The Constitutional Logic of the Common Law

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ABSTRACT

This Article uses two concepts from philosophical logic, the transitive property and syllogistic reasoning, to examine the history and theory of the common law. More specifically, the Article uses the transitive property to challenge the claims of sovereignty theorists that parliamentary supremacy is truly the most fundamental historical and theoretical basis of the British constitution. Instead, the transitive property helps show that the history and theory of the common law tradition has long provided a role for independent courts in maintaining the rule of law as a foundational principle of the British constitution. The Article then closely analyzes the reasoning of Marbury v. Madison *to trace through two syllogisms the legal bases for the Constitution's and the courts' authority, demonstrating that Chief Justice Marshall grounded these sources of authority differently in his opinion. The Article uses these two syllogisms to challenge the view that the courts' exercise of judicial review must depend, logically or legally, on the existence of a written constitution. Taken together, these two elements of logical reasoning help show historical and theoretical affinities between the US and the UK constitutional traditions that run deeper than the existence of parliamentary sovereignty in the United Kingdom or a written Constitution in the United States.*

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> For judicial control, particularly over discretionary power, is a constitutional fundamental. In their self-defensive campaign the judges have almost given us a constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence.[1]

I. INTRODUCTION

"In republican government," James Madison writes, "the legislative authority necessarily predominates."[2] In constitutional republics, a central conceptual challenge involves reconciling democratic will and legal constraints on government.[3] The famous solution of Madison (and his compatriots) was to divide the powers of government horizontally and vertically and to commit the powers of the national legislature to paper, alongside the procedural and substantive constraints upon that power.[4] The answer in the United States also involves recognizing the judiciary's independent authority to review the acts of the legislature to ensure their compliance with the Constitution's constraints upon the legislature's power.[5]

In UK government, Albert Dicey explains,

> [t]wo features have at all times since the Norman Conquest characterized the political institutions of England. The first of these features is the omnipotence or undisputed . . . sovereignty of Parliament . . . The second of these features, which is closely connected with the first, is the rule or supremacy of law.[6]

The UK constitution[7] is famously unwritten, and the conventional view of parliamentary sovereignty is that the powers of the national

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1. H.W.R. WADE, CONSTITUTIONAL FUNDAMENTALS 87 (rev. ed. 1989).

2. THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

3. *See, e.g.*, T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, 111–12 (1985).

4. *See*, *e.g.*, U.S. CONST. art. I, § 9 (establishing express limitations on the legislative branch's power); *id.* amends. I, IV, V, VI (introducing further limitations on the legislature).

5. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the constitutional role of the judiciary and the judicial review powers). By mentioning legislative power in the text I do not mean to suggest that the courts cannot review acts of other governmental institutions and actors to ensure their constitutionality.

6. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107 (8th ed. 1982).

7. Although Dicey refers to England in the previous quotation, I will refer to the constitution of the UK or Britain, because Dicey's conception is generally taken as the

legislature are legally illimitable.[8] According to this view, the judiciary lacks the authority to ensure that acts of the legislature comply with the UK constitution, because this would be tantamount to subjecting parliamentary power to a legal limitation.[9]

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orthodox understanding of the British constitution, within and beyond England itself. That said, it is equally important to recognize the devolution of political authority to and the independent legal traditions within the separate nations of Britain. And I would be remiss if I failed to note, as Colin Picker reminds us, that "Scotland is not England . . . [B]eing Scottish is not the same as being English. Indeed, being English is not the same as being British, as the Welsh and Northern Irish will attest. . . . Clearly, from a geographical perspective, Scotland is not England. One look at the geography of the United Kingdom will convince the most skeptical observer that they are indeed different countries. Furthermore, the cultures are very different, the histories until the Union were very different, and arguably have remained different even since then. . . . Linguistically, the Scots speak a different form of English, and even have their own language, still spoken by some in the Highlands and the Scottish Islands. The number of differences is countless." Colin B. Picker, *"A Light unto the Nations"—The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States*, 77 TUL. L. REV. 1, 4–5 (2002). One difference germane to this article is that Scotland was more substantially influenced by continental legal tradition than was England. *See* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 104 (2d ed. 1988); KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 202–03 (3d ed. 1998). Another is the contrast between conceptions of sovereignty in Scottish and English constitutional law and theory. *See generally* MacCormick v. Lord Advocate, [1953] SC 396, 411 (Scot.) ("The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. . . . [It] was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*."). *See also* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1617–18 (2011) (contrasting the differences in Parliament's ability to remodel courts in England and Scotland).

8. *See generally* DICEY, *supra* note 6, at 27 ("[T]he term 'sovereignty' . . . is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. . . . [T]he sovereign power under the English constitution is clearly 'Parliament.' "). This is the definition adopted by most contemporary sovereignty theorists. *See, e.g.*, JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 57 (2010) [hereinafter CONTEMPORARY DEBATES] ("[L]egislative sovereignty . . . [means] legislative power that is legally unlimited.").

9. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 66, 67 (Ruth Paley ed., 2016) [1765] ("[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . that . . . [can] control it . . . [T]here is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no."). Contemporary sovereignty theorists who attempt to harmonize absolute sovereignty and the rule of law can be read as adapting Blackstone's comment as a judicial presumption regarding Parliament's legislative intentions. According to this view, while the courts may not review primary legislation for constitutionality, they may properly assume that it is always Parliament's intention to legislate in accordance with the rule of law and, in particular, that Parliament would never (in the absence of unmistakably clear and explicit intentions to the contrary) delegate authority to an administrative or executive actor to violate the law. *See*, *e.g.*, MARK ELLIOTT, THE CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW 109 (2001). For instances of courts employing this assumption when reviewing government action, *see, e.g.*, AXA Gen. Ins., Ltd. v. Lord Advocate [2011] UKSC 46, [152] (declaring that Parliament is presumed not to break the principle of legality unless there is clear evidence to the contrary); R v. Sec'y of State for the Home Dep't, ex parte Pierson [1998] AC 539, 575 (HL) (appeal taken from

In the Anglo–American common law tradition, the challenge of reconciling democracy and constitutionalism has led the United States and the United Kingdom to develop contrasting methods of balancing the rule of the people and the rule of law.[10] According to the conventional view, constitutional rights in the United States are protected by the courts "against" the interests of the majority,[11] whereas in the United Kingdom, constitutional rights are defined by Parliament in the best interests of the British people.[12] While it is somewhat misleading to view the courts' role in the United States simply as protecting individual or minority rights against the majority,[13] I will discuss the dynamic in those terms because it is accurate to a meaningful extent and, in any case, its widespread acceptance is most important here. According to the familiar understanding of each nation's constitutional system, US courts possess the power to enforce constitutional limitations on legislative power because the Constitution provides the courts with the legal basis for doing so.[14] Conversely, UK courts lack the power to rule acts of Parliament unconstitutional because there is no foundational written charter on which the courts can rely.[15]

Wales) (Lord Browne-Wilkinson) ("A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."). *Id.* at 591 (Lord Steyn) ("Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.").

10. *See* Allan, *supra* note 3, at 140–41.

11. The classic expression of this view is that the exercise of this power by courts is "counter-majoritarian." *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."). A similar assumption underlies the occasional statements by British constitutional theorists that Parliament possesses a democratic standing that the courts do not. *See, e.g.*, Christopher Forsyth, *Heat and Light: A Plea for Reconciliation*, *in* JUDICIAL REVIEW AND THE CONSTITUTION 394 (Christopher Forsyth ed., 2000) ("Parliament speaks, and one trusts always will speak, with a democratic legitimacy the judges, however independent and no matter how respected, will always lack.").

12. *See* CONTEMPORARY DEBATES, *supra* note 8, at 79.

13. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–85, 294 (1957).

14. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 579 (1972) ("[I]t is a written Constitution that we apply. Our role is confined to interpretation of that Constitution."). As I will discuss later, the use of the Constitution as a basis for evaluating exercises of state power and as the authority for the courts to use the Constitution in this manner are not the same thing.

15. *See, e.g.*, Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 549 (1988) ("Acts of Parliament are not subject to judicial review on the ground that they are repugnant to the superior, paramount law of a written constitution."); Louis H. Pollak, *Judging Under the Aegis of the Third Article*, 51 CASE W. RES. L. REV. 399, 417 (2001) ("It is, of course, a hornbook platitude that, lacking a

The prevailing view is that the United States and the United Kingdom take divergent approaches toward judicial protection of fundamental rights because of the presence of a written constitution (and the absence of legislative supremacy) in the United States and the absence of a written constitution (and the presence of parliamentary sovereignty) in the United Kingdom.[16] This conventional understanding is misguided in two ways. First, the common law foundation of the UK constitution and the courts' historic authority to reform and refine the common law are the authentic basis for a judicial contribution to defining the scope and content of constitutional rights and legal constraints on government in the United Kingdom.[17] Second, the codification of the US Constitution does not, in fact or in theory, provide the legal foundation for judicial enforcement of constitutional rights and constraints on government action in the United States.[18]

As a preliminary point of departure, it is misleading to differentiate the US and UK constitutions on the basis that the former is written while the latter is not—the presence of a written constitution in the United States does not and should not preclude the recognition and protection of unenumerated rights and unwritten constitutional principles,[19] and the absence of a codified charter in the United

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written constitution, Britain does not have an American-style system of judicial review.").

16. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (C.C.D. Pa. 1795) ("[I]n England, the authority of the Parliament runs without limits, and rises above controul. It is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament. . . . [T]he validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. . . . Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision. What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it."); Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 130 (1986) ("Although the United States and England entertain similar values, the approaches we take toward satisfying those values in many respects diverge considerably. . . . Lacking a written constitution and judicial power to override legislative acts, England gives its judicial system fewer tools with which to protect individual rights when confronted with the popular will. The intent of the majority, as embodied in an act of Parliament, is the last word in England, while in the United States some of the most intractable national conflicts . . . are ultimately resolved by the judiciary acting as the ultimate interpreter of the Constitution.").

17. *See infra* note 119 and accompanying text.

18. *See* JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 2–3 (3d ed. 2000).

19. *See generally* Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 216, 217, 218 (1988) ("The British have an unwritten constitution; we have a written one—so most people familiar with our practices would say. I want to say that we have both. . . . To begin with, the American Revolution was

Kingdom does not mean that no foundational texts exist to define certain constitutional rights and principles of that system.[20] Both the US and the UK constitutions are grounded in the texts and principles of the common law tradition, which is defined in part by the generative (and nonexhaustive) set of sources that help to distinguish that tradition.[21] Each nation has its own distinct legal sources and its own distinctive legal tradition, to be sure, but it is a mistake to attempt to disconnect or isolate one common law nation's legal culture entirely from the broader common law world of which it is a part.[22]

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made by a generation of lawyers and pamphleteers who believed in and were used to arguing on the basis of a legally supreme and yet unwritten English or British constitution. This generation accepted a binding body of higher law, conceived as an amalgam of the rights of man and the birthrights of Englishmen. This conception then appeared in the earliest exercises of judicial review, immediately after independence. . . . The 'property' and 'liberty' protected by the due process clauses supplied the textual basis for constitutionally protected unenumerated rights, and there was no further need for any explicit doctrine of an unwritten constitution."). And the Ninth Amendment makes this explicit. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

20. *See* R (HS2 Action All. Ltd.) v. Sec'y of State for Transp. [2014] UKSC 3, [207] (appeal taken from Eng.) ("The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. . . . The common law itself also recognises certain principles as fundamental to the rule of law."). *See also* ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 32, 33 (1998) ("According to Dicey, the United Kingdom has an unwritten, or partly unwritten, constitution. That proposition is acceptable inasmuch as it is another way of stating that there is no single authoritative text. But it is quite inaccurate if it is taken to mean that there is no *written* constitutional law. For much of the constitution, and certainly all constitutional *law*, is written. There are in the first place many important statutes. . . . Secondly, of course, court decisions are written. . . . The constitution is therefore very largely a written one. The point is that it is *uncodified*. It is a jumble of diffuse statutes and court rulings, supplemented by extra-legal conventions and practices. It has also been described as a *common law* constitution."); S.E. FINER, VERNON BOGDANOR & BERNARD RUDDEN, COMPARING CONSTITUTIONS 42–43 (1995) ("The [UK] constitution is a rag-bag of statutes and judicial interpretations thereof, of conventions, of the Law and Custom of Parliament, of common law principle, and jurisprudence.").

21. *See* George Anastaplo, *The Constitution of 1787: A Commentary* 157-58 (1989) ("For the British, more of their Constitution is written than we usually recognize, for it includes such celebrated parts as Magna Carta, the Petition of Right, and the Habeas Corpus Act. On the other hand, for Americans, more of their Constitution is unwritten than we recognize, for it includes reliance upon such things as an accepted mode of interpretation, the common law . . ."). This was a point that Dicey himself appreciated. *See* DICEY, *supra* note 6, at 314 n.13 ("It is well worth notice that the Constitution of the United States, as it actually exists, rests to a very considerable extent on judge-made law.").

22. *See infra* note 101 and accompanying text.

II. THE TRANSITIVE PROPERTY AND THE COMMON LAW CONSTITUTION

Elsewhere, I have discussed at length[23] the view of Jeffrey Goldsworthy,[24] and others,[25] that parliamentary sovereignty is best conceived as the "rule of recognition" of the UK legal system. A rule of recognition, according to H.L.A. Hart's famous conception, is the legal norm that identifies the rules of a legal system as distinctively legal rules, and distinguishes them from other sorts of rules, principally through the attitudes and actions of government officials.[26] The important point is that, according to contemporary defenders of absolute parliamentary sovereignty, the rule of recognition is defined by the actions of all officials of government, not by judges alone.[27] And in this respect, Goldsworthy argues that sovereignty serves better than the common law as the historical and conceptual foundation of the UK constitution.[28]

In defending his claims regarding sovereignty's historical provenance, Goldsworthy argues that parliamentary sovereignty possesses a longer lineage in English legal history than common law constitutionalism.[29] He disregards statements of the common law as

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23. *See* Douglas E. Edlin, *The Rule of Recognition and the Rule of Law: Departmentalism and Constitutional Development in the United States and the United Kingdom*, 64 AM. J. COMP. L. 371, 375–76, 401–09 (2016) [hereinafter *The Rule of Recognition and the Rule of Law*].

24. *See* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 234 (1999) [hereinafter THE SOVEREIGNTY OF PARLIAMENT] ("[F]or many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in H.L.A. Hart's sense . . .").

25. *See*, *e.g.*, Patrick Elias, Retired Lord Justice of Appeal, Annual Lord Renton Lecture, The Rise of the Strasbourgeoisie: Judicial Activism and the ECHR 5 (Nov. 24, 2009) ("Parliamentary sovereignty . . . is a unique rule in that it is the one common law rule which cannot be abrogated or changed by Parliament. That is because, to use the language of Professor Hart, it is the fundamental rule of recognition. . . .").

26. *See* H.L.A. HART, THE CONCEPT OF LAW 94–95, 100–10 (3d ed. 2012) [hereinafter THE CONCEPT OF LAW].

27. *See* CONTEMPORARY DEBATES, *supra* note 8, at 52–56, 124.

28. *See id.* at 14–18.

29. *See* CONTEMPORARY DEBATES, *supra* note 8, at 26–27, 37–38, 42–43, 274–75; THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 28–29, 37, 45, 58–59, 74–75, 105, 134–35, 140–41, 157–58, 160–62, 164, 168, 190, 196, 200–01, 216, 227–28. By framing the issue in this way, Goldsworthy glosses over an important historical challenge to his argument. During the latter sixteenth and seventeenth centuries, the concept of sovereignty was still principally associated with the sovereign. Although parliamentarians (and common law judges) were interested in constraining the absolute sovereignty of the Crown, those arguing in favor of parliamentary authority did not describe this authority as the sovereignty of Parliament. *See*, *e.g.*, CHRISTOPHER W. BROOKS, LAW, POLITICS AND SOCIETY IN EARLY MODERN ENGLAND 80 (2008) ("The role of the lords and commons in parliament was to consult and consent in deliberations over the making of laws, but statutes had the force of law only through the royal assent. . . . [P]arliament was not sovereign . . ."); CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603–1714 52 (2d ed. 1980) ("Only Royalist thinkers had a clear theory of sovereignty. Parliamentarians . . . den[ied] 'sovereign power' to 'our sovereign Lord the King', but

authorizing or recognizing parliamentary authority as intermittent and unimportant.[30] The problem with Goldsworthy's view, and with the broader debate itself, is the extent to which a positivist philosophical perspective influences these theorists' interpretations of the historical record and, in turn, how this view of the history predetermines their claims about the conceptual framework within which contemporary debates about rights protection, judicial authority, and constitutional development should proceed.[31] To be clear, this Article takes no issue with legal positivism as a legal theory. Indeed, one point of this Article is to explain that legal positivism compels no conclusion one way or the other about the absolute sovereignty of Parliament.[32]

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they did not claim it for Parliament."). More broadly, during this time the courts and Parliament were primarily asserting their respective authority against the Crown, not each other. *See* P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 227 (1987) ("Parliament and the common lawyers had been allies in the seventeenth-century struggles against the Crown; they did not see themselves as rivals."); George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined*, 92 LAW Q. REV. 591, 595 (1976) ("This alliance and mutual respect between Parliament and the common lawyers has had a profound effect on the development of English law, particularly in judicial recognition of parliamentary supremacy and parliamentary acceptance of judicial independence.").

30. *See* CONTEMPORARY DEBATES, *supra* note 8, at 25–26, 29–33, 39, 42, 46–47, 50–51; THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 78–79, 109–12, 117, 123–24, 142–43, 145–46, 197, 203.

31. In fact, Goldsworthy has argued that the doctrine of parliamentary sovereignty is itself an expression of legal positivism as a theoretical perspective. *See* Jeffrey Goldsworthy, *The Real Standard Picture, and How Facts Make It Law: a Response to Mark Greenberg*, 64 AM. J. JURIS. 163, 169 (2019) ("This centuries-old doctrine [of legislative supremacy] in effect officially adopts legal positivism in relation to statute law . . ."). Goldsworthy's attempt to characterize legislative supremacy as an inherently positivist doctrine seems unavailing, given that Hart indicates that his work as a modern positivist may be differentiated from that of earlier positivists "mainly by its rejection of their imperative theories of law and their conception that all law emanates from a legally unlimited sovereign legislative person or body." CONCEPT OF LAW, *supra* note 26, at 244–45. For a more general picture of the underlying debate, *compare* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 352 (1978) ("I concentrate on the details of a particular legal system . . . not simply to show that positivism provides a poor account of the system, but to show that positivism provides a poor conception of the concept of a legal right."), *with* CONCEPT OF LAW, *supra* note 26, at 245–48, 268–72 (responding to a number of arguments against legal positivism).

32. This article also speaks to the value of different iterations and precise understandings of legal positivism in describing the actual operation of parliamentary sovereignty in British constitutional government. *See*, *e.g.*, David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 934 (2003) ("The Austinian positivist doctrine of parliamentary sovereignty resists any attempt to circumvent it and place limits upon the legislative power. The imposition of legal restraints upon Parliament, however, does not entail a return to natural law theories or require a rejection of positivism. . . . Hart's positivist theory does better than Austin's by describing more complex constitutional systems that incorporate ideas such as judicial review or the lack of one supreme, law-making sovereign. . . ."). For the conception of absolute sovereignty in Austinian positivism, *see* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 188

Like many sovereignty theorists, Goldsworthy argues that legislative supremacy better legitimates representative government in a democratic system[33] and that common law constitutionalism permits judicial authority to supersede the will of Parliament.[34] He then reverts to the rule of recognition in an effort to argue that the decisions of judges cannot by themselves alter the sovereignty of Parliament as the central feature of UK constitutional law and theory, which is accurate but somewhat beside the point.[35]

Goldsworthy seeks to challenge the "modest proposition that the common law 'established the fundamental legal framework' of English government."[36] In challenging this proposition, Goldsworthy argues that the courts (and the common law) lack any organic authority to define or refine the meaning of the English constitution.[37] In attempting to situate that constitutional limitation historically, Goldsworthy discusses Matthew Hale.[38] But here, Goldsworthy superimposes his view of the modern British constitution upon his scholarly assessment of Hale's writing.[39] Goldsworthy claims that

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(Wilfrid E. Rumble ed., 1995) ("[S]overeign or supreme power is incapable of legal limitation, whether it reside in an individual, or in a number of individuals."). *See also id*. at 205, 212. For some of Hart's criticisms of Austin on this point, *see* THE CONCEPT OF LAW, *supra* note 26, at 68–71.

33. *See* THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 63–64, 70, 137, 219–20. *See also* Forsyth, *supra* note 11, at 394–95.

34. *See* CONTEMPORARY DEBATES, *supra* note 8, at 6, 49, 55, 278–79; THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 202–03.

35. *See* CONTEMPORARY DEBATES, *supra* note 8, at 110; THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 234 ("There can be no doubt that for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in H.L.A. Hart's sense, which the judges by themselves did not create and cannot unilaterally change.").

36. *Id.* at 19 (quoting BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 57 (2004)).

37. *See generally* THE SOVEREIGNTY OF PARLIAMENT, *supra* note 24, at 235 ("[J]udges cannot justify [judicial repudiation of the parliamentary sovereignty doctrine] . . . on the ground that it would revive a venerable tradition of English law, a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by common law. . . .").

38. *See* CONTEMPORARY DEBATES, *supra* note 8, at 27, 38–42.

39. More fundamentally, Goldsworthy imposes a positivist conception of law upon Hale, even though Hale himself rejected the Hobbesian, positivist view of law, along with Hobbes's absolutist view of legally illimitable sovereignty. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 188–89 (1998) (distinguishing Hale's view of law from Edward Coke's and arguing that "Coke's logic depended on the assumption that if a law was made during the time of kings it must have been made by the authority of the King—and hence could be unmade by that same authority. That follows only if the King is the sole fountainhead of authority: the sole and exclusive sovereign. If, however, law can be made in a nonpositivistic way, that is, other than by emanating from the will of the sovereign, then there is no need to trace 'fundamental law' back to the Saxon forests or to mythical Trojan settlers in England. The King has no obvious authority to change law that came about, 'insensibly,' by the course of tradition. Coke had accepted too much of the idea of law as command. That elements of the common law have come into existence during the time of kings, but

"Hale did not think of the common law as something that could be altered by judges."[40] Goldsworthy is concerned to establish this point, because he had just explained that "Hale attributed to the common law the capacity to change the constitution . . ."[41] So the concern that drives Goldsworthy here is plain enough: if the common law can change the constitution, and the judges can change the common law, then the judges can change the constitution.[42] And given Goldsworthy's understanding that the British rule of recognition locates in Parliament the unique and ultimate authority of establishing constitutional meaning and defining fundamental rights, Goldsworthy cannot concede that the courts may historically have shared this constitutional authority and responsibility.[43]

Unfortunately for Goldsworthy, however, Hale did state that the judges could, through their decisions, alter the common law:

> From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniences of the People, for or by whom they are appointed . . . so many Times there grows insensibly a Variation of Laws, especially in a long tract of Time . . . yet it is not possible to assign the certain Time when the Change began; nor have we all the Monuments or Memorials, either of Acts of Parliament, or of Judicial Resolutions, which might induce or occasion such Alterations. . . . So that Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho' not now extant, might introduce some *New* Laws, and alter some *Old*, which we now take to be the very Common Law itself. . . .[44]

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have authority independent of the will of the King, does not prove that the law is vulnerable. It is equally consistent with the theory that the power of the King is limited. For obvious reasons, Hale did not spell this out, but the implications for absolutism can be seen in Hobbes's attack on the authority of tradition. Whig constitutionalism, when considered at its most fundamental level, was antithetical to Hobbes's view of sovereignty.").

40. CONTEMPORARY DEBATES, *supra* note 8, at 40.

41. *Id*.

42. *See id*. at 15 ("Both views . . . threaten . . . to replace legislative supremacy with judicial supremacy. Instead of Parliament being the master of the constitution, with the ability to change any part of it . . . the judges turn out to be in charge.").

43. *See id*. at 6–7.

44. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 39–40 (Charles M. Gray ed., 1971) [1713] [hereinafter COMMON LAW OF ENGLAND]. *See also id*. at 7–8 ("I therefore come down to the Times of those succeeding Kings, . . . and the Statutes made in the Times of those Kings, . . . [T]hey now seem to have been as it were a Part of the Common Law, especially considering the many Expositions that have been made of them . . . whereby as they became the great Subject of Judicial Resolutions and Decisions; so those Expositions and Decisions, together also with those old Statutes themselves, are as it were incorporated into the very Common Law, and become a Part of it."). We should, of course, be careful not to impart contemporary understandings of precedent and constitutional interpretation to Hale. While he understood judicial interpretations and expositions of existing law to be a part of the common law, he also subscribed to the declaratory view of the time that particular judicial decisions were evidence of the law rather than independent sources of law. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 228–29 (2008). *See also infra* note 76.

This passage reveals a series of problems for Goldsworthy's analysis. First, and most obviously, the passage expresses Hale's view that the common law could be altered not just by parliamentary enactments, but also by judicial decisions and customary practices.[45] Hale's view as a common lawyer was more complex, and more modern, than Goldsworthy wishes to accept.[46] Second, Hale's views undermine Goldsworthy's position that parliamentary supremacy in establishing legal rights was embedded as unquestioned historical fact prior to the Glorious Revolution.[47] Third, Goldsworthy's mischaracterization of Hale is emblematic of a pervasive problem with the historical contentions of contemporary defenders of sovereignty.[48] The history of English constitutional thought is simply not univocal on the question of parliamentary supremacy.[49] Read carefully, Hale's statement indicates that the English constitution has long embraced a shared institutional responsibility among the courts and Parliament for determining the meaning and development of the constitution.[50] Moreover, this passage adverts to Hale's underlying and "striking claim that the common law *is* the constitution of the English people."[51]

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45. *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 27, 43 (2011).

46. *See id*. at 37–43.

47. Hale died in 1676 and his *History of the Common Law* was first published in 1713. *See* COMMON LAW OF ENGLAND, *supra* note 44, at xiii. For further discussion of the point in the text, *see* GLENN BURGESS, ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 153 (1996) (explaining the recognition during the Stuart Period that "acts of misgovernment were usually within the purview of the courts: an administration, separate from the king, could be policed by a judiciary independent of him."); John H. Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT'L HUM. RTS. 3, ¶ 23 (2004) ("It is not my contention that the rule of law always prevailed in Renaissance England, or that human rights as now understood were always protected–any more than they are at the present day. But it is not so absurd to propose that the rule of law was an accepted constitutional principle in the Tudor and Stuart periods, and that many–though certainly not quite all–of the rights now classified as 'human rights' would have been recognized without difficulty by English lawyers of that period. The principal difference, perhaps, is that in earlier periods the ideals were embodied within the common law itself and subject to development through precedent.").

48. *See* Douglas E. Edlin, *Rule Britannia*, 52 U. TORONTO L.J. 313, 320 (2002) [hereinafter *Rule Britannia*].

49. *See, e.g.*, Roy Stone de Montpensier, *The British Doctrine of Parliamentary Sovereignty: A Critical Inquiry*, 26 LA. L. REV. 753, 754–56 (1966) (arguing that differing constructions of English history and law have led to the creation of the theory of parliamentary supremacy).

50. *See* COMMON LAW OF ENGLAND, *supra* note 44, at 43–46.

51. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 24 (2003) (emphasis added). *See also* COMMON LAW OF ENGLAND, *supra* note 44, at 30 ("I come now to . . . the Common Municipal Law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of common Justice in this great Kingdom . . . [F]or it is not only a very just and excellent Law in it self, but it is singularly accommodated to the Frame of the English Government, and to the Disposition of the English Nation, and such as by a long Experience and Use is as it were . . . become the Complection and Constitution of the English Commonwealth.").

Hale believed that Parliament and the judiciary had a role to play in refining the common law,[52] just as Dicey believed that Parliament and the judiciary had a role to play in defining the English constitution.[53] Reading these historical and institutional dynamics together, the most distinctive characteristic of England's common law constitution may in fact be its capacity for change over time.[54]

Here Goldsworthy's broader historical claims about parliamentary sovereignty intersect with his philosophical orientation as a legal positivist and help to reveal the relationship between the rule of law and the rule of recognition in Britain.[55] If the nature of the British constitution, as the ultimate legal rule of the British legal system, is best understood through Hart's rule of recognition (as Goldsworthy believes), then the rule of recognition must be defined through the beliefs and behaviors of all legal officials, not just judicial officials.[56] So it is not enough, in Goldsworthy's mind, to explore the historical and philosophical bases for common law constitutionalism and parliamentary sovereignty, Goldsworthy must argue that common law constitutionalism is the myth and parliamentary sovereignty is the reality.[57] Goldsworthy must also assert, as he does repeatedly, that the rule of recognition in the British legal system cannot be altered "unilaterally" by the judiciary.[58] If parliamentary sovereignty is ultimately a common law doctrine, however, and the common law can be altered by the courts (as Hale believed), then the doctrine of sovereignty as a fundamental principle of the British constitution can be altered by the courts.[59]

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52. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 592 (2006) ("Hale disassociated identity from origin and instead connected it with the perception of the common law's continuity despite change, and with the polity's acceptance of a body of common law–and various alterations to it–as law. The common law thus served, for Hale, as 'the Complection and Constitution of the English Commonwealth,' a constitution that could smooth over any political disruptions, including that of the English Revolution. Whether a particular transformation was effected through judicial decision or statute seemed to make little difference for Hale.").

53. *See infra* note 119 and accompanying text. Dicey's statement is part of his explication of the rule of law as one of the two (along with parliamentary sovereignty) defining principles of the English constitution. *See supra* note 6 and accompanying text.

54. *See* Christine Bell, *Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison*, [2014] PUB. L. 446, 457 ("The very essence of British constitutionalism is that it claims change as continuity, and enshrines on-going capacity for change as its grundnorm . . . [T]he commitment to an unwritten constitution is often assumed to be itself a commitment to a type of political constitutionalism that prioritises political change within a narrative of continuity as the constitution's key core commitment.").

55. *See The Rule of Recognition and the Rule of Law*, *supra* note 23, at 414–15.

56. *See supra* notes 24, 27–28 and accompanying text.

57. *See* CONTEMPORARY DEBATES, *supra* note 8, at 14–15, 57–61.

58. *See id.* at 45–46, 52-55, 96, 113–14, 267, 317.

59. *See, e.g.*, R (Jackson) v. Att'y Gen. [2005] UKHL 56, [102] (appeal taken from Eng. & Wales) (Lord Steyn) ("[T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle.

The critical point that Goldsworthy misses is the distinction between the rule of recognition and the constitution.[60] Given that the rule of recognition is the social rule by which the rules of law in the British legal system—including the law of the constitution—are identified, the British constitution exists apart from what Parliament may, at any given time, enact legislatively (even if the legislation that is enacted would alter a rule of British constitutional law). In other words, the rule of recognition must be distinct from the constitution.[61] Hale implicitly understood this.[62] Parliament can enact legislation that alters the British constitution, but the precise meaning of the alteration that Parliament has effected cannot be understood simply by reading the legislation.[63] It can be understood only after seeing, customarily through judicial decisions interpreting the statute, what precisely the statute succeeded in changing.[64] For Hale, this meant that the constitution exists within the institutional dynamics of government over time, and has meaning apart from what a political actor or institution may occasionally do, or try to do.[65]

For Hale, the common law was the compendium of English law, which included and incorporated parliamentary enactments and customary practices.[66] As the fundamental source of legal authority, the common law was itself the constitution of the English polity, and judicial decisions (and parliamentary enactments) reflected and contributed to a shared understanding of the common law as the constitution.[67] Gerald Postema explains this as Hale's view that

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If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."). *See also id*. at [126]. *But cf.* CONTEMPORARY DEBATES, *supra* note 8, at 50 ("[T]here is an incongruity between the legal doctrine that the courts are obligated to obey statutes, because Parliament is sovereign, and the theory that the courts can at any time release themselves from the obligation, because Parliament's sovereignty is their creation, and subject to their control.").

60. *See The Rule of Recognition and the Rule of Law*, *supra* note 23, at 403–07.

61. *See* Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 160–61 (Larry Alexander ed., 1998).

62. *See generally* COMMON LAW OF ENGLAND, *supra* note 44.

63. *See Rule Britannia*, *supra* note 48, at 321–22.

64. This was Dicey's view, as well. *See* DICEY, *supra* note 6, at 273 ("Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land. . .").

65. *See* ALAN CROMARTIE, SIR MATTHEW HALE, 1609–1676: LAW, RELIGION AND NATURAL PHILOSOPHY 57, 105 (1995); *see also* JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 84 (2004) ("Hale's law was a law that ruled over men. He did not mean that law won out over power in every instance. . . . But in England over time rule-of-law rebounded to make new precedents and to place new hedges around liberty.").

66. *See generally* COMMON LAW OF ENGLAND, *supra* note 44, at 44 ("The formal Constituents . . . of the Common Law . . . [are] [t]he Common Usage, or Custom, and Practice of this Kingdom . . . [t]he Authority of Parliament, introducing such Laws; and [ ] [t]he Judicial Decisions of Courts of Justice . . .").

67. *See id*. at 39–46.

"English common law is a composite of *lex scripta* and *lex non scripta*."[68] For Hale, these terms did not correspond simply to written and unwritten law—instead, *lex scripta* were laws that acquired their authority through their enactment by a "recognized lawmaking body."[69] *Lex non scripta* were laws that acquired their authority through their ongoing use in practice by which they were incorporated "into the systematic body of law."[70] With this distinction, Hale perceived what we now understand to be a distinction between constitutional law and the law derived from and validated by the constitution.[71] As the "constitution of civil government," Hale understood that through the *lex non scripta*, "[a]ll governing power—legislative as well as adjudicative, royal as well as parliamentary—is ordained, constituted, structured, and limited by this law."[72]

So in Hale's view, while an individual judicial decision did not fix the content of the constitution, the decision could and did express with distinctive authority the meaning of the common law as a framework of legal principles and reasoning, and that law was, as Hale himself put it, "the Frame of the English Government."[73] In the end, then, Hale's own words are the greatest challenge to Goldsworthy's attempt to argue that the common law is not the framework of English government.[74] As the legal basis of the government's authority, the principles of the common law determined how the exercise of the government's authority and Parliament's legislation would be understood and expressed by courts.[75] And the courts' expression in their judgments of their understanding of this authority was evidence of the law as it was taken to govern the actions of the government and the meaning of Parliament's enactments.[76] As evidence of the law that

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68. *See* GERALD J. POSTEMA, *Editor's Introduction*, *in* MATTHEW HALE: ON THE LAW OF NATURE, REASON, AND COMMON LAW xxxix (2017) [hereinafter ON THE LAW OF NATURE, REASON, AND COMMON LAW].

69. *Id.*

70. *Id.*

71. *See id.*

72. *Id.*

73. COMMON LAW OF ENGLAND, *supra* note 44, at 30.

74. *See supra* notes 36–41 and accompanying text.

75. *See The Rule of Recognition and the Rule of Law*, *supra* note 23, at 376–77.

76. For more on judicial decisions as evidence of the law, *see generally* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 448–49 (1996) ("A line of judicial decisions consistently applying a legal principle or legal rule to various analogous fact-situations is 'evidence,' in Hale's formulation, of the existence and the validity of such a principle or rule. The decisions are not only 'examples' of the principle or rule, but also 'proof' of its reception by the judiciary and hence a source of its binding force. Judges, to be sure, do not 'make' laws, but 'find' them in the received legal tradition and 'declare' them. This 'declaratory theory,' as it is often called, means that the source of law in precedent is itself linked to the source of law in custom, which in turn is linked to the source of law in 'reasonableness,' as the moral element in law was then called for the first time. The link with reasonableness leaves room for courts to overrule even longpracticed error. Yet

constrains government action and guides statutory interpretation, the common law functions as the English constitution because the powers of the state and the meaning of legislation cannot be understood in any way other than through the preexisting legal principles and forms of reasoning and judgment that have always been used to understand state power and parliamentary enactments.[77] Parliament cannot legislate and the government cannot act outside of or apart from the constitutional environment in which legislation and government action is understood according to the principles and traditions of the common law.[78]

Hale's focus in his time was on the Crown's power, and he recognized the authority of the courts to enforce legal constraints on the executive.[79] As Glenn Burgess put it:

> Hale seems to be saying that illegal acts of prerogative could—at least in some cases—be effectively ignoredby the courts. The courts would simply find that actions performed by means other than those of due legal process were void in the sense that the courts would not uphold them.[80]

In Hale's terms, the law possesses an "invalidating power," or "*potestas irritans*," which consists of "the power to make acts void if they are against the law. Thus the sovereignty of the king exists *within* a legal framework."[81] Hale distinguished this power from the "coercive power," or "*potestas coerciva*."[82] On this view the king was not understood to be under the direct coercive power of the laws,[83] but he

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reasonableness itself, in the seventeenth-century English sense, had a historical dimension.").

77. *See* COMMON LAW OF ENGLAND, *supra* note 44, at 44–46.

78. *See infra* note 99.

79. *See generally* COMMON LAW OF ENGLAND, *supra* note 44.

80. BURGESS, *supra* note 48, at 139–40. As Burgess goes on to explain, this understanding apprehends the functional operation of legal constraints on government power through institutional dynamics. The notion of the king "having 'absolute' prerogatives" whose authority was recognized as "*part* of the law" was consistent with "the fact that the king could not act contrary to common law" and that the courts would ensure "that the law would, in its *particular* operations, frustrate any attempts actually made to govern illegally." *Id*. at 147.

81. HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 261 (2003). *See also* MICHAEL LOBBAN, A HISTORY OF THE PHILOSOPHY OF LAW IN THE COMMON LAW WORLD, 1600–1900 80 (2007) ("The king was bound by law in a number of ways. He could not legislate alone; so that 'those actions of his which have not their formalities that the Law requires are made void'. . . . [I]f the king exceeded his power, Hale argued, he would be subject to the *potestas irritans* of the judges. This was their power simply to ignore his actions where they were *ultra vires*.").

82. BERMAN, *supra* note 81, at 261.

83. *See id.* In more modern terms, we might say that power-conferring rules provide the legal limitations on executive or legislative authority, even if there are no sanctions directly imposed upon the executive or the legislators for violating these rules. *See* Neil MacCormick, *Does the United Kingdom Have a Constitution? Reflections on* MacCormick v. Lord Advocate, 29 N. IR. LEGAL Q. 1, 9 (1978). Or, alternatively, we might

was bound by the directive power of the law and the invalidation of "acts contrary to the requirements of the law."[84] Of course, Hale was writing prior to the shift of political power from the Crown to Parliament, but the point remains consistent with respect to sovereignty itself.[85]

Conceived most broadly, the concept of sovereign power, or *potestas*, extends to and embraces all powers of government.[86] But even read expansively, the important point is that sovereignty was and should be understood as "the absolute *legal* authority of the ruling power in its corporate capacity."[87] Sovereignty denotes the authority to govern and governance involves the exercise of power "through the instrumentality of law" in the sense that law constitutes the government's capacity and authority to govern and thereby defines the legal content and validity of the actions taken by the government, so constituted.[88] Parliament is sovereign in its legislative capacity, then, in the sense that there are no coercive legal limitations on its ability to legislate.[89] However, as Hart (like Hale) appreciated, in the operation of the UK constitution through the UK rule of recognition, Parliament's enactments are subject to the superseding power of the law in the sense that the courts will not uphold them if they violate fundamental rule of law and democratic principles,[90] and authoritative judicial

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say that the voiding of the government's action is the sanction for the government's failure to act within its legal authority. *See* THE CONCEPT OF LAW, *supra* note 26, at 31 ("Legislation is an exercise of legal powers 'operative' or effective in creating legal rights and duties. Failure to conform to the conditions of the enabling rule makes what is done ineffective and so a nullity for this purpose. . . . The consequence of failure to conform to such rules may not always be the same, but there will always be some rules, failure to conform to which renders a purported exercise of legislative power a nullity or . . . liable to be declared invalid.").

84. ON THE LAW OF NATURE, REASON, AND COMMON LAW, *supra* note 68, at 221.

85. *See generally* Gary W. Cox, *Was the Glorious Revolution a Constitutional Watershed?*, 72 J. ECON. HIST. 567, 568 (2012) (explaining the shift in power from the Crown to Parliament following the Glorious Revolution of 1688).

86. *See, e.g.*, C.H. McIlwain, *Sovereignty Again*, 18 ECONOMICA 253, 253 (1926) (expressing that sovereignty is "supreme", "single," and "undivided").

87. Martin Loughlin, *Why Sovereignty?*, *in* SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 43 (Richard Rawlings et al. eds., 2013) (emphasis added).

88. *See id.*

89. *See* H.W.R. Wade, *The Basis of Legal Sovereignty*, 13 CAMBRIDGE L.J. 172, 174 (1955) [hereinafter *The Basis of Legal Sovereignty*] ("[T]here is one, and only one, limit to Parliament's legal power: it cannot detract from its own continuing sovereignty.").

90. *See* CONCEPT OF LAW, *supra* note 26, at 69 ("A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing (or at any rate need not impose) duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. . . . Such restrictions on the legislative power . . . may well be called constitutional . . . [T]hey vitally concern the courts, since they use such a rule as a criterion of the validity of purported legislative enactments coming before them."). *Cf. infra* notes 133–34.

interpretations of legal norms bind the government by ensuring that its actions are consistent with the existing understanding of the law.[91]

The authority of the courts to enforce constitutional principles and preserve the rule of law depends explicitly or implicitly upon the recognition of this authority by Parliament[92] and correspondingly the sovereignty of Parliament to legislate without limitation depends upon the recognition of this authority by the courts.[93] In Dicey's view, there was no irreconcilable tension in the UK constitution between parliamentary sovereignty and the rule of law,[94] because judicial enforcement of parliamentary legislation is what determines the functional realization of Parliament's authority to legislate.[95] Thinking of a rule

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91. *See* R (Evans) v. Att'y Gen. [2015] UKSC 21, [52] (appeal taken from Wales) (Lord Neuberger, joined by Lords Kerr & Reed) ("[I]t is a basic principle that a decision of a court is binding . . . and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive."). An inchoate expression of the more modern understanding that the legality of government acts depends upon their recognition by the other organs of government can be found in Hale's own writings. *See, e.g.*, ON THE LAW OF NATURE, REASON, AND COMMON LAW, *supra* note 68, at 199, 200 ("[T]he king without consent of the lords and commons in parliament . . . cannot make a binding law. . . . And as he cannot make a law without consent of parliament, so neither can he repeal a law without the like consent."); *id.* at 227 ("[B]y the constitution of this realm the supreme power of the king is limited and qualified that it cannot make a law or impose a charge but by the consent both of lords and commons assembled in parliament. . . . And yet this concurrence without the king's consent makes not a law . . .").

92. *See* DICEY, *supra* note 6, at 270 ("Parliament, though sovereign, . . . has never hitherto been able to use the powers of the government as a means of interfering with the regular course of law. . . . Parliament has tended as naturally to protect the independence of judges . . ."); R (G) v. Immigration Appeal Tribunal [2004] EWCA (Civ) 1731, [12] (Eng.) (Lord Phillips) ("It is the role of the judges to preserve the rule of law. The importance of that role has long been recognised by Parliament. It is a constitutional norm recognised by statutory provisions that protect the independence of the judiciary . . .").

93. *See* TOM BINGHAM, THE RULE OF LAW 167 (2010) ("[T]he principle of parliamentary sovereignty has been recognized as fundamental in this country . . . because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system."); *The Basis of Legal Sovereignty*, *supra* note 89, at 196 ("The seat of sovereign power is not to be discovered by looking at Acts of any Parliament but by looking at the courts and discovering to whom they give their obedience.").

94. *See* DICEY, *supra* note 6, at 268, 269 ("The sovereignty of Parliament and the supremacy of the law of the land . . . may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament . . . favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority, of Parliamentary sovereignty. . . . The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges. A Bill which has passed into a statute immediately becomes subject to judicial interpretation . . .").

95. *See id.* at 3–4 ("The principle of Parliamentary sovereignty means neither more nor less than this . . . the right to make or unmake any law whatever. . . . A law may, for our present purpose, be defined as 'any rule which will be enforced by the Courts.' "). *See also* Ahmed v. HM Treasury [2010] UKSC 2, [157] (appeal taken from Eng.) ("Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of

of recognition as the institutional dynamics that define, through the actions and beliefs of government officials, the meaning and force of the British constitution, the interactions of judicial, legislative, and executive organs of government are the operative meaning of the rule of law in the British system.[96] And the courts sometimes refer to the operation of these institutional dynamics in terms of a rule of recognition.[97]

This reciprocal institutional dynamic defines the meaning of parliamentary sovereignty in the British constitutional system. If the courts cannot alter the rule of recognition unilaterally, the same must be true equally of Parliament.[98] This is the theory of constitutional government that underlies the legal tradition of the common law, in the United Kingdom[99] and, as Dicey saw it, in all of "those countries which, like the United States of America, have inherited English

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Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country."); R (Cart) v. Upper Tribunal [2009] EWHC (Admin) 3052, [39] (Eng.) ("The rule of law requires that statute should be mediated by an authoritative and independent judicial source; and Parliament's sovereignty itself requires that it respect this rule.").

96. *See* Philip A. Joseph, *Parliament, the Courts, and the Collaborative Enterprise*, 15 KING'S C. L.J. 321, 322 (2004) ("Throughout English constitutional history, Parliament and the courts have exercised co-ordinate, constitutive authority. . . . Parliament and the political executive must look to the Courts for judicial recognition of legislative power, and the Courts must look to Parliament and the political executive for recognition of judicial independence."); *see also* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 84–85 (1999); KEITH SYRETT, THE FOUNDATIONS OF PUBLIC LAW: PRINCIPLES AND PROBLEMS OF POWER IN THE BRITISH CONSTITUTION 99–100 (2d ed. 2014); Nicholas Bamforth, *Ultra Vires and Institutional Independence*, *in* JUDICIAL REVIEW AND THE CONSTITUTION 133–35 (Christopher Forsyth ed., 2000).

97. *See, e.g.*, Pham v. Sec'y of State for the Home Dep't [2015] UKSC 19, [80] (appeal taken from Eng.) (Lord Mance) ("For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. . . . [U]nless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, [and] Parliament as sovereign. . . . "); R (Jackson) v. Att'y Gen. [2005] EWCA (Civ) 126, [90] (Eng. and Wales) ("What is in issue is a consensual constitutional change in the manner in which sovereign power is exercised. The nature of that change depends not simply on the words used in the legislation by which that change was brought about. It depends on general recognition of the nature of the change, as demonstrated particularly by those who brought about the change, but additionally by all affected by it. This is what Hart described as the 'rule of recognition' in chapter six of his work on *The Concept of Law*."). *See also infra* note 112.

98. *See* Elias, *supra* note 25, at 5 ("The basic constitutional facts of the system must be as true for the judges as they are for Parliament . . ."). Goldsworthy seems on occasion to concede this point. *See* CONTEMPORARY DEBATES, *supra* note 8, at 113, 116, 122.

99. *See Pierson* [1998] AC at 587 ("Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law."). Or in Hale's terms: "*Lex non scripta* . . . supplies the matrix within which individual enactments of parliament are to be understood and interpreted." ON THE LAW OF NATURE, REASON, AND COMMON LAW, *supra* note 68, at xxxix. *See also supra* notes 68–72 and accompanying text.

traditions."[100] And like Dicey, British judges have sometimes referred to the shared constitutional DNA of common law systems around the world:

> All of the[se Commonwealth constitutions] were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.[101]

The functional realization of the rule of law in a constitutional system necessitates that each branch of government can act only in accordance with the law, because the recognition of the legality and legitimacy of each branch's action depends upon its explicit or implicit endorsement by the other branches of government.[102] This is perhaps most notable when a legal challenge is raised in court against an

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100. DICEY, *supra* note 6, at 110. Of course, each common law nation that inherited English traditions also inherited its own challenge of reconciling the judicial enforcement of constitutional principles within a democratic system of government. *See* CONTEMPORARY DEBATES, *supra* note 8, at 80.

101. Hinds v. The Queen [1977] AC 195, 212 (PC) (appeal taken from Jam.) (Lord Diplock). *See also* R v. Horseferry Rd. Magistrates' Court, ex parte Bennett [1994] 1 AC 42, 67 (HL) (appeal taken from Scot.) ("Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself."); GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 22–23 (1995) ("Underlying the rule of law in the United States is the common law of England which was established on this continent in Colonial days. The common law . . . is critical to the rule of law for the English-speaking peoples, reflecting and reinforcing as it does a general constitutional system.").

102. *See generally* Re McFarland [2004] UKHL 17, [7] (appeal taken from N. Ir.) ("Just as the courts must apply Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or not, so Parliament and the executive must respect judicial decisions, whether they approve of them or not. . . ."); R (Cart) v. Upper Tribunal [2011] UKSC 28, [21] (appeal taken from Eng.) ("The satisfactory operation of the separation of powers requires that Parliament should leave the judges free to perform their role of maintaining the rule of law but also that, in performing that role, the judges should, so far as consistent with the rule of law, have regard to legislative policy.") (quoting R (G) v. Immigration Appeal Tribunal [2004] EWCA (Civ) 731, [20] (appeal taken from Eng.)). I recognize that the powers of British government are not understood to be separated in the same manner as the powers of the US government. Regardless of whether legislative and executive powers are fused in the British system, however, the point being made here depends principally upon the separation of judicial authority from the other branches. In addition, even if the legislative and executive branches overlap more in the UK than they do in the US, their respective functions are usually distinguishable. *See* Eric Barendt, *Separation of Powers and Constitutional Government*, [1995] PUB. L. 599, 614–15.

executive[103] or administrative action,[104] but the point holds with respect to legislative action, as well.[105] Furthermore, in certain notable cases, senior members of the British judiciary have indicated that the fundamental principles of the British constitution operate in a manner "little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[106] The constitutional form in which these rights and principles are expressed in different nations is less important than the substantive

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103. The foundational expression of this principle is traced to Entick v. Carrington, (1765) 19 STATE TRIALS 1029, 1065–66. For a more recent ruling to the same effect, *see* Council of Civil Serv. Unions v. Minister for the Civil Serv. [1985] 1 AC 374, 409, 410 (the GCHQ case) (HL) (appeal taken from Eng.) (Lord Diplock) ("[I]n the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i e that part of the common law that is given by lawyers the label of 'the prerogative.' . . . I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review."). *Id.* at 417 (Lord Roskill) ("I am unable to see . . . that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive."). *See also* R (Rotherham Metro. Bor. Council) v. Sec'y of State for Bus., Innovation & Skills [2015] UKSC 6, [61] (appeal taken from Eng.) ("The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law."); A v. Sec'y of State for the Home Dep't (No. 2) [2005] UKHL 71, [22] (appeal taken from Eng.); A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [107]–[108] (appeal taken from Eng.); R v. Looseley [2001] UKHL 53, [40] (appeal taken from Eng.); *Bennett* [1994] 1 AC at 61–62 ("[T]he judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.").

104. *See, e.g.*, Anisminic Ltd. v. Foreign Comp. Comm'n [1969] 2 AC 147, 214 (HL) (appeal taken from Eng.); R (G) v. Immigration Appeal Tribunal [2004] EWCA (Civ) 1731, [13] (Eng.) ("The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously. If Parliament attempts by legislation to remove that power, the rule of law is threatened.").

105. *See, e.g.*, *Jackson* [2005] UKHL 56 at [107].

106. R v. Sec'y of State for the Home Dep't, ex parte Simms [2000] 2 AC 115, 131 (HL) (appeal taken from Eng.) (Lord Hoffmann); *see also* R (Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs [2007] EWCA (Civ) 498, [64] (Eng.) ("'Those [prerogative legislative] powers, however, as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the constitution from which the power derives. Exactly the same . . . is true of a country such as the United Kingdom whose constitution, though unwritten, is no less real."). *Cf.* Sylvia Snowiss, *The* Marbury *of 1803 and the Modern* Marbury, 20 CONST. COMMENT. 231, 247 (2003) ("[S]ocieties with and without written constitutions and [US-style] judicial review, such as the United States and Great Britain, can produce roughly the same results, namely regimes of effective and limited government, civil liberties, and institutional stability. . . . [F]or all of *Marbury*'s stress on the written constitution, with its implicit contrast to the unwritten English constitution . . . a written constitution remains closer to an unwritten constitution than to a statute."). I discuss below the related conceptions of constitutional and judicial authority that underpin *Marbury*. *See infra* notes 151–63 and accompanying text.

content of these principles and their shared recognition throughout the common law world.[107] Whether they originate in a charter document, a legislative enactment, or a judicial decision, the fundamental principles that legitimate and regulate government action and the rights that individuals may claim as constitutionally protected derive from common law concepts of procedural and substantive justice whose expression is not limited to one institution or one nation.[108]

Traditionally, an unwritten constitution may be amended by "ordinary legislation," but some British judges have differentiated between ordinary legislation and constitutional legislation or have recognized that certain ordinary statutes possess substantive characteristics that allow courts to regard them as "constitutional statutes":

> There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. . . . [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. . . . This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts . . . will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand.[109]

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107. *See generally* R (Daly) v. Sec'y of State for the Home Dep't [2001] UKHL 26, [30] (appeal taken from Eng. & Wales) (Lord Cooke) ("It is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by *recognising rather than creating them*.") (emphasis added). *See infra* notes 141, 202, 225, 228.

108. In British constitutional law, this is frequently described as the principle of legality. *See, e.g.*, *Pierson* [1998] AC at 589 (Lord Steyn) ("[T]he principle of legality served to protect procedural safeguards provided by the common law. But the principle applies with equal force to protect substantive basic or fundamental rights. . . . A corresponding principle applies in respect of basic standards and safeguards enshrined in legislation. This proposition is hardly radical. Ultimately, common law and statute law coalesce in one legal system.").

109. Thoburn v. Sunderland City Council [2003] QB 151, [60], [62], [64] (Eng.), *cited in HS2 Action All.* [2014] UKSC 3 at [208]. *Cf.* R v. Lord Chancellor, ex parte Lightfoot [2000] QB 597, 614 (Eng.) ("[C]onstitutional rights as I have sought to describe them will generally be creatures of the common law. Statutes enacted by Parliament, by virtue of Parliament's very sovereignty, possess equal force and status. All are capable of repeal or amendment on the same basis. It is both an irony of our constitution, and a

In the view of these judges, which seems to be shared implicitly by Parliament as an institution, "the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."[110] Properly understood, this judicial authority does not contradict or countermand Parliament's legislative authority because statutory law (constitutional or ordinary) secures the rights of individuals and defines the powers of government through its interpretation and application by the courts through their rulings.[111] And along with their interpretation of existing legislation, the courts must sometimes determine the nature of parliamentary action needed to alter constitutional rights or relationships.[112] The common law constitutional tradition maximizes individual liberty and agency and ensures the legitimacy of government action, in part by limiting the power of government to interfere with the liberty and agency of individuals.[113] In this constitutional tradition, the functional meaning

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well-worn chestnut among legal theorists, that the all-powerful legislature lacks the power to confer entrenched constitutional rights.").

110. *Jackson* [2005] UKHL 56 at [107]; *see also* R (Privacy Int'l) v. Investigatory Powers Tribunal [2019] UKSC 22, [119] (appeal taken from Eng.) ("[T]he relationship between Parliament and the courts is governed by accepted principles of the 'rule of law'. Unsurprisingly, there is no challenge to the proposition . . . that there is 'no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review.' ") (quoting *Cart* [2011] UKSC 28 at [122]); WILLIAM S. HOLDSWORTH, 6 A HISTORY OF ENGLISH LAW 262–63 (3d ed. 1945).

111. *See HS2 Action All.* [2014] UKSC 3 at [79].

112. For a notable judicial reference to a "constitutional statute" that reinforces the centrality of parliamentary legislation in the UK constitutional system, *see* R (Miller) v. Sec'y of State for Exiting the European Union [2016] EWHC (Admin) 2768, [44] (Eng.) (quoting *Thoburn* [2003] QB 151 at [62]). The Supreme Court of the United Kingdom affirmed the High Court's judgment in *Miller*. *See* R (Miller) v. Sec'y of State for Exiting the European Union [2017] UKSC 5, [67] (appeal taken from Eng.). The Supreme Court ruled in *Miller* that the European Communities Act of 1972 (the 1972 Act) is legislation of a "constitutional character" that cannot be abrogated unilaterally through the prerogative powers of the executive or by implication. *See id.* at [79]–[82], [87], [108]. As a result, the UK is subject to EU treaty provisions, including the Treaty on European Union (2007), which describes the procedure under Article 50 by which a member state may leave the EU. *See id.* at [25]–[26]. The Court ruled that the executive cannot withdraw the UK from operative treaties without an authorizing act of Parliament and the Article 50 procedure cannot be triggered by prerogative action that would alter existing law in the absence of enabling primary legislation. *See id.* at [88], [122]. The Court noted that parliamentary legislation was needed to effectuate the UK's accession into the EU through which EU rights gained direct domestic effect in the UK. *See id.* at [61]–[65]. And the Court indicated that corresponding parliamentary legislation would be needed to effectuate the UK's exit from the EU and the concomitant extinguishment of EU rights under UK law. *See id.* at [60] ("[I]n constitutional terms the effect of the 1972 Act was unprecedented. . . . Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.").

113. *See generally* 8 HALSBURY'S LAWS OF ENGLAND ¶ 101 (4th ed. 2001) ("According to this traditional view of the doctrine of parliamentary sovereignty, the

of these rights is defined most often through claims raised in courts and interpretations given by judges.[114] So the courts will often be the institution through which these rights are enforced and government actions are constrained, because without maintaining the courts' ability to review the government's actions and enforce individuals' rights, the nation's constitutional commitment to the rule of law would be threatened.[115]

This commitment to the rule of law enforced by independent courts is one of the cardinal values upon which the US and the UK constitutions are based.[116] Written or unwritten, entrenched or unentrenched, the constitutions of the common law tradition exhibit a particular conception of government, according to which fundamental legal principles are enforced through the "ordinary"[117] judicial process to ensure that the people and the state are always governed by the (same, common) law. Lord Brown (as he would become) summed up this commitment to common law constitutionalism in this way:

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liberties of the subject are merely implications drawn from two principles, namely: (1) that individuals may say or do what they please, provided they do not transgress the substantive law, or infringe the legal rights of others; and (2) that public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of the common law (including the royal prerogative) or statute, and in particular they may not interfere with the liberties of individuals without statutory authority.").

114. As Dicey recognized and emphasized. *See* DICEY, *supra* note 6, at 273 ("The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. . . . By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.").

115. *See generally Privacy Int'l* [2019] UKSC 22 at [142] ("[F]ollowing the logic of the reasoning in *Cart*, it may be thought implicit in the constitutional framework for the rule of law . . . that legal issues of general importance should be reviewable by the appellate courts . . ."). As the Court suggested in *Privacy International*, the specific legal mechanisms by which courts ensure the UK's constitutional commitment to preserve the rule of law may vary, and may in appropriate situations be determined legislatively by Parliament.

116. *See generally* MCCLELLAN, *supra* note 18.

117. Two of Dicey's senses of the rule of law refer specifically to "ordinary law" enforced by "ordinary courts." *See* DICEY, *supra* note 6, at 110 ("[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."); *id.* at 114 ("[E]very man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."). *See also* Begum v. Tower Hamlets London Bor. Council [2003] UKHL 5, [35] (appeal taken from Eng.) (Lord Hoffmann) ("[T]he English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts."); *Privacy Int'l* [2019] UKSC 22 at [139] ("Consistent application of the rule of law requires such an issue [decided by an administrative tribunal] to be susceptible in appropriate cases to review by ordinary courts."). *Cf. infra* note 176 and accompanying text.

"Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law."[118]

This common law basis of British constitutionalism was explicitly endorsed by Dicey as his third formulation of the rule of law: "the general principles of the constitution . . . are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."[119] In fact, Dicey's thinking here shares a close affinity with Hale's and Hart's.[120] The meaning of the British constitution identified by the UK rule of recognition is determined by the actions and beliefs of government officials whose actions are governed, and thereby legitimated, by their compliance with British constitutional principles.[121] In the terms of Hartian positivism, the most accurate understanding of the UK constitution identified by the UK rule of recognition is "obscured by the simple doctrine of sovereignty" insofar as "we must distinguish between a legally unlimited legislative authority and one which, though limited, is supreme in the system."[122] The correct understanding, as Dicey and

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118. R v. Univ. of London, ex parte Vijayatunga [1988] 1 QB 322, 343. *See also Cart* [2011] UKSC 28 at [37] ("[T]he scope of judicial review is an artefact of the common law whose object is to maintain the rule of law . . ."). For an expression of this principle in US law, *see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51–52 (1936) (Hughes, C.J.) ("Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."); *see also id.* at 84 (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.").

119. DICEY, *supra* note 6, at 115; *see also* E. NEVILLE WILLIAMS, THE EIGHTEENTH–CENTURY CONSTITUTION, 1688–1815: DOCUMENTS AND COMMENTARY 383–84 (1960); HOLDSWORTH, *supra* note 110, at 263 ("Throughout the course of English history a large part of our constitutional law has been made by judicial decisions; for our constitutional law is simply a part of the common law.").

120. *See* THE CONCEPT OF LAW, *supra* note 26, at 152–53; COMMON LAW OF ENGLAND, *supra* note 44, at 44. *See also* LOBBAN, *supra* note 81, at 87–89 ("Hale saw the common law as a developing body. . . . The law grew both through the passing of new legislation and through judicial interpretation. . . . Judges thus had a role to play in the development of the law, helping to accommodate it 'to the conditions, exigencies and conveniencies of the people.' However, this was to be done by the reasoning of men learned in the principles and precedents of law. For Hale, a body of experts interpreted and developed a body of law which had originated in the past, by applying it to novel circumstances in ways which would be most faithful to the spirit of that law.") (quoting COMMON LAW OF ENGLAND, *supra* note 44, at 39).

121. *See supra* notes 26, 50 and accompanying text.

122. THE CONCEPT OF LAW, *supra* note 26, at 70–71. *Cf.* STEPHEN SEDLEY, ASHES AND SPARKS: ESSAYS ON LAW AND JUSTICE 129 (2011) ("Parliamentary sovereignty itself is not a given but is part of a historic compromise by which the counterpart of the

Hart saw, of the UK system of constitutional government would recognize that Parliament is "the highest legislating authority . . . in the sense that all other legislation may be repealed by [it], even though [its] own is restricted by a constitution."[123] Through the traditional judicial function, then, the courts ensure that the rule of law in Britain is not something that British officials are solely working toward, it is also something that they are always working from, because it is something that they are never working without.[124] In this way, Britain realizes its commitment to the rule of law and, consistent with the common law process of ensuring the legality of government action, British judges are able to determine when certain actions of the government are inconsistent with the British constitution.[125]

The realization that Parliament derives its authority from the law and cannot, therefore, abrogate the legal foundations of its own authority has been as long recognized as it has been frequently forgotten.[126] In the early seventeenth century, for example, Thomas Hedley noted that Parliament "derived its power from the legal system. . . . Though parliament had unlimited powers of piecemeal legislation,

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common law's deference to Parliament as the single legislative power has been Parliament's recognition of the courts as the single adjudicative power. . . . [T]he legislative and judicial arms of the state are each sovereign in their proper spheres. . . .").

123. THE CONCEPT OF LAW, *supra* note 26, at 71; *see also supra* note 90.

124. *See Cart* [2009] EWHC (Admin) 3052 at [34], [36], [37] ("The court's ingrained reluctance to countenance the statutory exclusion of judicial review has its genesis in the fact that judicial review is a principal engine of the rule of law. . . . The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. . . . Only a court can fulfil the role."). *Cf.* A.W. Bradley, *Administrative Justice and Judicial Review: Taking Tribunals Seriously?*, [1992] PUB. L. 185, 189 ("[I]n the common law tradition, a public authority may not enforce in a judicial forum a byelaw or regulation which, if judicially scrutinized, would be held unlawful.").

125. *See* DICEY, *supra* note 6, at 121 ("The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the constitution . . . [is] not the source but the consequence of the rights of individuals, as defined and enforced by the Courts . . ."); *id.* at 314 ("The second of these principles is what I have called the 'rule of law,' or the supremacy throughout all our institutions of the ordinary law of the land. This rule of law, which means at bottom the right of the Courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions. If the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the substance of our constitution."). For a judicial expression of these principles, *see* A v. Sec'y of State for the Home Dep't [2004] EWCA (Civ) 1123, [248] (Eng.) ("[T]he law forbids the exercise of State power in an arbitrary, oppressive or abusive manner. This is, simply, a cardinal principle of the rule of law. The rule of law requires, not only that State power be exercised within the express limits of any relevant statutory jurisdiction, but also fairly and reasonably and in good faith. Consequently the courts will not entertain proceedings, or receive evidence in ongoing proceedings, if to do so would lend aid or reward to the perpetration of any such wrongdoing by an agency of the State.").

126. *See The Basis of Legal Sovereignty*, *supra* note 89.

wholesale destruction of the law was quite impossible, 'for that were includedly to take away the power of the parliament itself.' "[127] In other words, the fact that Parliament can alter rules of law, including rules of constitutional law, does not mean that Parliament can eliminate the legal rules that form the constitutional basis of its very authority to legislate or can annihilate the constitutional framework within which its existence as a legislature may be recognized.[128] In Hart's terms, these are the rules of change that empower the legislature to make and alter the law through legislation.[129] As Hart explained, legislative authority is a legal authority that is itself predicated upon legal rules (which are often conceived as constitutional provisions or principles).[130] Hart emphasized that this recognition of the legal authority of the legislature to legislate is what contributes to and constitutes "the *existence* of a legal system."[131]

So if we imagine Parliament legislating in a manner that would controvert its own authority to legislate in accordance with the law, we would have to imagine Parliament legislating away the constitutional system in which it exists as a legislature. Hart saw, as Hedley and Hale did long before him, that this amounts to a constitutional contradiction.[132] Here, again, we find the dynamic element of the

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127. ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642 204 (2006); (quoting Thomas Hedley, Speech in the House of Commons (June 28, 1610) in 2 PROCEEDINGS IN PARLIAMENT 1610 173–74 (Elizabeth Read Foster ed., 1966)).

128. For an explanation of the distinction I have in mind here, *see* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 56–59 (1992) (discussing the creation and alteration of the basic norm of a legal system); *id.* at 72–73 (discussing the creation and invalidation of legal norms within a legal system). The Supreme Court of the United Kingdom has discerned this distinction. *See Miller* [2017] UKSC 5 at [78] ("There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom.").

129. *See* THE CONCEPT OF LAW, *supra* note 26, at 95–96.

130. *See id.* at 59, 61 ("The statement that a new legislator has a right to legislate presupposes the existence, in the social group, of the rule under which he has this right. . . . The officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority: the legislators do this when they make laws *in accordance with* the rules which empower them to do so . . .") (emphasis added).

131. *Id.* at 61 (emphasis added).

132. *See supra* notes 65, 80–84, 127 and accompanying text. *Cf. Charge to Grand Jury–Treason*, 30 F. Cas. 1039, 1041 (D. Mass. 1861) (Sprague, J.) ("[I]t is vain to contend for a constitutional right to overthrow the constitution, and a legal right to destroy all law."). *See also* JOHN E. ATWELL, ENDS AND PRINCIPLES IN KANT'S MORAL THOUGHT 178 (1986) (explaining that a claim of "a constitutionally-authorized right . . . to overthrow the constitution" amounts to a claim of "a right to destroy that which makes it a right" and is "therefore self-contradictory."). Although Sprague and Atwell discuss this point in relation to armed revolts, the point holds with respect to Kelsenian revolutions, as well. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 118–19 (1945).

functional UK constitution identified by the UK rule of recognition. The meaning of Parliament's hypothetical legislation, which would ostensibly nullify the constitutional and democratic foundations of the UK legal system, cannot be determined by Parliament alone.[133]

The rule of law is just as much a part of the rule of recognition in the United Kingdom as parliamentary sovereignty. And a defining feature of common law constitutionalism is the identification of laws with regard to their consistency with the fundamental principles according to which the laws are made, and the substantive rights that those principles describe. According to this tradition, when acts of the government threaten the fundamental values of the constitutional system, the common law courts have an independent authority to determine the legality of government action and thereby ensure that the rule of law is maintained.[134] In the United Kingdom, and in every nation that inherited the common law tradition, the courts' institutional function involves defining individual rights and enforcing principled constraints on state power that help to construct the meaning of their nation's constitution over time. It is precisely in this sense, as Hale, Dicey, and Hart all understood, that the common law functions as the fundamental legal framework of government in the United Kingdom.

III. THE *MARBURY* SYLLOGISMS AND THE CODIFIED CONSTITUTION

For many sovereignty theorists, the exercise of judicial review under the US Constitution is a cautionary tale. Echoing Goldsworthy's concerns about common law constitutionalism,[135] the concerns about

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133. *See* Moohan v. Lord Advocate [2014] UKSC 67, [35] (appeal taken from Scot.) ("[I]n the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law . . . would be able to declare such legislation unlawful."). *Cf. The Basis of Legal Sovereignty*, *supra* note 89, at 189. ("[T]he 'ultimate legal principle' . . . lies in the keeping of the courts, and no Act of Parliament can take it away from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament . . .").

134. *See Jackson* [2005] UKHL 56 at [107] (Lord Hope) ("[T]he courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law."); *id.* at [159] (Baroness Hale) ("The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."). *See also Ahmed* [2010] UKSC 2 at [146] ("Access to a court to protect one's rights is the foundation of the rule of law."); *Begum* [2003] UKHL 5 at [27] ("If an administrator is regarded as being an independent and impartial tribunal on the ground that he is enlightened, impartial and has no personal interest in the matter, it follows there need not be any possibility of judicial review of his decision. He is above the law. That is a position contrary to basic English constitutional principles.").

135. *See supra* note 34.

US–style judicial review include the politicization of judicial selection and judicial decision making, and the judicialization of issues that are better resolved through the political process. The combined effect of these trends is a loss of faith in the courts and in the political process. Needless to say, there are genuine empirical, historical, and political rejoinders to these criticisms, as well. For purposes of this Article, however, I will prescind from these debates. My focus here is on the assumption that the existence of US–style judicial review depends upon the existence of the written US Constitution.

Many UK constitutional lawyers and theorists, and others,[136] view US–style judicial review[137] as a consequence of the written US Constitution. For these lawyers and scholars, avoiding this expansive exercise of judicial authority, and the attendant political conflict it engenders, are reasons in themselves for the United Kingdom not to codify its constitution.[138] And some argue further that, in the absence of a written constitution on which courts could rely, avoiding these conflicts is a "pragmatic" reason that UK courts recognize the sovereignty of Parliament as a constitutional doctrine.[139]

One problem with this view is that it rests upon a misapprehension of the constitutional basis for judicial review in the

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136. *See*, *e.g.*, Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta*, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 375 n.57 (1990) ("[I]f the . . . chosen method [of judicial review] is not tied closely to the text, structure, and history of the Constitution, then far from being the 'right kind' of judicial review, it is not judicial review at all."); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 542–43 (1998) ("[T]he Constitution authorizes judicial review only for government activity conflicting with the written text.").

137. For the balance of this section, when I refer to judicial review I am referring to the judicial authority to void unconstitutional primary legislation or government action.

138. *See* KEVIN HARRISON & TONY BOYD, THE CHANGING CONSTITUTION 88 (2006) (quoting Lord Falconer) ("If we had a written constitution it would be open to judges' interpretation and lead to a clash between judges and politicians."); Dawn Oliver, *Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament*, *in* PARLIAMENT AND THE LAW 322 (Alexander Horne & Gavin Drewry eds.) (2d ed. 2018) ("[T]he UK is unlikely to adopt a written Constitution which grants the Supreme Court the right to review provisions in Acts for constitutionality. . . . [The] doctrine of parliamentary sovereignty works relatively well and broadly in the public interest because the doctrine is a typically British pragmatic way of avoiding damaging conflict between the courts and our political bodies. . . . The doctrine works largely because other arrangements are in place to constrain government, but not by law: law is not everything. . . . [I]n the absence of an entrenched written constitution establishing a constitutional court with constitutional review powers, parliamentary sovereignty . . . can avoid the negative unintended consequences of judicial review that have been experienced in other countries . . .").

139. *See* Oliver, *supra* note 138, at 321 ("I have suggested that there is a pragmatic rationale for the doctrine of parliamentary sovereignty in the UK: given the absence of a formal written constitution which enjoys public support and legitimacy, the courts know that a challenge by them to the legal validity of a provision in an Act of Parliament may itself by challenged and disobeyed by government, that in such a conflict the courts could well find themselves unable to enforce their orders . . .").

United States and then transposes that misunderstanding onto the UK constitutional system. Dawn Oliver provides a characteristic expression of the underlying assumptions:

> In the USA, for instance, the Supreme Court may strike down legislation that is incompatible with the Constitution (*Marbury v. Madison*, 1 Cranch 137 (1803)) . . . . A difference between almost all other countries and the UK . . . is that the UK does not have a written Constitution in the sense of an authoritative text against which a bill can be measured for compatibility with the Constitution.[140]

This section closely examines the reasoning of *Marbury* as a way of responding to Professor Oliver's reading of the case, and then will reconsider Oliver's claims about the UK system in light of this analysis of *Marbury*.

There are a number of interrelated historical and conceptual problems with the assumption that a written constitution is a prerequisite for the exercise of judicial review: (1) it assumes that the rights courts can enforce are differently (and more securely) protected if they are written in a charter document;[141] (2) it creates the impression that courts cannot enforce rights unless they are written in a charter document;[142] (3) it proceeds from the misconception that judicial review in the United States developed only after or in reference to a written charter document;[143] and (4) it overlooks the fact that "the

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140. DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM 198 (2003). *Cf.* Richard Stacey, *Popular Sovereignty and Revolutionary Constitution-Making*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 166 (David Dyzenhaus & Malcolm Thorburn eds., 2016) ("[W]here the constitution empowers a court to strike down ordinary laws for reasons of their inconsistency with the organizational laws set out in the constitution, all the court does is ensure that the representative government's discharge of its electoral mandate . . . remains within the regulative limits set during the period of constitutional lawmaking. Whether a court is entitled to interpret the constitution in this way *is contingent on* the terms of each constitutional document. Some constitutions may not give the courts this power, but where they do, it is the people themselves, in the exercise of popular sovereignty at a constitutional moment, that establish the power of judicial review.") (emphasis added).

141. *See* T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 143 (1993) ("[T]he common law is often considered inferior to bills or charters of rights as a vehicle for protecting fundamental liberties. It is mistakenly thought that *restatement* of individual rights in a constitutional document could transform their strength, when they have to be asserted in opposition to countervailing public interests."); *see also* W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 47–48 (2007).

142. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975) ("As it came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten . . . rights as well. The practice of the Marshall Court and of many of its contemporary state courts, and the writings of the leading constitutional commentators through the first generation of our national life, confirm this understanding.").

143. *See* WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 35–44, 50–62, 64–67 (2d ed. 2018); A.E. DICK HOWARD, THE ROAD FROM

United States Supreme Court . . . does not derive its power to declare Acts of Congress to be unconstitutional from the US Constitution."[144] While the first three of these problems should be kept in mind during the discussion that follows, The focus here is primarily on the fourth.

Although it is easy to lose sight of, the reason that the courts of the United States do not derive their power to declare congressional acts unconstitutional from the US Constitution, and the reason that John Marshall in *Marbury* did not base the courts' authority to exercise judicial review on the written Constitution, is that the power of judicial review is not mentioned in the written US Constitution.[145] Fundamental as this point is, it continues to elude those who believe judicial review must be grounded on the existence of a written constitution that empowers courts to exercise that authority. To be clear, I am not arguing against the historical and political salience of the fact that the US Constitution was written.[146] I am not arguing that the framers of the US Constitution did not contemplate the courts' exercise of this authority,[147] nor am I arguing that the basis for this authority does not exist in the structural framework and interrelated clauses of the document.[148] I am arguing that judicial review in the United States does not depend, logically or legally, upon the existence of a written constitution; and conversely the absence of a written

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RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 280 (1968); Edward S. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 105–20 (1910).

144. BRICE DICKSON, *Comparing Supreme Courts, in* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 6 (Brice Dickson ed., 2007).

145. *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 12 (2d ed. 2015) ("The text does not expressly confer upon the Supreme Court the power to declare unconstitutional an act of Congress, the President, or state government.").

146. *See* Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1400–01, 1496–1504 (2019).

147. *See*, *e.g.*, THE FEDERALIST NO. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("By a limited constitution I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."); James Wilson, *Debates of the Pennsylvania Convention* (Dec. 1, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 450–51 (Merrill Jensen ed., 1976) ("I had occasion, on a former day, . . . to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges – when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void."). *See also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 61–62, 64–65 (1985); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 492 (1994).

148. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3–7 (1959).

constitution in the United Kingdom does not preclude the exercise of this authority by British courts.

Marshall did, in *Marbury*, discuss judicial review in relation to the distinctive nature of a written constitution.[149] But he does not ground the authority of the written constitution and the authority of the courts' power to interpret and apply that constitution on the same legal or conceptual footing.[150] The authority of the Constitution as fundamental law and the authority of the courts as expositors of the constitution's meaning are closely related but not coextensive. Confusion about this distinction has led to confusion about the historical and theoretical basis for judicial review in a common law system with a written constitution.

Analyzing Marshall's reasoning in *Marbury* can help to differentiate the bases of constitutional and judicial authority discussed in the case.[151] To focus on the specific elements of Marshall's reasoning, here are the central arguments in the form of syllogisms[152] that define the respective authority of the written Constitution and of the courts in exercising judicial review.[153]

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149. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

150. *See id.* ("The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.").

151. I describe Marshall's reasoning in the form of syllogisms. There is an extensive literature on the use of syllogistic reasoning in the common law tradition of judicial decision making. *See*, *e.g.*, JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 76–79 (2012); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 41–50 (1978); NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF JUDICIAL REASONING 32–37, 44–47 (2005); ANDREI MARMOR, THE LANGUAGE OF LAW 79–83 (2014).

152. For ease and clarity of expression, the syllogisms as presented in the text are enthymematic. There is some historical basis to believe that Marshall might deliberately have been reasoning and writing in syllogistic form when constructing his *Marbury* opinion. *See* Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L. REV. 349, 361 (2009) (describing the presentation of the "Virginia Syllogism" at the trial of James Callender, noting that Marshall was present in court for the argument, and explaining that he used "similar language" in *Marbury*).

153. Edward White also analyzes Marshall's reasoning in *Marbury* as a syllogism. *See* G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1477–83 (2003). Briefly summarized, Professor White construes the syllogism in five steps: (1) The Constitution is the fundamental and paramount law of the nation; (2) the Constitution was written to define and limit government powers and to allow Americans to refer to these limits when they believe the government has exceeded its constitutional powers; (3) legislative acts that violate the Constitution do not bind the people or the courts; (4) the judicial power under the Constitution includes the power to determine whether legislation contravenes the Constitution; and (5) the judiciary is

A. *The Constitutional Syllogism*

The Constitution is the supreme law of the land.[154]
Any law of the United States that conflicts with the Constitution is void.[155]
Section 13 of the Judiciary Act of 1789 conflicts with Article III of the Constitution.[156]
∴ Section 13 of the Judiciary Act of 1789 is void.[157]

B. *The Judicial Syllogism*

The courts have the authority to say what the law is.[158]
The Constitution is law.[159]
∴ The courts have the authority to say what the Constitution is.[160]

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superior to other governmental interpreters of the Constitution because the judiciary is nonpartisan. *See id*. As I will explain, my analysis of Marshall's reasoning differs from White's. I cannot address all of the points on which we diverge here. But I will mention two particular concerns that touch on the central themes of this article. First, White elides Marshall's arguments regarding the authority of the Constitution and the authority of the judiciary. *See id.* Although these are related, the legal and conceptual bases for constitutional and judicial authority are discrete and independent in *Marbury*. Second, White claims that the reasoning in *Marbury* commits Marshall to a defense of judicial supremacy that is not necessarily present, explicitly or by implication, in the opinion itself. *See The Rule of Recognition and the Rule of Law*, *supra* note 23, at 384–86.

154. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land. . . .").

155. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void.").

156. *See id.* at 175–76 ("To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction . . .").

157. *See id.* at 179–80 ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . . [T]he framers of the constitution contemplated that instrument, as a rule for the government of courts . . .").

158. *See id*. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

159. *See id*. at 177 ("[A]ll those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . .").

160. *See id.* at 178–79 ("[T]he constitution is to be considered, in court, as a paramount law. . . . In some cases then, the constitution must be looked into by the judges.").

Doctrinally and conceptually, to understand the different bases for the authority of the Constitution and the authority of the courts, we should focus on the major premises of each syllogism. The authority for the statement that the Constitution is the supreme law of the land is the text of the Supremacy Clause. Indeed, where Marshall uses that precise phrase from Article VI—"the supreme law of the land"—he refers explicitly to the Constitution.[161] However, where Marshall discusses the authority of the courts to interpret and apply the law—"to say what the law is"—including the Constitution as a source of law, he refers generally to the province and duty of the judicial department.[162] Reading the judicial syllogism together with the constitutional syllogism, then, the courts have the power to say that Section 13 of the Judiciary Act of 1789 conflicts with the Constitution and is void (and, prospectively, the power to say when any law conflicts with the Constitution and is void).[163]

The differentiated legal bases for the authority of each respective major premise helps to explain the mistake of conflating the discrete foundations of constitutional and judicial authority discussed in *Marbury*. The basis for the Constitution's authority derives from the written Constitution itself. The Supremacy Clause was a textual effort (among others) to avoid the widely perceived problems with the Articles of Confederation in establishing an autonomous and self-sustaining national government.[164] That is the purpose of the Supremacy Clause and its perhaps self-evident (to Marshall, at least) assertion of the authority of a written constitution.[165] The written Constitution is supreme law because that is the purpose of writing a constitution, the purpose in particular of defining and limiting the

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161. *See id.* at 180 ("[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned. . . . Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void.").

162. *See supra* note 158.

163. *See Marbury*, 5 U.S. at 177–78 ("If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

164. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 161–62 (2010) (explaining the role of the Supremacy Clause in realizing Madison's goal—although not by Madison's preferred means of a federal legislative negative—of providing the federal government with the authority to invalidate actions of states that violate the US Constitution or federal laws); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042–47 (1997).

165. This was self-evident to Hamilton and Madison, as well. *See* THE FEDERALIST NO. 33, at 161 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]he clause which declares the supremacy of the laws of the union . . . only declares a truth, which flows immediately and necessarily from the institution of a federal government."); THE FEDERALIST NO. 44 (James Madison).

powers of the legislature in a democratic system.[166] In the US federal system of separated powers, this would famously involve empowering the federal government to constrain possible excesses of the states,[167] and then, in turn, enabling the respective branches of the federal government to restrain one another.[168]

This is an appropriate moment to address an abiding criticism of Marshall's *Marbury* opinion. Many scholars have pointed out over the years that Marshall expresses the major premise of the constitutional syllogism as encompassing the intrinsic supremacy of all written constitutions.[169] His opinion does read that way in several passages and taken so broadly the claim is appreciably false. After all, in many nations with written constitutions there is no means (and surely no judicial one) of invalidating a statute that conflicts with the constitution.[170] So it is fair enough to note that Marshall incautiously

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166. *See Marbury*, 5 U.S. at 176–77 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. . . . The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . ."). *Cf.* VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 13 (2009) ("Part of the purpose of such a [codified] constitution is to limit the power of the legislature. . . . In countries with enacted constitutions, it is normally not Parliament, the legislature, which is supreme, but the constitution.").

167. *See* THE FEDERALIST NO. 44 (James Madison).

168. *See* THE FEDERALIST NOS. 47, 48 at 249, 256 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. . . . [U]nless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

169. *See*, *e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, DUKE L.J. 1, 17–18 (1969).

170. Although I will not take too much space to pursue the point here, Van Alstyne's assertions have problems of their own. For example, he states that "even in Marshall's time . . . a number of nations maintained written constitutions and yet gave national legislative acts the full force of positive law without providing any constitutional check to guarantee the compatibility of those acts with their constitutions." *Id.* at 17. As support for this claim, Van Alstyne cites "France, Switzerland, and Belgium . . ." *Id*. at n.29. Limiting Van Alstyne's assertion "in Marshall's time" to when he wrote *Marbury* in (or around) 1803, his claim is difficult to support. For instance, the French constitution of 1799 (and later incarnations) allowed for "the possibility of constitutional control of legislation." *See* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 33 (1971). As Cappelletti goes on to explain, constitutional control of legislation in the French tradition was not a judicial authority, and it was arguably "theoretical" for much of French history, but Van Alstyne's reference to France must, at least, be qualified. *See id*. at 33–34. Belgium enacted its national constitution in 1831. *See* NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 380–81 (2003). And the first Swiss national constitution appeared in 1848. *See* WAYNE NORMAN, NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE 82 (2006). Whatever else Van Alstyne may find to criticize in *Marbury*, it seems excessive

considered his argument in *Marbury* to derive from or to apply to all written constitutions in all legal systems. But it is also worth examining carefully (or charitably[171]) a critical sentence of the opinion with respect to this criticism: "This theory [of constitutional supremacy] is essentially attached to a written constitution, and is consequently to be considered, by *this* court, as one of the fundamental principles of *our* society."[172] So Marshall's more specific argument may be interpreted as a claim not about all written constitutions, but instead as a claim about the written US Constitution, which the italicized terms suggest is reasonable, and this argument gains more traction. The closing passage of the opinion reinforces this reading:

> [I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, *the particular phraseology of the constitution of the United States* confirms and strengthens the principle, *supposed to be* essential to all written constitutions, that a law repugnant to the constitution is void.[173]

Taken in its entirety, then, Marshall's specific claim in *Marbury* about the supremacy of the Constitution coheres with the text, contemporaneous writings, and political history. On that basis, it seems more plausible for Marshall to contend that, in the US system, a law that conflicts with the Constitution is considered void. This is why the premises of the constitutional syllogism are phrased as they are, because Marshall did not need to make a claim about all constitutions everywhere, and in several important passages of his opinion he did not do so. His opinion in *Marbury* was written to describe the legal result when a US law conflicts with the

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to fault Marshall for failing to account for written constitutions that would not come into existence for another twenty-eight and forty-five years, respectively. *See* Van Alstyne, *supra* note 169, at 17–18. In addition, of course, all of these are civil law nations in which the judicial systems were not historically designed or understood to allow a court to make binding judgments regarding the constitutionality of legislation. *See* Mauro Cappelletti, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 60–61 (1971).

171. Attacking *Marbury* has become a bit of a parlor game for some US academics over the years. Of course, the opinion must stand on its own merits, like any other example of legal reasoning and judicial decision making. My point here is just that fairly understanding Marshall's judgment means attributing to him the best argument his writing and reasoning will sustain. *See* DONALD DAVIDSON, SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 211 (2001) ("The Principle of Coherence prompts the interpreter to discover a degree of logical consistency in the thought of the speaker . . ."). On Davidson's account, the principle of coherence is a form or element of the principle of charity inherent in a responsible interpretive effort to understand another's expressions. *See id*. at 147–50. For a defense of Marshall's opinion against many of the broadsides advanced against it, *see* Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235 (2003). For Weinberg's discussion of judicial review, *see id*. at 1395–1407.

172. *Marbury*, 5 U.S. at 177 (emphasis added).

173. *Id.* at 180 (emphasis added).

Constitution.[174] Of course, this still does not mean that courts were empowered to make that determination. Perhaps Marshall's recognition of the distinction between the authority of the Constitution and the authority of the courts is why he grounded this judicial authority on a different legal and conceptual basis in *Marbury*.

The basis of the courts' authority to exercise judicial review does not derive from the written Constitution.[175] It originates in the inherent authority of common law courts: "*Marbury*'s justification of judicial review, grounded as it is in the 'ordinary and humble judicial duty' of the common law courts, seems necessarily to entail a general obligation of independent law-exposition by article III courts. This is what courts 'do'; it is their 'job.'"[176]

The courts say what the law is because they are courts, and that is what courts do. That includes the law of the Constitution. The courts have the authority to enforce the provisions of the Constitution and void legislative acts that conflict with it, not because the Constitution is written, but because they are courts functioning in a common law system in which an independent judiciary is the institution through which the legal rights of individuals and legal constraints on government are enforced.[177]

This point is probably easiest to grasp by distinguishing judicial review with respect to state and federal legislation. Historically, the ability of the federal government to control conflicting actions of state governments was a preoccupation of the Philadelphia Convention.[178] As the convention debates unfolded, this constitutional concern was ultimately resolved through the institutional authority of federal courts to rely upon the Supremacy Clause in voiding state legislation that conflicts with the Constitution or federal law, and this authority may be discerned in the text of the Supremacy Clause itself.[179] The

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174. Some have argued that the Constitution was meant to function as supreme law solely with respect to state acts, and that the courts' authority to declare federal acts void was similarly limited. *Cf.* OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 147 (Richard A. Posner ed., 1992) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States."). I will return to this distinction presently. *See infra* notes 178–81 and accompanying text.

175. *See Marbury*, 5 U.S. at 177–80.

176. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983).

177. *See supra* notes 47, 80–81, 118.

178. *See, e.g.*, Jack Rakove, *The Legacy of the Articles of Confederation*, 12 PUBLIUS 45, 53–55 (1982); LACROIX, *supra* note 164, at 136–38.

179. *See* U.S. CONST. art. VI, cl. 2 ("[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). For analysis of the discussion on this point at the Convention, *see* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 730, 744–45,

topics of judicial authority and the language of the Supremacy Clause were addressed together at the convention and were understood to relate directly to one another,[180] and the principal concern was controlling the power of states to contravene the Constitution and the federal government.[181] So we can see more clearly why Marshall relied in *Marbury* on the common law rather than the Constitution as the basis of the judicial authority he articulated—the case involved review of federal, not state, legislation, and this was not the instance of judicial authority that had been discussed at the convention and was translated most directly into the Constitution through the Supremacy Clause and Article III.[182] Although the underlying common law nature of the judicial authority remained fundamentally the same, the Constitution itself did not serve well, in Marshall's day, as the basis for articulating the judicial authority at issue in *Marbury*.[183]

The common law basis of the courts' authority in *Marbury* leads to another frequent misconception. As Marshall acknowledges, the courts' jurisdiction may be defined constitutionally or statutorily in various respects;[184] however, their jurisdiction cannot be constrained

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762–63, 766, 770 (1998); Robert H. Birkby, *Politics of Accommodation: The Origin of the Supremacy Clause*, 19 W. POL. Q. 123, 134–35 (1966).

180. *See* Liebman & Ryan, *supra* note 179, at 771 ("Read, as designed, in conjunction with the Supremacy Clause, 'the judicial Power' means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law."); *see also id.* at 732–33.

181. *See* LACROIX, *supra* note 164, at 163–64; Liebman & Ryan, *supra* note 179, at 750–51.

182. To underscore the distinct bases for constitutional and judicial authority under the US Constitution, it is worth noting, as David Currie has explained, that the text of the Supremacy Clause, standing alone, could actually be read as authorizing judicial review of state legislation but not of federal legislation. *See* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 659 (1982) ("[I]f this interpretation is correct, the supremacy clause furnishes a powerful argument *against* judicial review of Acts of Congress. Although the clause plainly gives the Constitution the right of way over competing state law, it appears to equate federal statutes with the Constitution by declaring them both 'supreme law.'").

183. *Cf.* David Thomas Konig, *James Madison and Common-Law Constitutionalism*, 28 LAW & HIST. REV. 507, 511 (2010) ("In defending a federal judiciary that mediated between state and national authority and applied a 'supreme law of the land,' therefore, Hamilton/Publius was restating the role of the common-law judge . . . [with respect to] what Article III accomplished by specifying only those 'Cases' and 'Controversies' within the jurisdiction of the 'Judicial power.'").

184. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 175 (1803) ("When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original.").

or extinguished in a manner that would preclude them from determining whether the government was acting in violation of the law.[185] According to the institutional dynamics of the US system, this is the functional operation of the Supremacy Clause as a constitutional constraint on the actions of government: the federal courts ascertain whether and when a government organ or official has violated the Constitution through their ordinary operation as common law courts determining the rights of litigants in the course of deciding cases.[186] This was the constitutional method of ensuring common law constitutionalism within the US system, but the underlying principle that government is accountable to the law through the operation of ordinary courts resolving legal claims is characteristic of the common law tradition itself, rather than an innovation of the US Constitution.[187] Even more, as Marshall recognized explicitly in *Marbury*, it would defeat that system *ab initio* if the courts could not enforce the provisions of the Constitution when they conflict with the acts of a government official or organ.[188] As Marshall described, there

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185. *See* Monaghan, *supra* note 176, at 11 ("[T]here is no suggestion that the judicial duty of article III courts 'to say what the law is' with regard to constitutional questions varies with the nature of the case in which the question arises. . . . There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be 'jurisdictionally' shut off from full consideration of the substantive constitutional issues, at least absent adequate opportunity for consideration of those claims in another article III tribunal."). For various applications of this principle, *see* DeMore v. Kim, 538 U.S. 510, 517 (2003); Webster v. Doe, 486 U.S. 592, 603 (1988); Johnson v. Robison, 415 U.S. 361, 365–67 (1974).

186. *See* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 19 (2003) ("A[nother] place where the common-law way of thinking appears in the Constitution is in the Supremacy Clause of Article VI. . . . What is remarkable here is not the fact of federal supremacy but the manner in which it was to be secured, namely, through the courts of law. . . . What made the unique arrangement of American federalism possible, at least in the early years of the Republic, was its mediation by a judiciary trained to focus not on abstract questions of sovereignty but on questions of right and power as they arise in a particular case. This allowed the logic of the novel system to be worked out over time, as issues developed.").

187. *See generally* R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA 42 (2002) ("[T]he government and its officials are under the same law and the same courts as the citizen: what could more clearly demonstrate the notion that both the governors and the governed have to live under the same rule of law? . . . In England, so the classic doctrine goes, the ordinary courts are competent for the judicial review of acts of administration: the officials of the state do not constitute a separate, privileged class."); *see also supra* notes 117, 134.

188. *See Marbury*, 5 U.S. at 178 ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. . . . It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. . . . That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of

are important limits to the jurisdiction of the courts, but those limits do not and cannot extend to precluding the courts from ruling on an individual's claim that the government has violated his rights under the law or the Constitution.[189] That this judicial duty may fairly be characterized as "ordinary" should be understood as a statement of its regularity and necessity, but this judicial duty may equally be characterized as extraordinary for its importance in actualizing the commitment to constitutional government of the US system.[190]

The common law method of enforcing rule of law values through the operation of ordinary courts reinforces the different bases for the authority of the courts and of the Constitution. Article III created federal courts within a common law legal tradition. As such, the federal courts are common law courts whose traditional role and authority is reaffirmed, rather than reinvented, by the language of the Constitution.[191] In this respect, the judicial authority described by Article III preexisted in the traditional common law authority of the courts of that system, which the framers adapted to the newly created federal system of government: "Federal courts are common law courts. . . . [T]he judicial power [is] imparted to us by Article III of the Constitution and the court's common law power implicitly confirmed by the seventh amendment."[192] This is the reason that, in *Marbury*,

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itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.").

189. *See id.* at 170, 171 ("The province of the court is, solely, to decide on the rights of individuals. . . . If one of the heads of departments commits any illegal act, under the color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. . . . [I]t is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.").

190. And of the UK system. *See supra* notes 117–18, 125 and accompanying text.

191. *See* JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 270–71 (1995) [1888] ("The functions of the [federal] judiciary . . . are the natural outgrowth of common law doctrines and of the previous history of the colonies and states; all that is novel in them, for it can hardly be called artificial, is the creation of courts coextensive with the sphere of the national government."); Liebman & Ryan, *supra* note 179, at 752 ("[T]he nationalists secured an all-important qualitative assurance via the extension of 'the Judicial Power' to the specified categories of cases and controversies: Whenever called upon to decide those matters, federal judges would be required to deploy the qualities—the decision-making powers and responsibilities—inherent in 'the Judicial Power' and thus inherent in every court constituted by or under the judiciary article."). Generally speaking, the federal courts develop federal common law only where federal legislation does not directly address an issue, *see* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943), or where state law is unavailable, *see* City of Milwaukee v. Illinois, 451 U.S. 304, 314 n.7 (1981). These aspects of the federal courts' operation within a federal system of government do not change the underlying nature of the federal courts as common law courts. *See* Flowers Transp., Inc. v. M/V Peanut Hollinger, 664 F.2d 112, 113 (5th Cir. 1981).

192. Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415, 431, 432 (5th Cir. 1986) (*en banc*) (Wisdom, J., joined by Clark, Rubin, Politz, Johnson, and Williams,

Marshall "simply extrapolates the judicial role in constitutional cases from the 'ordinary and humble judicial duty' in conventional cases. Law interpretation is what courts 'do.'"[193]

This is an easy point to miss, because it is so tempting to think that the writing of the Constitution changed everything. But it did not. It created a new political system that was meant to protect against the perceived political abuses of the British model of government while maintaining the legal tradition in which the framers were trained and whose rights and processes they prized.[194] The judicial system of the common law, and the rights defined by that system, were incorporated within the larger system of government envisioned by the Constitution.[195] The common law foundations of that constitutional and judicial tradition were preserved through the drafting and ratification of the written Constitution,[196] although aspects of the

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JJ., concurring in part and dissenting in part). It is worth noting that the Supreme Court's affirmance of *Point Landing* grounded the courts' personal jurisdiction upon service of process, not under its Article III authority, but rather on the individual right of due process under the Fifth Amendment. *See* Omni Capital Int'l, Ltd. v. Wolff, 484 U.S. 97, 104 (1987).

193. Monaghan, *supra* note 176, at 12.

194. *See*, *e.g.*, JOHN PHILLIP REID, 1 CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 237 (1987) ("American whigs began their resistance in 1765 in the belief that Parliament was acting unconstitutionally. . . . They were defending the constitution of limited government and of property in rights that once had been the English constitution. They were rebelling against the constitution of arbitrary power that the British constitution was about to become."); R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 167–68 (1995); STONER, *supra* note 186, at 14, 15 ("[A]s the colonies re-formed themselves into states, they all adopted, often by statute or constitutional provision, the common law as the basis of their jurisprudence. . . . The decision of the colonies to adhere by and large to their common-law tradition—indeed to make their case for independence by appeal to the ancient rights they had by common law—makes it plain that, even as they introduced the written constitution to the world, they had no intention of replacing the unwritten law . . .").

195. *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 99 (2003) ("The common law, the 'law of the land,' was anterior to all constitutions. In England, still lacking a written constitution, the common law itself supplied the rules now described as constitutional. . . . In America the U.S. Constitution declared itself 'the supreme law of the land,' and constitutional amendments added the guarantee of due process. That meant, in turn, that the judges would test legislation against the norms of the common law."); G. Edward White, *Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 68 (Maeva Marcus ed., 1992) ("[T]he common law of England had become part of the 'laws of the United States' within the meaning of Article III of the Constitution . . ."). White is discussing Ellsworth's judgment in *Williams' Case*. *See* Williams' Case, 29 F. Cas. 1330, 1331 (C.C. Conn. 1799) (Ellsworth, C.J.) ("The common law of this country remains the same as it was before the Revolution.").

196. *See* REID, *supra* note 65, at 95 ("There was a stream of tradition that . . . has been lost on historians of our own day who believe that eighteenth-century events such as the American Revolution can be explained without giving thought to the ideology of English constitutionalism, or that the common law neither determined 'the kinds of conclusions men would draw in the crisis of the [revolutionary] time' nor provided a guide

tradition were adapted to the specific circumstances of colonial and early US government.[197] In this respect, Marshall's reasoning in *Marbury* reflects and reinforces his other judicial and extrajudicial writings.[198] So the unamended 1787 Constitution preserved the preexisting common law tradition in the independent judiciary of Article III with the authority to interpret and apply the law,[199] along

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for 'what to do next.' . . . [T]he common law led them to similar conclusions about parliamentary authority. . . . This methodology helps to explain the persistent strength of rule-of-law over the centuries in common-law jurisdictions. . . . It is a methodology that has outlived the Tudors, the Stuarts, and the sovereignty of Parliament.").

197. *See, e.g.*, Louis F. Del Duca & Alain A. Levasseur, *Legal History and Ethnology: Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 3 (2010); Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 KAN. L. REV. 347, 371 (2003); McConnell, *supra* note 39, at 196–97.

198. *See*, *e.g.*, Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C. Va. 1811) (Marshall, C.J.) ("This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our *political* connection with the parent state, we did not break our connection with each other.") (emphasis added); Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, NOVEMBER 1800–MARCH 1807 24 (Charles F. Hobson & Fredrika J. Teute eds., 1990) ("My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation. That on our revolution the preexisting law of each state remained so far as it was not changed either expressly or necessarily by the nature of the governments which we adopted. That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government. I do not recollect ever to have heard the opinions of a leading gentleman of the opposition which conflict with these.") (spelling updated).

199. The language of Article III that protects judicial independence through life tenure originates in the English statute that protects judges from parliamentary influence and interference. *Compare* U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour"), *with* Act of Settlement 1701, 12 & 13 Will. 3, c. 2, § 3 ("Judges Commissions be made *Quam diu se bene Gesserint*" [as long as he shall behave himself well]). *See* Robert Stevens, *The Act of Settlement and the Questionable History of Judicial Independence*, 1 OXFORD U. COMMONWEALTH L.J. 253, 261 (2001) ("Historically, the Act of Settlement marks the crossroads of the English Constitution. The provisions of the Act . . . represented an inarticulate effort to have the kind of separation of powers spelled out with much greater clarity at the Constitutional Convention in Philadelphia 75 years later."). In "Federalist No. 78," Hamilton adverts to the incorporation of the Act of Settlement within Article III. *See* THE FEDERALIST NO. 78, at 408 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]here can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of judicial offices. . . . The experience of Great Britain affords an illustrious comment on the excellence of the institution.").

with rights of *habeas corpus*[200] and trial by jury.[201] And the substantive individual rights of the common law tradition would soon follow, enumerated two years later in the Bill of Rights.[202]

The importance of the writing of the US Constitution occasionally leads people to believe that the writing is necessarily the most important aspect of the Constitution. But it is equally important to remember that the concepts written into the Constitution were drawn from its common law antecedents.[203] The common law is the foundation for the federal judicial system created by the Constitution and for the fundamental rights protected through their enforcement by this judicial system.[204] In this respect, the authority of the Constitution and of the courts are distinct and mutually reinforcing elements of the rule of law as expressed in the charter document:

> [I]t is impossible to appreciate fully the Supreme Court for what it was intended to be if its common-law powers and duties are not recognized. But then, it is

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200. *See* U.S. CONST. art. I, § 9, cl. 2.

201. *See* U.S. CONST. art. III, § 2, cl. 3.

202. *See, e.g.*, FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 9–55 (1985); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999); ELIZABETH WICKS, THE EVOLUTION OF A CONSTITUTION: EIGHT KEY MOMENTS IN BRITISH CONSTITUTIONAL HISTORY 26–28 (2006). *Cf.* Burmah Oil Co., Ltd. v. Bank of Eng. [1980] AC 1090, 1145 (appeal taken from Eng.) ("Of course, the United States have a written constitution and Bill of Rights. Nevertheless both derive from the common law and British political philosophy."). For more on the relationship between the common law rights written into the US Constitution and British political theory, *see* John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963, 971, 972 (1989) ("[E]ighteenth century American constitutional theory was seventeenth century English constitutional theory. . . . American constitutional principles were not *sui generis*, but were the taught principles of common law constitutionalists.").

203. *See*, *e.g.*, Smith v. Alabama, 124 U.S. 465, 478 (1888) ("The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."); Murray v. Chicago & N.W. Ry. Co., 62 F. 24, 27, 28 (C.C.N.D. Iowa 1894), *aff'd*, 92 F. 868 (8th Cir. 1899) ("When the constitution of the United States was adopted, it was based upon the general principles of the common law, and its correct interpretation requires that the several provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate the existence of the common law in the colonies. . . . The constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof."); STONER, *supra* note 186, at 16–17.

204. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 231 (1917) (Pitney, J., dissenting) ("[I]t appears beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject, are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law."); United States v. Sanges, 144 U.S. 310, 311–12 (1892); W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 101–03 (1901); Ward v. Erie R.R. Co., 230 N.Y. 230, 234 (1921) (Cardozo, J.), *cert. denied*, Erie R.R. Co. v. Ward, 256 U.S. 696 (1921).

> impossible to understand the United States Constitution itself if its considerable dependence upon the common law is not recognized, a dependence so deep and so extensive as to make it seem only natural that the Supreme Court should be regarded as a vital part of the common-law system in this Country. The common law is again and again taken for granted in the Constitution. Many of the terms used . . . have been shaped by centuries of the common law. Many of the rights referred to, and guaranteed, by the Constitution and later by the Bill of Rights depend for their detailed application upon the common law . . .[205]

As with the UK constitution, thinking of the legal authority of the US Constitution in relation to a rule of recognition demonstrates that the writing of a constitution, standing alone, cannot establish the authority of that constitution as a national charter of government. Where the US Constitution is concerned, the political vision and public prestige of its authors matter, of course, to its acceptance at the time of ratification and over time.[206] But the authority of its authors cannot sustain the authority of the Constitution without an ongoing acceptance of its value as a principled articulation of a shared commitment of its officials and citizens to be governed according to its standards.[207] From the perspective of a rule of recognition, that enduring authority can be found only in the actions and beliefs of the officials empowered and constrained by the document. Similarly, the authority of the judicial system created by the Constitution was not and could not be created by the document itself. The authority of the federal judiciary, then and now, is grounded in its application and protection of the venerated processes and rights of the common law tradition. This does not mean that the Constitution did nothing to fashion the federal courts as a particular instantiation of common law courts, with defined jurisdictional requirements, etc.[208] It does mean, though, that we cannot accurately understand the federal courts in isolation from their creation, identification and operation as common law courts.[209]

The historical basis for the federal courts' common law authority is linked with an important theoretical point, as well. Hart explained the constitutional basis for the courts' authority to interpret the meaning of the constitution in this way:

> '[T]he constitution is what the judges say it is' does *not* mean merely that particular decisions of supreme tribunals cannot be challenged. At first sight the spectacle seems paradoxical: here are courts exercising creative powers which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must . . . be tested. How can a constitution confer authority to say what the constitution is? . . . . One form of 'formalist' error

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205. Anastaplo, *supra* note 21, at 134.

206. *See* Raz, *supra* note 61, at 157–60.

207. *See* GARDNER, *supra* note 151, at 101–02; Raz, *supra* note 61, at 173–76.

208. *See generally* U.S. CONST. art. III, § 2.

209. *See*, *e.g.*, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 468–72 (1942) (Jackson, J., concurring); United States v. Brown, 331 F.2d 362, 365 (10th Cir. 1964).

> may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.[210]

In this passage, Hart is describing the momentous circumstance of Marshall deciding *Marbury* (and his specific reference to the courts' authority "to say what the constitution is" suggests that this circumstance was exactly what he had in mind).[211] In determining the basis for the courts' authority to say what the constitution is, Marshall was in the situation of determining the validity of the laws that conferred the jurisdiction of the Supreme Court upon the court. But as Hart recognized, the paradox only exists as a result of the formalist error of assuming that the courts' authority to decide must be delegated as a legislative power in the form of the Constitution or the Judiciary Act of 1789. Here again is the importance of recognizing that Marshall did not commit this error because he did not assume that the courts' authority must be delegated by the written Constitution. He located the authority of the courts in their preexisting common law powers and duties. Since the Constitution is a form of law, Marshall said, the authority of the courts to say what the constitution is comes from their common law function as courts, not from the Constitution.

The most fundamental error in assuming that the written US Constitution is what grants US courts the authority to declare legislation unconstitutional is not just that the US Constitution does not mention this authority, it is that the US Constitution could not impart this authority to courts even if it did mention this authority. What allows the courts to possess this authority is not what the Constitution says, it is what the officials of the system think and do. The rule of recognition is what ultimately determines whether the courts possess the authority to interpret the Constitution. And, again, *Marbury* itself is the best historical demonstration of this. The power of the federal courts to invalidate unconstitutional legislation was not established simply because Marshall said in *Marbury* that the courts have this power. Marshall's statement was just the first step. The courts have this power because the other officials of the federal government recognized and respected the Supreme Court's judgment as an authoritative statement of the Constitution's meaning. The acts and attitudes of these officials toward the Supreme Court's judgment is what established *Marbury* as an authoritative source of

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210. THE CONCEPT OF LAW, *supra* note 26, at 152, 153.
211. *Id.*

constitutional law according to the US rule of recognition.[212] This is what Hart means when he says that the courts get their authority to decide *after* the decision has been given. As Goldsworthy reminded us with regard to the UK constitution, the courts cannot determine the meaning of the constitution by themselves. The same is true of the US Constitution.

As Hart understood, the crucial distinction here is not between courts operating with or without a written constitution. A constitution, written or unwritten, cannot establish its own meaning or force. Instead, according to Hart, the rule of recognition in that legal system determines the meaning and effect of that constitution. And according to the rules of recognition in the United States and the United Kingdom, the courts ultimately determine the meaning of the (written or unwritten) constitution because the courts' judgments acquire their authority as legal sources by virtue of their reception by the other officials of government.[213] So the power of judicial review described by Marshall in *Marbury* did not and could not depend upon the articulation of this power in a written charter. It could only depend, in the end, on its recognition as a power of the courts by the officials and institutions governed by the constitutional principles that the court articulated. The rule of law is actualized in the United States through the courts' judgments holding officials of the government accountable to the law, and the courts' judgments of what the law requires govern those officials because those officials consider themselves bound by the courts' judgments. All that succeeds is success.

IV. CONCLUSION

The United States and the United Kingdom have taken different historical and constitutional paths toward reconciling democratic government and the rule of law. The United States wrote down and

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212. On the reception and acceptance of *Marbury* by officials of the federal government (and the public), *see* Maeva Marcus, *Judicial Review in the Early Republic*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 25 (Ronald Hoffman & Peter J. Albert eds., 1996); NELSON, *supra* note 143, at 107.

213. *See generally* Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 109 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) ("Even when there is widespread disagreement among officials about whether a Supreme Court decision is 'correct' as a matter of constitutional law, officials cooperate by treating the decision *as* the law. Enforcement agencies decline to enforce a law that the Court has declared unconstitutional even if they think the decision mistaken. . . . [A]s a matter of legal practice, officials generally regard one another as under an institutional duty to defer to the Court's validity decisions. . . . This has an important consequence: such behavior indicates that officials are self-consciously practicing a recognition norm that confers upon the Court final authority to decide whether a duly enacted norm conforms to the substantive norms of the Constitution."); *see also supra* notes 90–97 and accompanying text.

publicly ratified its charter. The UK constitution evolved over time through institutional dynamics. Many theorists seize upon this distinction between a written and an unwritten constitution as the foundational difference between the two legal systems' method of protecting rule of law values and constraining government power:

> One answer to the question how can constitutionalism be protected against parliamentary sovereignty is that we [in the UK] should follow the examples of many Western democracies and adopt an entrenched written constitution which would limit Parliament's power . . . [by] granting the courts, or the Supreme or Constitutional Court, the power to disapply or invalidate provisions in Acts and other laws which are incompatible with the Constitution. Such a provision in a written constitution . . . could provide the courts with the legitimacy for overriding a statutory provision which they lack under current arrangements.[214]

As this passage indicates, these theorists assume that a written constitution alters the constitutional allocation of authority between the legislature and the courts in granting the courts the power to invalidate unconstitutional legislation, and in providing a written charter against which the courts could then measure and constrain the powers of the government. And these scholars assume that this is the distinction that empowers US courts, but not UK courts, to invalidate unconstitutional government action. However, rather than focusing on the writing, we should focus on what was written.

The independent institutional position of US and UK courts, and the protection of constitutional rights and the subjection of the state to constitutional rules through the ordinary judicial process reflects the common law tradition in which both systems of government exist. The institutional independence of US courts, the fundamental rights protected by the constitution, and the rule of law values according to which government action is legitimated and constrained, which are found in the written US Constitution, all originated in the English common law tradition. Historically and theoretically, traced through the writings of Hale, Dicey, Hart, Madison, Marshall, and many others, we find that the protection of constitutional rights and constitutional values through the ordinary judicial process of independent courts is the traditional method by which the rule of law and democratic government have been preserved. There are, without question, many important structural differences between the US and the UK forms of government: the separation of powers in the United States and the "fusion" of executive and legislative functions in the United Kingdom, the presidential system of the United States and the parliamentary system of the United Kingdom, theories of originalism and

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214. Oliver, *supra* note 138, at 316–17. Oliver does not believe the UK should grant this authority to courts under a written constitution. *See id*. at 317 ("I would not favour this.").

interpretivism in the United States and the *ultra vires* theory and common law constitutionalism in the United Kingdom, judicial "supremacy" in the United States and parliamentary sovereignty in the United Kingdom, and the different means of political representation in the Senate and House of Representative in the United States and the House of Lords and the House of Commons in the United Kingdom, just to name some of the most conspicuous examples. All of these matter.

In studying the genuine differences between the United States and the United Kingdom, we should not become overly distracted by the fact that the US Constitution is written. We should not assume that the writing of the US Constitution is what granted to US courts the power to invalidate unconstitutional legislation and government action.[215] For one thing, the written US Constitution does not contain a provision granting this power to the courts. That is one reason that Marshall wrote *Marbury*. But in writing *Marbury*, Marshall did not invent the concept or power of judicial review; he referred to a judicial practice already in existence. And that is why, in writing *Marbury*, he differentiated the authority of the Constitution and the authority of the courts, and why he grounded the Constitution's authority in the text and the courts' authority in the common law.

The United States and the United Kingdom have developed their own distinctive approaches to maintaining the rule of law and popular sovereignty. Contemporary theorists of parliamentary sovereignty tend to assume that democracy and the rule of law are irreconcilable principles. Goldsworthy, for example, seems to hold this view because he understands democracy to mean only representative democracy, and he understands the rule of law to impose legal constraints on the representative branch of government. He never fully considers the challenges posed for his view by constitutional democracy.[216] Instead, Goldsworthy maintains a fairly limited, and highly idealized, conception of democracy:

> I regret the contemporary loss of faith in the old democratic ideal of government by ordinary people, elected to represent the opinions and interests of ordinary people. According to this ideal, ordinary people have a right to participate on equal terms in the political decision-making that affects their lives as much as anyone else's, and should be presumed to possess the intelligence, knowledge and virtue needed to do so.[217]

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215. And we should not assume that grounding the courts' authority to review government action on the Constitution will necessarily result in greater protection of individuals from the government or greater constraints on the government. *See* James E. Pfander, *Dicey's Nightmare: An Essay on The Rule of Law*, 107 CALIF. L. REV. 737, 783–87 (2019).

216. *See Rule Britannia*, *supra* note 48, at 328.

217. CONTEMPORARY DEBATES, *supra* note 8, at 9–10. Goldsworthy seems to subscribe to the "folk theory" of democracy with its assumptions about the faithful and

Of course, one might reasonably wonder where "the old democratic ideal of government by ordinary people" was supposed to exist. Not in Athens,[218] Rome,[219] the United Kingdom,[220] or the United States,[221] at least. The notion of government by "ordinary people" is not terribly old, and it also is not the only ideal of democracy. And one might reasonably wonder whether elected representatives do actually represent the opinions and interests of ordinary people, and whether they try to. To be fair, Goldsworthy does at least acknowledge that these doubts exist,[222] although his insistence that this is a "loss of faith" suggests that he views this as a contemporary problem rather than a longstanding historical one.

Leaving these difficulties with his view to one side, my immediate concern is Goldsworthy's persistent refusal or inability to see that genuine democratic systems of government (constitutional or

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accurate representation of populist preferences in policymaking and governance. *See* Christopher H. Achen & Larry M. Bartels, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 21–23 (2017).

218. *See*, *e.g.*, SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 66–67 (1999). Gordon's point here (and mine) is not that Athens was not a democratic form of government, but rather that it was not a government of the people, by the people, in the sense that Goldsworthy has in mind.

219. *See*, *e.g.*, Allen M. Ward, *How Democratic Was the Roman Republic?*, 31 N.E. CLASSICAL J. 101, 108 (2004) ("For a state to be democratic in some meaningful way, it is necessary that the mechanisms of popular sovereignty operate democratically even if that sovereignty might ultimately be limited or balanced by other elements to prevent the abuse of popular power. Moreover, the extra-constitutional social and cultural milieu must not thwart the democratic exercise of popular sovereignty. The Roman Republic failed on both counts.").

220. *See* GORDON, *supra* note 218, at 234 ("The franchise in seventeenth-century England was severely restricted, and remained so until the latter part of the nineteenth century, so the few that sat in the House of Commons were the elected representatives of only a somewhat larger few.").

221. The concerns of the framers of the US Constitution regarding "excessive democracy" and the steps taken in the document to guard against those concerns are well known. *See* THE FEDERALIST NO. 10 (James Madison); Letter from Alexander Hamilton to Theodore Sedgwick (July 10, 1804), *in* 10 THE WORKS OF ALEXANDER HAMILTON 458 (Henry Cabot Lodge ed., 1904) ("[Democracy is] our real disease . . . the poison of which, by a subdivision, will only be the more concentrated in each part, and consequently the more virulent."). Without question, the institutional changes occasioned by the 17th Amendment, and the representational changes initiated by the 15th, 19th, 24th, and 26th Amendments, have expanded the ability of "ordinary" Americans "to participate on equal terms in the political decision-making that affects their lives." Needless to say, the need for the Amendments underscores the 1787 Constitution's intended constraints on that participation. And some scholars doubt that these Amendments did meaningfully remedy the US Constitution's "undemocratic" nature. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003). In any event, the authors of the US Constitution did not share Goldsworthy's anodyne view of democracy, and his conception of democracy does not reflect the realities of American constitutional development. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 309–11, 354–55 (1993).

222. *See* CONTEMPORARY DEBATES, *supra* note 8, at 10.

otherwise) might necessitate both electoral representation and independent judiciaries.[223] Both are needed to ensure that the ideal of democratic government can function effectively in the real world.[224] Moreover, Goldsworthy cannot sidestep the practical issues by claiming that he wishes to have a purely philosophical discussion, because he never squarely confronts the core philosophical question that underlies (and undermines) his argument:

> A democrat may believe in the ideal of democracy, which may consist solely . . . on the ground that people and their preferences should be treated equally when votes are counted. Or he may subscribe to a broader conception of democracy whereby certain rights and freedoms must be guaranteed to individuals in order for a regime to count as a democracy.[225]

Goldsworthy never meaningfully engages with the notion that democracy might be defined as something other than just the votes or views of the majority.[226] And he never truly considers the possibility that democracy and the rule of law are reconcilable, for example, through an understanding of constitutional democracy as a societal

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223. *See* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSP. ON POL. 805, 810–11 (2009) ("There is, therefore, no warrant for the view that legislatures are more representative than judiciaries on democratic grounds, or for supposing that judicial review is a threat to democratic forms of representation. Put simply, we can value democratic government and the scope for representation that it presents without supposing that democratic government mandates only one form of representation, or any particular balance between judicial and legislative institutions."). *See also id*. at 814–15.

224. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 177 (rev. ed. 1969) ("The two fundamental processes of decision that characterize a democratic society are: decision by impartial judges and decision by the vote of an electorate or a representative body."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88 (1980) ("[A] representation-reinforcing approach to judicial review . . . [is] entirely supportive of, the underlying premises of the American system of representative democracy."). Ely was writing with the US in mind, but as Fuller's more general statement makes clear, Ely's point can reasonably be extended to any system that inherited English legal traditions. Members of the Supreme Court of the United Kingdom have expressed a similar view. *See also supra* note 133.

225. Cécile Fabre, *A Philosophical Argument for a Bill of Rights*, 30 BRIT. J. POL. SCI. 77, 96 (2000). Richard Kay argues that the exercise of judicial review by constitutional courts manifests a form of "mixed government" that can encompass representative democracy without necessitating a democratic justification for the existence of the courts' review power. *See* Richard S. Kay, *Democracy, Mixed Government and Judicial Review*, *in* LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY 224–25 (Lisa Burton Crawford, Patrick Emerton & Dale Smith eds., 2019).

226. *See* Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17, 20, 23–25, 32–33 (1996); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 375–76 (rev. ed. 1994); Samuel Freeman, *Political Liberalism and the Possibility of A Just Democratic Constitution*, 69 CHI.–KENT L. REV. 619, 659 (1994).

precommitment to fundamental rights enforced by an independent judiciary.[227]

At the heart of constitutional democracy is the commitment to be governed only in accordance with laws that we have, in some recondite but real way, had a role in effectuating. And constitutional democracy requires that government cannot act outside of the legal prescriptions and precommitments that govern and legitimate its actions. In this important sense, acts of the government that conflict with the constitution also conflict with this conception of democracy.[228] As expressions of constitutional democracy, the sovereignty of Parliament in the United Kingdom and the writtenness of the Constitution in the United States can be fully understood only from within the distinctive UK and US legal traditions of which they are a part, and only from within the common law tradition of which the United Kingdom and the United States are a part.[229] Parliamentary sovereignty and the US

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227. *See supra* notes 107, 133 and accompanying text; *see also* Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 353–55 (1990); Lever, *supra* note 223, at 814.

228. *See Ahmed* [2010] UKSC 2 at [45] (Lord Hope) ("Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy."). *See also supra* notes 103–08, 124–27 and accompanying text.

229. Dan Priel argues that the US and the UK no longer exemplify the same approach to the authority of the common law. *See* Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divid*e, 65 AM. J. COMP. L. 609 (2017). According to Professor Priel's typology, the United Kingdom (and the rest of the Commonwealth nations) adhere primarily to the traditional practice conception of the common law, according to which the common law's authority derives from the considered view of trained legal professionals over time. *See id.* at 624–25. In contrast, the US shifted during the twentieth century toward customary and will-based conceptions that now predominate. *See id.* at 614–15, 639. These conceptions base the authority of the common law, respectively, on shared norms of a community that legitimate legal sources insofar as these sources express or cohere with the customary rules, *see id*. at 631–32, and on the will of a designated sovereign expressed through law, *see id*. at 634. In arguing that the UK and the US no longer share a "common law commonality," because of these disparate views of the common law's authority, Priel's view might be taken as a challenge to my argument that their shared (though distinctive) lineage as common law systems helps us to see the related mistakes of exaggerating the importance of either parliamentary sovereignty in the UK or the writtenness of the Constitution in the US or of differentiating the importance of the courts in maintaining the rule of law values of the common law tradition in each nation on the basis of parliamentary sovereignty or the written US Constitution. I cannot respond comprehensively to Professor Priel here. The clearest and most direct way for me to explain my disagreement with Priel is to focus on his core claim that the US no longer meaningfully endorses the practice theory of common law authority. *See id.* at 642–45. As evidence for this claim, Priel emphasizes the extent to which a nation's judges refer to and rely on the judgments of judges from other common law jurisdictions. As he puts it, the practice view "will tend to be sympathetic to commonality among legal systems if they have a shared historical origin. Since authority on this view has its basis in history, the law of another jurisdiction can be significant (and compelling even if not binding) as long as the two legal systems have a shared history and can see themselves as belonging to the same 'tradition.' And here obviously, the relevant tradition invoked is the 'common law tradition.' " *Id.* at 630. And

Constitution depend for their authority, in the end, on their recognition of the rule of law values on which they are grounded, historically and conceptually. On this account, it is no historical or conceptual accident that the United Kingdom and the United States were common law systems before and after their respective recognition of parliamentary sovereignty and a codified charter.

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according to Priel, "American courts used to cite English cases . . . relatively frequently, but rarely do so anymore . . ." *Id.* at 614–15. As just one significant example to rebut Priel's assertion, in the US Supreme Court's leading judgments determining the legality of the US government's various responses to the September 11, 2001 attacks, the justices of the Court repeatedly cite English cases. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 556–57, 560 (2004) (Scalia, J., dissenting); Rasul v. Bush, 542 U.S. 466, 481–82 (2004), and 503–04 (Scalia, J., dissenting); Hamdan v. Rumsfeld, 548 U.S. 557, 660 (2006) (Scalia, J., dissenting); Boumediene v. Bush, 553 U.S. 723, 741–42, 745, 749–52 (2008), and 844–47 (Scalia, J., dissenting). Of course, I have not mentioned the Supreme Court's citations to English statutes and legal scholarship or the decisions of lower federal courts that cite UK sources. My point here is not to deny or downplay the material differences between the US and UK legal systems. My goal here is instead to help us concentrate on what truly are the material differences. Although Professor Priel's claim that the US is somewhat more parochial than other common law nations may well be correct, that has much more to do with contested views of constitutional interpretation (which Priel does not consider), and the number of jurisdictions in the federal and state judicial systems (as Priel notes), than with the notion that the US is an isolated outlier that has abandoned the practice conception of legal authority reflected in the rest of the common law world. In this connection, I should also mention that the UK Supreme Court also occasionally indicates its disinclination to consider the rulings of other common law jurisdictions when determining the meaning of the UK constitution. *See, e.g.*, *Privacy Int'l* [2019] UKSC 22 at [102]–[103].