argument is, and always has been, a serious mistake. As Bentham pointed out in his critique of Blackstone's *Commentaries*, 'nor is a disposition to find "everything as it should be," less at variance with itself, than with reason and utility. [. . .] since whatever now is established, once was innovation.'<sup>55</sup> But Bentham's main charge was that it is at odds with reason too. As Bentham well knew, the past is a repository of enormous injustice and inequality. Disenfranchisement, villeinage, squalor, disease, illiteracy, rape,

<sup>52</sup> W Auckland, *The Journal and Correspondence of William, Lord Auckland, Volume III* (R Bentley 1862) 320.

<sup>53</sup> N Johnson, *The History of the Parliamentary Franchise*, House of Commons Research Paper, 13/14, 1 March 2013.

<sup>54</sup> E Burke, *Reflections on the Revolution in France* (JCD Clark ed, Stanford University Press 2001) 181.

<sup>55</sup> J Bentham, *A Comment on the Commentaries and A Fragment on Government* (HLA Hart, JH Burns eds, Clarendon Press 2008) 400.

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servitude, bigotry, malnutrition and short lives – some or all of that was the daily life of the vast majority of people in pre-twentieth century Britain. The past must be confronted and overcome, not revered.

5 It might be argued that Burke's insights are under appreciated here. Surely the collectivisation of agriculture in the Soviet system, the Cultural Revolution under Mao, and the cartelisation of the economy under the fascists were wrong for reasons Burke deeply understood. Well, they were wrong for many reasons, but I doubt that Burke latched onto the right ones. There is no need to be a conservative to see the problems inherent in  
10 those schemes. The Fabian tradition and the leadership of the Labour Party has long recognised, historically, the folly of the communist project and the crimes of fascism, without abandoning their commitment to radical social change.<sup>56</sup>

*B. Anti-Rationalism*

15 Yogi Berra once remarked that 'in theory there's no difference between theory and practice; in practice there is.' Such to a significant extent encapsulates the key message of the critique of rationalism in politics and constitutionalism in the work of Michael Oakeshott. He argued that practice is where social and moral values take on their true meaning,  
20 but the enlightenment rationalists kept extracting principles from such background and generating elaborate schemes of governance from them. Politics, Oakeshott maintained, is 'deeply veined with both the traditional, the circumstantial, and the transitory.'<sup>57</sup> He believed that practical knowledge was that which 'can neither be taught nor learned, but  
25 only imparted and acquired.'<sup>58</sup> Such knowledge was vastly superior to rationalist temperament, which would 'assimilate politics to engineering.'<sup>59</sup> His critique of rationalism in politics, to summarise, is that it disregards the significance of knowledge culled through extended experience – in Parliament, civil society and religion – in preference for rationalist schemes based on book learning or speculation. He roundly  
30 condemned the American constitution, as well as the Beveridge

<sup>56</sup> See G Orwell, *The Lion and the Unicorn: Socialism and the English Genius* (Secker & Warburg 1941).

<sup>57</sup> M Oakeshott, *Rationalism in Politics* (Liberty Fund 1991) 7. For a highly nuanced application of these ideas to the contemporary constitution, see G Gee and G Webber, 'Rationalism in Public Law' (2013) 76 MLR 708. On Oakeshott in current constitutional theory, see D Dyzenhaus and T Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015).

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*



Report, and argued for giving preference for the presently known rather than an uncertain future based on abstract principle or book learning.

Oakeshott underestimated the extent to which the political players in the French and American revolutions, as well as social reformers, were  
5 people of action. They knew enough about things to turn the world upside down. But beyond that, the theoretical core of his argument seems to me either banal or false. It is banal if it means to take experience seriously, and it is false if it means, as he says directly, that high principle and rational planning in situations of epistemic uncertainty are most  
10 likely to be misguided. This latter claim can be illustrated by two counter-examples.

The advent of proportional representation as a voting system has greatly invigorated party plurality and coalition governments in many countries.<sup>60</sup> Plurality systems, like the UK's, often return a large majority  
15 of seats in the Commons to a party with around 40% (and often less) of the vote, as with the victory of the Labour Party in 2005 (35.2% of the vote). That encourages a political focus on the margins of that 40% plurality, and hence stifles party diversity (or its efficacy) and the more inclusive bargaining strategies that such diversity can enable.  
20 Proportional representation has the opposite effect, encouraging a politics of compromise and actually increasing the likelihood of a good social policy.<sup>61</sup> Now, proportional representation was actually the child of natural rights thinkers, barristers, philosophers and mathematicians.<sup>62</sup> The idea is traced back to John Adams, a Founding Father of the US  
25 Constitution, but also advocated by Mirabeau, and advanced in prototype form by the Marquis de Condorcet in a draft Girondist constitution of 1793. It was expounded by the British mathematician Thomas Wright Hill, whose son exported it to Adelaide, Australia, where it was used in public elections for the first time in 1840. It was developed more extensively  
30 in England by the barrister Thomas Hare, whose scheme was

<sup>60</sup> A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999) ch 8.

<sup>61</sup> For a discussion in the broader context, see EM Immergut, 'Political Institutions' in FG Castles and others (eds), *The Oxford Handbook of the Welfare State* (OUP 2010) ch 15, esp 238. See also T Iversen, 'Democracy and Capitalism' in ch 12 of the same volume, esp 190-191.

<sup>62</sup> The development and history of proportional representation outlined here is discussed at length in J Hart, *Proportional Representation: Critics of the British Electoral System 1820-1945* (OUP 1992); see also T Hare, *A Treatise on the Election of Representatives, Parliamentary and Municipal* (Longman 1859); and JS Mill, *Considerations on Representative Government* (2nd edn, Parker, Son, and Bourn 1861) ch 7. For a contemporary critique, see F McCall Rosenbluth and I Shapiro, *Responsible Parties: Saving Democracy from Itself* (Yale University Press 2018).



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adopted and championed by John Stuart Mill in his *Considerations on Representative Government* (1861) and ultimately put before Parliament, which rejected it. All the authors were preoccupied with the failure of plurality systems to adequately represent minority interests. Their rationalism – the schemes were notoriously complex and difficult to explain to voters – was an inestimable practical boon to the politics of Europe and indeed the world.

A second example is of course the development of the post-war welfare state. When William Beveridge outlined his radical plan to eliminate the five giants of want, disease, ignorance, idleness and squalor, in his report of 1942, he faced down the argument that the existing patchwork of friendly societies, national charities and diverse private insurance schemes should just be reformed. His rebuttal is now legendary: ‘A revolutionary moment in the world’s history’ he told us, ‘is a time for revolutions, not for patching.’<sup>63</sup> The National Health Service was launched in 1948 and is possibly the most socialist health service in the entire world. It was driven entirely by two very simple ideas – that it meet the needs of everyone, and that it be free at the point of delivery.<sup>64</sup> Those simple ideals were the engine that motivated a huge exercise in rationalist bureaucracy, one that delivered one of the country’s proudest achievements.

We might do a service to this anti-rationalist argument, however, by recasting it in the following way. One could argue as follows: we do not oppose reform, or even big reform, *but* we think that piecemeal legislative reform of the constitution is better than wholesale constitutional overhaul via the adoption of a codified but abstract scheme. Parliament can go statute by statute, crafting detailed bundles of rules rather than lonely abstract principles, while providing ample room for democratic participation along the way. And we can revise it when needed. In that form, the argument is one the political left could sign on to as much as the right. This, in my view, is one of the very best arguments from this quarter. Indeed, it almost succeeds. The major problem with it, however, is that in a first past the post electoral system, there is a structural problem with constitutional change of the piecemeal variety. As we all know, single parties dominate each Parliament, and constitutionalism, on anyone’s view, ought to be a cross-party affair. In a winner takes all system of politics, a constitutional reform victory is always the Government’s

<sup>63</sup> W Beveridge, *Social Insurance and Allied Services* (Cmd 6404, 1942) pt 1 para 7.

<sup>64</sup> In fact the three core values outlined by Aneurin Bevan MP, were that it meet the needs of everyone; that it be free at the point of delivery; and that it be based on clinical need, not ability to pay, see HC Deb 30 April 1946, vol 422, col 45. The current NHS constitution collapses the second into the third, and in fact charges are payable in limited circumstances.

victory and the Opposition's concession. And neither of them, for that matter, would want to vote to substantially diminish their own powers – this is how we got here. A proper constitutional choice requires a different kind of assembly.

5 C. *Judicialisation of the Political Constitution*

Judicialisation will be addressed briefly, because in my view, the whole issue of judicial power in this country is a storm in a teacup. The Judicial Power Project's list of 50 problematic cases<sup>65</sup> appears to me to be little more than a list of cases that are debatable on the merits – many of which I would defend as rightly decided – and most outside the EU law cases are small fry for public policy. The constitution has a lot of problems, but that list is not one of them.<sup>66</sup>

10 Admittedly, the role for judges would likely become more prominent under a written constitution, depending on its content, than it is now. That was also true of the proposal to create a scheme of devolution in the UK, which is structured by three core legislative schemes that have been before the courts at various points. The devolution comparison illustrates well a deeper point about the judicialisation critique. The devolution scheme enormously invigorated the politics of the United Kingdom, 20 launching three legislatures, introducing proportional representation to significant parts of the UK, and as part of a broader package, bringing relative peace to Northern Ireland. Those assemblies make a lot of law as well. Scotland has adopted about 270 Acts of the Scottish Parliament since its founding in 1999, in addition to some 7500 statutory instruments. Without such indigenous powers, it is quite possible that the 25 Edinburgh Bakers' Widows' Fund Act 2018 would never have been passed.

This extensive legal scheme of devolution, and the business interests it regulates, would look ripe for challenge in the courts by regulated entities, 30 but such has not thus far happened to any but a marginal extent.<sup>67</sup>

<sup>65</sup> Judicial power project, '50 Problematic Cases' (Judicial Power Project, 2018) <<http://judicialpowerproject.org.uk/50-problematic-cases/>> accessed 23 May 2018.

<sup>66</sup> For a critique of the Judicial Power Project, see P Craig, 'Judicial Power, the Judicial Power Project and the UK' (2018) 36 University of Queensland Law Journal 355.

<sup>67</sup> C McCorkindale, A McHaarg, PF Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36(2) University of Queensland Law Journal 289, 297: 'If the fear was that the judiciary would regularly be called upon to (and would often) exercise strong powers of judicial review in relation to ASPs, this has not yet materialised.' The authors argue that not merely the exercise of constitutional judicial review but the existence of such power can matter. The evidence of that in Scotland is slight at the

The straightforwardly political benefits of the constitutional enterprise that devolution was, especially for Northern Ireland and Scotland, vastly dwarf the significance of any new role for judges.

5 We should similarly recall that we already have a bill of rights in the form of the Human Rights Act 1998. So we largely know what judges will do with a constitutional bill of rights. I have gone through all the section 4 declarations of incompatibility, which is the equivalent of Britain's 'strike down power', and examined all the parliamentary debates and committee reports in response to them.<sup>68</sup> Three short take-away points are pertinent  
10 here. First, one must look with a magnifying glass for serious disagreement in parliament about what the courts were doing. Second, nearly all cases were taken by politically marginalised groups. And third, nearly all cases concerned a very tiny proportion of the public or involved remedies that constrained Parliament to a minor extent. Anti-democratic the  
15 scheme is not.

Now, if we take for granted that we already have a quasi-federal scheme in which there is little evidence of legal opportunism, and a human rights charter that has largely functioned as predicted, then the question is – just how much of an expanded role for judges would there be under a written  
20 constitution? I suspect not much. And that's what I see this objection as: much ado about not much, which lies, moreover, right in the way of a potentially huge contribution to democratic renewal.

### 3. *The Process of Enactment*

Clearly, if the case for a written constitution is largely democratic, the  
25 participation by the people in the end product is essential. Looking abroad, the usual method is popular approval through a referendum. But that is ratification; I made a case for authorship. Authorship requires representation, because drafting requires discussion and a procedure for agreement. This is where the question gets very interesting – what kind of  
30 representation?

moment, and as the authors note at 309-310, constitutional judicial review is a firm and largely uncontroversial part of the Scottish Nationalist Party's programme for independent statehood.

<sup>68</sup> J King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Hunt and others (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015). See similarly: A Young, 'Is dialogue working under the Human Rights Act?' [2011] PL 773; A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012).

The first obvious place to consider is Parliament. It is the supreme assembly of the state, with the legitimacy, pedigree, and complex set of customs, practices and conventions that have shaped it into the nation's best conduit for political dialogue, decision and scrutiny. But it is the wrong place to draft a written constitution. It is the very nature of the UK Parliament that not even one party, but rather the leadership of a normally divided party dominates every major vote in the Commons, at least outside the select committees, and can prevail over any resistance by the House of Lords. And all that with just over a third of the popular vote behind it.

Neither should the process be executive led, *by the Government*, for precisely the same reasons.<sup>69</sup> Perhaps for these reasons esteemed commentators have suggested other options broadly within executive powers but at some distance from Government itself. For example, Robert Blackburn's preferred body for drafting a written constitution as a Bill to Parliament is a 'Commission for Democracy'.<sup>70</sup> He suggests this be formed through ministerial prerogative following cross-party negotiations and agreement of its general aims and composition. Although lacking direct participation from the public, an advisory unit could be established to facilitate the process by informing and engaging the public. But it would be possible to establish executive bodies such as a Royal Commission or some other form of commission that is independent, staffed by representatives and experts, and properly resourced.<sup>71</sup> Such a body could run appropriate public consultation<sup>72</sup> and give the appearance of independence from Government and Parliament. However, the main problem here is that if this body were too remote from Parliament, it would lack the legitimacy for bold recommendations. And if on the other hand it were too close, it would exhibit the politics of tribalism. At any rate, the almost insurmountable problem for any executive run process is that the final product must be passed or rejected by Parliament. It would lack the legitimacy to bypass Parliament. That downstream sluice will send powerful upstream currents, forcing the appointed commission to be more judicious than just in its findings.

<sup>69</sup> As were the initiatives undertaken by Gordon Brown – on which, see S Davidson and S Elstub, 'Deliberative and Participatory Democracy in the UK' (2016) 16 BJPIR 367.

<sup>70</sup> Blackburn(n 43) 21-25.

<sup>71</sup> Discussed in *ibid* 15-17.

<sup>72</sup> It would do so through the commission of a variety of 'mini-publics', namely, citizens' juries, deliberative opinion polls, planning cells, consensus conferences and citizen assemblies: see S Elstub and G Pomatto, 'Mini-publics and Deliberative Constitutionalism' in R Levy, H Kong, G Orr and J King (eds) *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) ch 22.

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For such reasons, the idea of a constitutional convention is apt. Such conventions could take many forms. Alan Renwick and Robert Hazell, for example, envisage representation through a citizens' convention which allows ordinary members of the public to take evidence, deliberate, and make recommendations.<sup>73</sup> The members of the convention are to be selected through stratified random sampling, and politicians should be engaged without being full members, so that the convention is not overly detached from Parliament or the Government. Proposals by the convention are ultimately left to the Government to respond to, whether through parliamentary debate or legislation. In my view, while this proposal takes us quite far to the correct position, it falls at the same hurdle identified above. If Parliament controls the final product, it can act as a conservative veto point that will block the convention's work, and all the more so if the deliberations of citizens are considered too remote from the realities of the workings of everyday government.

It is for these reasons why I believe a constituent assembly is the the best option if we are to respect the democratic case I have laid out. A constituent assembly is a body – a type of constitutional convention – convened for the particular purpose of drafting or revising a constitution, and which, crucially, *has its own legislative authority*. Constituent assemblies are there to constitute, not only to deliberate and report. My case for the constituent assembly does not rest on the metaphysical idea of constituent power, ranking it as superior to parliamentary authority.<sup>74</sup> To be clear on this deeper point, as noted in Part 1, my references to 'the people' don't seek to essentialise the idea, as did Carl Schmitt and his populist flag-bearers. I simply mean the citizenry and electors, perhaps residents. At any rate, my case for the constituent assembly is altogether more practical – it is about the right design of a representative process for enacting a constitution.

In my contention, to be suitable for the task of writing a constitution, the assembly must do three core things: it must represent the people; it must debate the right questions in an informed and complete manner; and it must have the real authority that will lead to its conclusions being accepted by those holding political power. In other words, it must produce a constitution that is *representative, informed, and effective*. I have

<sup>73</sup> A Renwick and R Hazell, 'Blueprint for a UK Constitutional Convention' (The Constitution Unit UCL, June 2017) <<https://www.ucl.ac.uk/constitution-unit/news/2017/jun/new-report-blueprint-uk-constitutional-convention>> accessed 18 March 2019.

<sup>74</sup> D Lee, *Popular Sovereignty in Modern Constitutional Thought* (OUP 2016); B Ackerman, *We the People, Vol 1: Foundations* (Harvard University Press 1991).

shown already why Parliament and Government will fail to be representative in the required way. So it might surprise some to hear me argue now that in my view it is essential that political parties are given a prominent role in the constituent assembly. Let me focus here on their epistemic role and their role in generating effectiveness. As to the former, it is a very real fact that when it comes to constitutional reform, the issues are complex and there is a real need to have people involved who understand the art of the possible as well as the art of the probable. We are not contemplating the citizens' assemblies on one or a few issues here. In this scenario, the whole constitution is on the table. Only grizzled party hacks are likely to fully understand the mosaic.

The astute observer might object here that if the role is epistemic, why not just call in the party members for hearings, alongside other experts, rather than give them a vote.<sup>75</sup> However, this would overlook the importance of effectiveness. Recall that in my scheme the constituent assembly has *original* legislative authority. It does not send its product to Parliament for approval – though it would consult it regularly. That original legislative authority only starts to look feasible if the parties are involved intimately at the decision-making stage about content. By feasible I do not mean a Faustian bargain – the sale of the nation's political soul to get the show on the road. It is rather the recognition of the role that political buy-in plays. The approval or disapproval of the parties is likely to be important to the referendum outcome, and to daily functioning in politics thereafter. Of course neither can it be forgotten that the parties have a key representative role too. Parties have constituencies, and can bargain on their behalf. They have a *mandate* to seek accommodation. Tribes do not disappear at the founding.

But at the end of the day, the parties *are* tribes, and that can raise conflicts of interest, produce myopia, and also result in a reluctance to change minds through deliberation. This is why the deliberative democrats have been so hard on them, though their position has evolved of late.<sup>76</sup> To compensate for these problems, therefore, I would propose the appointment of a substantial body of non-party citizens. So the assembly

<sup>75</sup> I doubt, on the one hand, that average citizens could absorb the full significance of some of these issues, or know how to adjudicate between conflicting narratives. Doing so would require some acculturation in politics and its history. But there is in any case a different reason for having the parties at the table.

<sup>76</sup> For a defence of partisanship, see NL Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton University Press 2008) (and esp at 147, where she recognises that '[d]eliberation is represented as the balm and corrective of party antagonism.' For a conception of deliberative democracy which is both critical and appreciative of parties, see R Levy and G Orr, *The Law of Deliberative Democracy*

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would have mixed composition in this sense: an elected component along party lines and an appointed element for reasons just given. For the election, a closed list proportional representation system would be best. In that way, parties can put forward the candidates they think are best suited to the task of writing a constitution. And of course any group can form a party for the purposes of participation in such an election. Deciding on the correct proportion between elected and appointed members is a complex question. In my view, in the UK the proportion is best determined in consideration of the need to break the grip of the two main parties on the outcome of deliberations. That consideration accordingly suggests that a composition of roughly one third appointed and two thirds elected members is appropriate for the composition of the constituent assembly. That is so because under such composition the two parties would most likely be unable to act jointly to block major reforms.

As to the appointees, the question is a touch more complicated. Either we can appoint persons who are experts, that is, persons of eminence and ability such as those appointed as cross-bench peers in the House of Lords. Or we can appeal to a representative body of citizens – by which I mean descriptively representative (ie. there is a correspondence between the characteristics of the population and the characteristics of the persons put in the assembly).<sup>77</sup> For the latter, we can appeal to sortition. Sortition is a technique used for jury trials and it has been done for a variety of citizens' assemblies and citizens' juries around the world. Proper sortition is a demographic science, and it would if applied constitute a body that is truly representative in the descriptive sense along gender, race, income, employment, age, region and other lines – informed, one hopes, by the feminist insight about the importance of critical mass in voices being heard. Since what I propose would be a long-term daily gathering, most likely stretching a few years, the participant would need adequate compensation and job security. I favour this option, over the appointed persons model, because I think it is the most legitimate. I imagine a constitution drafted by a panel of constitutional law experts and eminent persons would be just my kind of process. But that is exactly why we

(Routledge 2016) esp ch 5 and at 127ff, where they review the discussion within the field of deliberative democratic writing.

<sup>77</sup> J Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (1999) 61 *The Journal of Politics* 628; MS Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton University Press 1998); J Mansbridge 'Rethinking Representation' (2003) 97 *The American Political Science Review* 515. As noted to me by Albert Weale, there would be a good case for exploring ideological diversity as one of the criteria for appointment to such a body.



should not go with it. Such persons should and would be heard, but nothing more.

#### 4. *The Status and Amendment of the Constitution*

5 What status would the enacted constitution have? A landmark report prepared by Professor Robert Blackburn and Dr Andrew Blick for a parliamentary inquiry on a written constitution canvasses three options for its status:<sup>78</sup>

- (1) A non-binding declaratory code.
- (2) A statute.
- 10 (3) An entrenched constitution with a super-majority amendment formula.

My view is that the constitution should be entrenched, but flexible. Entrenched because without that, it could be overwritten by a simple Act of Parliament, inadvertently even. That would be a mistake, because the amendment process should be extremely careful. Entrenchment is the solution, but *how deeply* entrenched? The democratic case must take this question very seriously. A constitution protected by a strict amending procedure effectively allows the people at one point in time – 1787 in the US or 1949 in Germany – to prevail over often vastly larger and often much more representative majorities at a later point in time. We can call this problem the ‘dead hand of the past.’

The argument has a lot to be said for it. But it is hard to give a universal answer to the question of how rigid a constitutional amendment formula should be. In post-war Germany, there was good reason – to put it mildly – to make the constitution’s defence of fundamental rights, the federal structure, the political parties and the unions, quite firmly entrenched. In post-revolutionary America, the strains of holding a huge federation together suggested that stability would depend on a measure of security. Do not forget that the amending formula of the US constitution pre-dates the bill of rights. In other highly divided societies like Northern Ireland, and sometimes new democracies like post-apartheid South Africa, there are often good reasons why a deeper entrenchment would be attractive.

<sup>78</sup> Political and Constitutional Reform Committee, *A new Magna Carta?* (HC 2014-15, 463) 29.



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Eternity clauses offer a way to protect the ‘sacrosanct principles’<sup>79</sup> of a constitution by limiting amendment power over provisions which preserve the contemporary polity or which are especially vulnerable because they run counter to the pre-constitutional political arrangement; however, these cannot prevent extra-constitutional forces from bringing about change.<sup>80</sup>

But in many other countries, there is no clear political demand for anything like this kind of strict entrenchment. All of the Scandinavian countries, France, Ireland, Italy and many other nations have amending formulas that require either one or more Acts of the legislature, or a referendum, or both.

At one end of the spectrum, amending the Finnish constitution is regarded as the function of the legislature alone. An amending bill must pass with a simple majority upon its second reading, followed by an abeyance until after the next general parliamentary election. After this first stage the amendment succeeds if passed by a two-thirds majority.<sup>81</sup>

Italy and Sweden, too, confer the amendment competence on the legislature, but with the possibility that a referendum may be invoked. The Italian constitution requires simple majorities in both houses, the second taking place after a three month interval, though such amendments can be submitted for approval by referendum by one fifth of the members of either house, or by 500,000 electors, or five regional councils.<sup>82</sup> The Swedish constitution requires two simple majorities either side of a parliamentary election, though the election must take place not less than nine months after the proposal is first submitted to the legislature. A motion for a binding referendum can also be brought by one-tenth of members of parliament, and it will carry if approved by one third.<sup>83</sup> Under the French constitution, amendments passed in identical terms by both assemblies of parliament will become effective upon approval by referendum. However a referendum may be bypassed, in some cases, with the approval of three-fifths of the votes of both houses sitting jointly in congress.<sup>84</sup>

<sup>79</sup> A Brecht, *Federalism and Regionalism in Germany—The Division of Prussia* (OUP 1945) 138.

<sup>80</sup> Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Power* (OUP 2017) 16ff.

<sup>81</sup> The Constitution of Finland, Art. 73. This citation and those below are to those provisions of the constitutions that are in force at the time this article is published.

<sup>82</sup> Constitution of the Italian Republic, Art. 138.

<sup>83</sup> The Instrument of Government, Ch. 8 Arts. 14, 16.

<sup>84</sup> French Constitution of 1958, Art. 89. However, see the President’s important powers relating to the use of referenda in Art. 11.

Other constitutions unconditionally integrate referenda into the amendment procedure. Under the Danish constitution, a bill must be passed, a new election called, and the same bill passed again before being submitted for approval by referendum.<sup>85</sup> The Norwegian constitution is similar, with the additional requirement that the proposal be circulated in print ahead of the intervening election.<sup>86</sup> The Irish constitution requires simple majorities of both houses for an amendment which is thereafter put to a referendum.<sup>87</sup>

In my view, an amendment procedure should *always* be designed to ensure that the political decision is extremely careful and not rushed. But subject to that, in principle I think the baseline or starting position should be that it is respectful of ongoing equal political status – i.e. not be fiercely counter-majoritarian. One can depart from that presumption when the case is made out, as (arguably) in the examples of rigidity or strictness as set out in some of the stricter formulas referred to above. However, the political case for that type of rigidity I think will more often be the exception than the norm in a mature democracy, at least in those that are not highly divided societies.

It is also evident that in none of the countries mentioned above is the amendment process anywhere near as flexible – as easy – as it is in the United Kingdom. Indeed there is not even agreed criteria for what would constitute a constitutional amendment in the UK, and hence nothing to prevent ‘amendments’ being affected *even without an Act of Parliament*.<sup>88</sup> So there is, in other words, some gulf between the quite rigid formulas of anywhere from a two-thirds majority and upwards on the one hand, and the current position in the UK on the other.

For these reasons, I think the democratic case for a written constitution for a country like the UK commends an amending formula of the following sort: a bill passed by both houses of parliament under a special procedure (e.g. a Speaker’s conference, committees of the whole house), and ratified by public referendum, before it takes effect as an amendment of the constitution. This means that referenda must be *preceded* by a

<sup>85</sup> The Constitutional Act of Denmark, section 88.

<sup>86</sup> Constitution of the Kingdom of Norway, Art. 121.

<sup>87</sup> Constitution of Ireland, Art. 46.

<sup>88</sup> The institution of English Votes for English Laws would be such an example, which was effected by way of the amendment of the standing orders of the House of Commons rather than by legislation: R Kelly, *English votes for English laws*, House of Commons Library Research Paper, 17/7339, 20 June 2017. The proposed plan to promptly increase the number of peers to the House of Lords mooted in the People’s Budget crisis in 1909 is another example: see C Ballinger, *The House of Lords 1911-2011: A Century of Non-Reform* (Hart Publishing 2012) ch 1.

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carefully debated and concrete initiative passed by Parliament. This tends to make the consequences and institutional form of the proposed course of conduct more apparent. That mitigates some of the vices of populist initiatives that are not subject to parliamentary debate and scrutiny. However, the possibility of direct popular *ratification* is at the same time an antidote to some of the problems in the legislative process I have averted to – preventing, for example, reforms that may be unpopular but suit a party with a dominant majority in Parliament. This approach ensures that Parliament will play a key role in the amendment process, but also that there is a national conversation and popular ratification of amendments. The legislative form of the proposal will ensure that the conversation is focused and the outcome relatively concrete.

This flexibility might be enough, one could think, to answer definitively the objection that the constitution is lacking in the democratic credentials I set out in Part 1. However, I do not think that is true. Existing arrangements take on inertia. People get attached. They do not want to get into things. Professor Nick Barber has argued against a written constitution precisely because it would force some awkward conversations unnecessarily, because, to put it another way, a constitutional rewrite would be *gauche*.<sup>89</sup> I take a different view. The constitution is something that should belong to each generation in the important sense of authorship that I have outlined in Part 1. We cannot renew it every Parliament. Yet we *can* sit down and explore it front to back once in a generation. And that is why I would suggest that a constituent assembly be convened along the lines I have identified above, about once in a generation.<sup>90</sup> That means putting a sunset clause into the constitution, to prevent political opportunism in fixing the date.<sup>91</sup> The proposal is hence different from the situation that exists with respect to a number of state constitutions in the United States. In New York, for example, the constitution provides that a referendum take place every 20 years on

<sup>89</sup> See for example: Barber, ‘Against a written constitution’ (n 22); N Barber, ‘Why entrench?’ (2016) 14 *ICON* 325.

<sup>90</sup> This might range anywhere between 20-40 years, and it is pointless to try to settle a number for present purposes.

<sup>91</sup> See Thomas Jefferson, Letter to James Madison, 6 Sept. 1789, in *Thomas Jefferson: Writings*, (MD Peterson ed, Library of America 1984) 959–64. Richard Tuck has shown that Jefferson is likely to have drawn the same idea from a proposal by the Marquis de Condorcet in August 1789: R Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (CUP 2016) 136, 263-266. On sunset clauses in related contexts, see A Kouroutakis, *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis* (Routledge 2017); S Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar Publishing 2014).

whether to hold a new constitutional convention.<sup>92</sup> Voters normally decline, though not always. The proposal I put down here is that the convention takes place automatically, precisely to engage the spirit of authorship outlined above. The people and even the parties will really not know, until they engage in the process, whether the status quo is actually fine. They cannot know, because it requires an extensive national conversation and a large investment of time and attention.

A number of persons would fear doing this, particularly when populist sentiments are all the rage. They might rather argue to let sleeping dogs lie, rather than put the fundamental issues in question when crazy people are influential.<sup>93</sup> However, it would be well to recall on the one hand that the constituent assembly I have suggested is still composed by a two-thirds elected component along party lines, and on the other that there is empirical evidence that mini-publics are conducted in a respectful, balanced and public-oriented way even in a country with a significant politics of populism.<sup>94</sup> I side with the deliberative democrats in seeing deliberative constitutionalism, which the proposed constituent assembly would embody, as an solution to rather than aggravation of populist politics. As Simone Chambers has observed, '[d]eliberation, whether in the jury, a mini-public, between judges, in a parliament or even in the chaotic unstructured public sphere, implies a multiplicity of voices, opinions and claims being voiced. [...] Arguments, not votes, pose the more serious threat to populism.'<sup>95</sup>

<sup>92</sup> N.Y. CONST. art. XIX, § 2-3.

<sup>93</sup> Last year in New York, when a referendum was held on whether there should be a constitutional convention as provided for under the its state constitution, bodies like the New York branch of Planned Parenthood and the New York Civil Liberties Union campaigned against a 'con-con' while the New York State Bar Association campaigned in favour of one: Jesse McKinley, 'New York Voters Reject a Constitutional Convention' *The New York Times* (New York, 7 November 2017) <<https://www.nytimes.com/2017/11/07/nyregion/new-york-state-constitutional-convention.html>> accessed 1 June 2018; Committee on the New York State Constitution, 'Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention' (New York State Bar Association, 17 June 2017). For a general discussion see E Bottini, 'Who is Afraid of the Constitutional Convention? The Rejection of Constitutional Change in the State of New York' (I-CONNECT: the blog of the International Journal of Constitutional Law, 22 November 2017) <<http://www.icconnect-blog.com/2017/11/who-is-afraid-of-the-constitutional-convention-the-rejection-of-constitutional-change-in-the-state-of-new-york/>> accessed 1 June 2018.

<sup>94</sup> See Elstub and Pomatto (n 72) (exploring two Italian citizens' juries on federal reform of the state of Italy).

<sup>95</sup> S Chambers, 'Afterword: Populist Constitutionalism v. Deliberative Constitutionalism' in Levy and others (n 72) at 370-371.

### 5. *Conclusion*

The journey to this conclusion has been a long one, so it will help to summarise the key arguments. First, a democratic case requires participation by the people's representatives in the authorship of the fundamental rules of the polity. Rights-based and clarity-based arguments do not presently make the case on their own, but each are complementary to the democratic argument in important ways. Second, the case against the written constitution often fetishises the past without justification, it opposes rationalist reform when it has delivered some of our most lasting achievements, and it overemphasises the role of courts, which is both less significant than supposed and whose perceived vices are dwarfed by the positive potential for democratic renewal. Third, the best way past the strangle-hold the Westminster Parliament holds over the reform process is a constituent assembly featuring a combination of party members and members of the general public. And fourth and finally, the status of the constitution should be that it is entrenched but amendable by Act of Parliament and referendum; and that it come up for renewal about once a generation. That is, in my view, the democratic case for a written constitution.

There is an important question about how that democratic case relates to a truly seismic event in United Kingdom constitutional politics: the planned departure of the UK from the European Union (or, colloquially, Brexit). There is a common tendency at the time of writing to refer to all the shifting fault-lines made evident in the Brexit crisis as grounds for comprehensive constitutional reform. These include the constitutional tensions between the Westminster and devolved governments; the lack of clarity about fundamental constitutional norms, such as whether the Queen could withhold Royal Assent to a bill that passed both Houses if the Prime Minister advised her to do so; the secrecy and unreliability of constitutional conventions; and the extraordinary enhancement of executive power to make important policy decisions using delegated legislation and Henry VIII powers under the European Union (Withdrawal) Act 2018. My view is that while these events expose genuine problems, and may well provoke a full-blown constitutional crisis akin to those that precede most foreign experiences of constitutional overhaul, they provide a political occasion rather than clear justification for a constitutional reform process leading to a written constitution. Whether the problems created by Brexit are solved by the adoption of a written constitution is a deep and difficult question. The prior question is, Brexit aside, what

precisely is the case for a written constitution and what kind of process and degree of entrenchment would such a case support? The democratic case does not make the case for the substance of a *particular* constitution. Therefore the argument here does not enable one to hold up a particular  
5 constitution as the answer to the problems the crisis exposed. At best, it can point to a process in which the relevant conversation can be held, and prescriptions for the enactment and status of a written constitution which will answer the more powerful objections to having one in the first place. But that conversation should be held for good democratic reasons entirely  
10 independent of the reasons attributable to Brexit. Nevertheless, Brexit may lead to a serious crisis – perhaps even a ‘good crisis’ that the advocates of a written constitution should ‘never let go to waste’<sup>96</sup> – but the democratic case for a written constitution stands on its own feet.

<sup>96</sup> The expression ‘Never let a good crisis go to waste’ is often attributed to Winston Churchill, but it is unclear whether the claim is more than apocryphal.