CONCLUSION: ENTRENCHMENT OF FUNDAMENTAL LAW REVISITED. pdf

1: Constitutional Law, Administrative Law and Human Rights : Ian Loveland :

The fifth edition of Ian Loveland's acclaimed Constitutional Law, Administrative Law, and Human Rights continues to provide in-depth coverage of the core elements of a constitutional and administrative law syllabus.

Watch a video interview with Dr Andrew Blick at the launch event on 4th December The subject is of substantial importance in its own right. Expert commentaries on this subject have tended to approach it from a rational perspective, discussing the concessions the UK might make to achieve a more satisfactory outcome. However, the present work emphasises that UK attitudes towards the ECJ as towards the EU generally are founded in questionable assumptions that in turn create the premise on which the programme of departure from the EU rests. Within this context, to analyse the UK approach to negotiations through a lens of rationality is a potentially flawed approach. This paper, therefore, considers Eurosceptic perceptions of the Court, interrogating their validity, but also accepting that, whatever their merits, they are nonetheless the basis for the current UK posture. It begins by considering the views taken of the ECJ by those hostile to UK participation in European integration; and critically assesses their analyses. It asks what the alternative to the ECJ might be. The paper considers the weakening of the position that to leave without a deal in place is a reasonable â€" or even desirable â€" option; and the consequences of this change of discourse for attitudes towards post-EU arbitration arrangements. This entity is sustained and advanced through the active development of rules intended to ensure regulatory harmonisation across member states. They reduce non-tariff barriers to trade, complementing the elimination of duties entailed by the Customs Union. The ECJ is responsible for the interpretation of this body of European law, which takes priority over all other legislation applying within the Union. This system of rules, upheld by the Court, is intrinsic to the European integration project. Their primary interest is in the avoidance of tariffs, not the prevention of regulatory protectionism. They favour a minimalist framework, whereby the UK relationship with the EU is determined by the default mechanism of World Trade Organisation WTO rules, with no other arrangement in place. The credibility of this approach has diminished under public scrutiny in recent months, as is discussed below. Aside from the fundamental philosophical difference described above, there are a number of strands to the Eurosceptic criticism of the ECJ. One involves the number of cases that the UK has lost before it, when UK policy has been found to be in violation of European law and accordingly been required to alter its position. However, such uses of these data lacked proper context. It hears cases against all member states. The UK has not been an outlier in its loss rate. Moreover, the bulk of the cases lost by the UK were brought by the European Commission, and the Commission only takes such legal action if it thinks it has a high chance of victory. Furthermore, quantitative evidence of this sort does not reveal how important was each individual case; and the outcome of particular judgements, whether the UK won or lost, might anyway be judged desirable or otherwise according to the particular perspective taken. To recognise this proposition, of course, is to acknowledge the value of the EU project as a whole, and is therefore not compatible with a Eurosceptic agenda. A second line of criticism involves the discretion possessed by the Court. In reaching decisions, so the argument runs, the ECJ is able fundamentally to alter the rules of the system. Consequently, deals arrived at between politicians can subsequently be undone by the Court. A further complaint arises in Eurosceptic narratives connected to the potential of the ECJ for autonomous action. There have been claims of a tendency for the Court to expand its reach and by extension that of the European integration project generally, continuing the federalising tendencies of the EU. Those who perceive the ECJ as in possession of excessive power find it more objectionable still because of a supposed lack of democratic accountability for the aggrandising activities of the Court. Across various different types of jurisdiction in different parts of the world claims are often made about the idea of supposedly undemocratic expansionism by the judiciary. This criticism has been voiced with regard to UK courts when dealing with matters not related to European law. In recent decades, domestic judicial review has become an increasingly important part of the UK legal system. Courts are able to scrutinise

â€” and if appropriate negate â€” the actions of ministers and public authorities generally. Such proceedings can consider whether a particular action was within existing powers; whether it was reasonable, and whether it was exercised in accordance with proper procedures. These forms of judicial intervention will continue in any possible post-EU environment and could â€” for reasons discussed below â€” intensify in their prominence. In this sense, in as far as exit from the EU is seen as a means of preventing judicial engagement in decision-making by politicians through severance from the ECJ, it will not succeed, since domestic courts as well as the ECJ perform such a role. Indeed, under the common law system sometimes held to be under threat from the EU and ECJ, courts have a greater scope to develop their own approaches and expand the reach of their jurisdiction on their own initiative. Another form of domestic judicial review in the UK that would remain unaffected by Brexit involves assessing compliance with the European Convention of Human Rights ECHR , to which the UK has been a signatory since the s and which was incorporated directly into the internal UK legal order through the Human Rights Act Human rights review of this type has generated probably more controversy than any other form of judicial review. Indeed, commitment to continued enforcement of the Convention could conceivably form an important part of an exit deal with the EU. Complaints about the ECJ as interfering with political processes, changing the rules on its own initiative, and lacking in democratic legitimacy, are also manifestations of a more general controversy, found within all democracies. The role of courts is to interpret the law, including as it applies to government. This area of overlap naturally involves tensions. The desire to avoid frustration of an elected or democratically accountable administration is legitimate. But so too is support for the rule of law, without which democracy cannot function properly. To subordinate the courts wholly to the will of those who claim popular mandates would be disastrous. The rule of law requires that governments and governed alike should be subject to legal rules and limitations, which in turn necessitates an independent judiciary. Courts must have discretion to apply their own interpretations of the law. At times, it must be acknowledged, they can reach decisions that substantially alter previously existing understandings. They might, for instance, reinterpret the concept of individual rights to keep pace with changing social attitudes. Some might question their democratic authority unilaterally to alter the law in this way. With judgements involving types of law that are not European in origin, the UK Parliament can, if it objects sufficiently to a particular judgement, alter or clarify the law to reverse the outcome of a case. However, with European law as interpreted by the Court, the same option is not available. Yet this position arises from the intrinsic nature of the EU as a sovereignty-sharing arrangement. To remove the UK from the jurisdiction of the Court is to leave the arrangement â€” but also to break with the benefits it brings. The extent to which the UK can continue to enjoy those advantages from outside the EU will depend in part upon the arbitration mechanisms it is willing to agree to, and the extent to which the ECJ is involved in them. It is unfortunate that many advocates of UK membership of the EU have acquiesced in the rhetorical premise of their opponents. Rather than challenging the stigmatisation of federalism, they have implicitly or explicitly accepted that it is an undesirable concept in the European context, but have held that the EU is not inherently federal in its structures, or that any federalising tendencies it presents can be contained. In fact, the federal concept can usefully be applied to the EU, conveying its key strength. While in most federal polities it is responsibility for external policy that is centralised, European federalism is an inversion of the usual pattern. Foreign affairs are handled on a largely intergovernmental basis, with the role of the European External Action Service and High Representative for Foreign Affairs and Security Policy limited. But the Single Market, on the other hand, has the character of a central initiative within a federal system, with harmonised standards applied across the EU. As the EU adopts more legislation, and as more cases are brought before the Court, the ECJ advances the federalisation of Europe, expanding the scope of the Single Market. It is this Single Market, the largest of its kind in the world, to which the UK government hopes to maximise continued access. To suppose that it can do so while excluding itself from the remit of the ECJ is to contradict the federal rationale that many Eurosceptics rightly recognise as underpinning the EU. The federal perspective is also instructive regarding the democratic legitimacy of the ECJ. European law â€” in other words, the law that the Court

applies â€” is the product of processes that are akin to those of democratic federations. The European Parliament is directly elected; and the Council of Ministers comprises governments that are democratically accountable in accordance with the procedures in place in the respective member states. It is true that the EU could be more fully democratic, if judged using criteria that applied to national systems. But such a development would involve at minimum establishing a clearer link between the make-up of the Commission and European-wide elections. This shift in an increasingly federal direction has been fiercely opposed by the same Eurosceptics who have denounced the EU and by extension the ECJ for a lack of democratic legitimacy. Third, there are complaints about the Court from sovereignty perspectives. In this sense, objections to the ECJ arise not only from it being a court, but also being European, or â€” as some perceive it â€” foreign. The idea of an institution based in Luxembourg making decisions with direct legal force in the UK is, for some, unacceptable. They dislike the idea that the Court is composed mainly of non-UK judges, from non-UK legal traditions, and that it is â€” in their view â€” of inferior quality to a UK court. Critics might also object to the principle of the ECJ overruling UK courts, perhaps over matters of fundamental legal principle. They also baulk at the incorporation of the jurisprudence of the Court into UK law. Often also raised in the debate on national sovereignty is the matter of parliamentary sovereignty, an important doctrine in traditional interpretations of the UK constitution. This concept entails an Act of the Westminster Parliament being the ultimate source of legal authority in the UK. There is no UK written constitution to which an Act of Parliament can be made subject. No court, so this theory holds, can strike down an Act. Some observers have found membership of the EU difficult to reconcile with the idea of parliamentary sovereignty, since it involves the existence of rival law-making institutions, the product of which, European law, takes precedence even over Acts of Parliament though admittedly this incorporation of European law into the UK domestic system takes place via an Act of the Westminster Parliament, the European Communities Act As a key organ of the European legal order, the ECJ is both symbol and instrument of this perceived compromising of parliamentary sovereignty. The restoration or preservation of parliamentary sovereignty has been a longstanding and crucial component of the Eurosceptic agenda, providing another motive for seeking a complete severance from the jurisdiction of the ECJ. In considering these sovereignty issues, it should be recalled that the existence of an EU-level Court responsible for upholding European law is an inescapable necessity of a Single Market. At its core, the Single Market is a set of universal rules that, to be consistent in their application, must be interpreted by a single body, the Court. Full participation in the Single Market, therefore, necessitates complete acceptance of the jurisdiction of the Court; and the extent to which a state outside the EU can obtain access to the Single Market is dependent in part upon how far it is willing to adhere to European law. The idea that the Court and the Single Market can be detached from one another, that has been promoted by some advocates of leaving, is misleading. Yet it is now increasingly recognised that the UK must be willing to submit itself to arbitration mechanisms of some kind if it is to avoid the most disruptive of exits. Some apparently believe that it is not appropriate to subject a multinational polity with divergent legal systems to the same court. If this supposition is true, then the UK Supreme Court, the ultimate court of appeal in civil cases for England, Wales, Scotland and Northern Ireland, representing between them three distinct legal systems, is an inherently flawed entity. Yet the present government intends to create specific central powers within the UK to ensure the preservation of a single market in the post-EU UK. This policy suggests an awareness of the need for a single legal system to ensure an integrated market. Why, then, should UK policy-makers expect the EU to take a different attitude with regard to its own internal market? Under any plausible model for a post-EU legal order for the UK, it will not in any case be possible fully to exclude the jurisprudence of the EU. Case law that has accumulated since cannot simply be expunged. It is likely that UK courts will have regard not only to pre-exit EU judgements, but also in some way to decisions made after the point of departure. The Eurosceptic claim that rejecting the EU and ECJ is necessary to a preservation or restoration of parliamentary sovereignty has come to appear particularly ironic in the period since the referendum.

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2: Brexit and the European Court of Justice | The Federal Trust

Table of Contents for Constitutional law, administrative law, and human rights: a critical introduction / Ian Loveland, available from the Library of Congress.

Additional Information In lieu of an abstract, here is a brief excerpt of the content: Koen Geens and Carl Clottens Respondent: Abstract Dispersed versus concentrated ownership in the EU? The respondent and the intervening speakers seemed to agree that no such conscious decision was taken at EU level. Regardless of whether or not there was a conscious or unconscious EU decision to favour dispersed ownership, the question is whether or not the EU is heading in this direction. One share, one vote 1S1V. A narrow majority seemed to support the introduction of a 1S1V system, but it is widely acknowledged that there is no political support, certainly not in the light of the financial crisis which drives politicians to favour concentrated national ownership. Opponents of the 1S1V system pointed to the importance of rewarding long-term investors, certainly in times of crisis and short selling, but the group seemed to agree that the distinction between long-term and short-term investors was difficult to draw, exacerbated by the fact that a historic investor would not necessarily commit to stay on in the long term, and that both types of investors were important in the market. In this connection, the group also stressed the importance of tackling the issue of pyramids, but there was insufficient time to explore this â€" â€" topic in further depth. Workshop members seemed to agree that what cannot be achieved by positive or negative harmonisation will likely be remedied by the market itself as experienced in Germany and the UK. In times of crisis or restructuring, minority shareholders may impose 1S1V conditions for investing more capital. There may be a growing consensus towards neutral, or even nonneutral , disclosure of control-enhancing mechanisms CEMs and deviations from the 1S1V principle. Garrido Garcia This is a very controversial topic indeed and I am afraid that my position is also going to be very controversial and very provocative. The basic aim of my contribution is twofold. I will first discuss the unfortunate 1S1V proposal by the European Commission and then I will add some thoughts on what the proportionality principle, in my opinion, really means. I will conclude with what lies ahead in the future. Let me begin with the history of the initiative. The experience with the Takeover Directive particularly the optional breakthrough rule had shown that, politically, Europe was unwilling to advance further on the principle of proportionality. You are not currently authenticated. View freely available titles:

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3: Yale Law Journal - Political Entrenchment and Public Law

Courts and legal scholars have long been concerned with the problem of "entrenchment"â€"the ways that incumbents insulate themselves and their favored policies from the normal processes of democratic change.

According to Scott Gordon, a political organization is constitutional to the extent that it "contain[s] institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry , including those that may be in the minority ". An example from the constitutional law of sovereign states would be a provincial parliament in a federal state trying to legislate in an area that the constitution allocates exclusively to the federal parliament, such as ratifying a treaty. Action that appears to be beyond power may be judicially reviewed and, if found to be beyond power, must cease. Legislation that is found to be beyond power will be "invalid" and of no force; this applies to primary legislation, requiring constitutional authorization, and secondary legislation, ordinarily requiring statutory authorization. In this context, "within power", intra vires, "authorized" and "valid" have the same meaning; as do "beyond power", ultra vires, "not authorized" and "invalid". In most but not all modern states the constitution has supremacy over ordinary statutory law see Uncodified constitution below ; in such states when an official act is unconstitutional, i. It was never "law", even though, if it had been a statute or statutory provision, it might have been adopted according to the procedures for adopting legislation. Sometimes the problem is not that a statute is unconstitutional, but the application of it is, on a particular occasion, and a court may decide that while there are ways it could be applied that are constitutional, that instance was not allowed or legitimate. In such a case, only the application may be ruled unconstitutional. Historically, the remedy for such violations have been petitions for common law writs , such as quo warranto. Excavations in modern-day Iraq by Ernest de Sarzec in found evidence of the earliest known code of justice , issued by the Sumerian king Urukagina of Lagash ca BC. Perhaps the earliest prototype for a law of government, this document itself has not yet been discovered; however it is known that it allowed some rights to his citizens. For example, it is known that it relieved tax for widows and orphans, and protected the poor from the usury of the rich. After that, many governments ruled by special codes of written laws. Some of the better-known ancient law codes include the code of Lipit-Ishtar of Isin , the code of Hammurabi of Babylonia , the Hittite code , the Assyrian code and Mosaic law. In BC, a scribe named Draco codified the cruel oral laws of the city-state of Athens ; this code prescribed the death penalty for many offences nowadays very severe rules are often called "Draconian". It eased the burden of the workers, and determined that membership of the ruling class was to be based on wealth plutocracy , rather than by birth aristocracy. Cleisthenes again reformed the Athenian constitution and set it on a democratic footing in BC. Diagram illustrating the classification of constitutions by Aristotle. Aristotle ca BC was the first to make a formal distinction between ordinary law and constitutional law, establishing ideas of constitution and constitutionalism , and attempting to classify different forms of constitutional government. The most basic definition he used to describe a constitution in general terms was "the arrangement of the offices in a state". In his works Constitution of Athens , Politics , and Nicomachean Ethics he explores different constitutions of his day, including those of Athens, Sparta , and Carthage. He classified both what he regarded as good and what he regarded as bad constitutions, and came to the conclusion that the best constitution was a mixed system, including monarchic, aristocratic, and democratic elements. He also distinguished between citizens, who had the right to participate in the state, and non-citizens and slaves, who did not. For constitutional principles almost lost to antiquity, see the code of Manu. One of the first of these Germanic law codes to be written was the Visigothic Code of Euric This was followed by the Lex Burgundionum , applying separate codes for Germans and for Romans; the Pactus Alamannorum ; and the Salic Law of the Franks , all written soon after Influenced by Buddhist teachings, the document focuses more on social morality than institutions of government per se and remains a notable early attempt at a government constitution. The Constitution of Medina Arabic: It constituted a formal agreement between Muhammad and all of the significant tribes and

families of Yathrib later known as Medina , including Muslims , Jews , and pagans. To this effect it instituted a number of rights and responsibilities for the Muslim, Jewish, and pagan communities of Medina bringing them within the fold of one communityâ€"the Ummah. Middle ages after The Pravda Yaroslava, originally combined by Yaroslav the Wise the Grand Prince of Kyiv , was granted to Great Novgorod around , and in was incorporated into the Ruska Pravda , that became the law for all of Kievan Rus. It survived only in later editions of the 15th century. This idea was extended and refined by the English barony when they forced King John to sign Magna Carta in The most important single article of the Magna Carta, related to " habeas corpus ", provided that the king was not permitted to imprison, outlaw, exile or kill anyone at a whimâ€"there must be due process of law first. This article, Article 39, of the Magna Carta read: No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgement of his peers, or by the law of the land. This provision became the cornerstone of English liberty after that point. The social contract in the original case was between the king and the nobility, but was gradually extended to all of the people. It led to the system of Constitutional Monarchy , with further reforms shifting the balance of power from the monarchy and nobility to the House of Commons. The Nomocanon of Saint Sava Serbian: This legal act was well developed. The Nomocanon was completely new compilation of civil and canonical regulations, taken from the Byzantine sources, but completed and reformed by St. Sava to function properly in Serbia. Beside decrees that organized the life of church, there are various norms regarding civil life, most of them were taken from Prohiron. Legal transplants of Roman - Byzantine law became the basis of the Serbian medieval law. The essence of Zakonopravilo was based on Corpus Iuris Civilis. It regulated all social spheres, so it was the second Serbian constitution, after St. The Code was based on Roman - Byzantine law. Between and , a Saxon administrator, Eike von Repgow , composed the Sachsenspiegel , which became the supreme law used in parts of Germany as late as Even so, its first recorded use in the function of a constitution supreme law of the land is with Sarsa Dengel beginning in Third volume of the compilation of Catalan Constitutions of In the Principality of Catalonia , the Catalan constitutions were promulgated by the Court from or even two centuries before, if we consider the Usatges of Barcelona as part of the compilation of Constitutions until , when Philip V of Spain gave the Nueva Planta decrees , finishing with the historical laws of Catalonia. These Constitutions were usually made formally as a royal initiative, but required for its approval or repeal the favorable vote of the Catalan Courts , the medieval antecedent of the modern Parliaments. These laws had, as the other modern constitutions, preeminence over other laws, and they could not be contradicted by mere decrees or edicts of the king. The Golden Bull of was a decree issued by a Reichstag in Nuremberg headed by Emperor Charles IV that fixed, for a period of more than four hundred years, an important aspect of the constitutional structure of the Holy Roman Empire. In China , the Hongwu Emperor created and refined a document he called Ancestral Injunctions first published in , revised twice more before his death in These rules served in a very real sense as a constitution for the Ming Dynasty for the next years. The oldest written document still governing a sovereign nation today [20] is that of San Marino. The first book, with 62 articles, establishes councils, courts, various executive officers and the powers assigned to them. The remaining books cover criminal and civil law, judicial procedures and remedies. Written in , the document was based upon the Statuti Comunali Town Statute of , itself influenced by the Codex Justinianus, and it remains in force today. In the Carta de Logu was legal code of the Giudicato of Arborea promulgated by the giudicessa Eleanor. It was in force in Sardinia until it was superseded by the code of Charles Felix in April The Carta was a work of great importance in Sardinian history. It was an organic, coherent, and systematic work of legislation encompassing the civil and penal law. Iroquois "Great Law of Peace" Main article: Great Law of Peace The Gayanashagowa, the oral constitution of the Iroquois nation also known as the Great Law of Peace, established a system of governance in which sachems tribal chiefs of the members of the Iroquois League made decisions on the basis of universal consensus of all chiefs following discussions that were initiated by a single tribe. The position of sachem descended through families, and were allocated by senior female relatives. Rakove stated that "The

voluminous records we have for the constitutional debates of the late s contain no significant references to the Iroquois" and stated that there are ample European precedents to the democratic institutions of the United States. The two forms of government are distinctive and individually remarkable in conception. The English Protectorate that was set up by Oliver Cromwell after the English Civil War promulgated the first detailed written constitution adopted by a modern state; [32] it was called the Instrument of Government. This formed the basis of government for the short lived republic from to by providing a legal rationale for the increasing power of Cromwell, after Parliament consistently failed to govern effectively. Most of the concepts and ideas embedded into modern constitutional theory, especially bicameralism , separation of powers , the written constitution, and judicial review , can be traced back to the experiments of that period. Charles had rejected the propositions, but before the start of the Second Civil War, the Grandees of the New Model Army had presented the Heads of Proposals as their alternative to the more radical Agreement of the People presented by the Agitators and their civilian supporters at the Putney Debates. On January 4, the Rump Parliament declared "that the people are, under God, the original of all just power; that the Commons of England, being chosen by and representing the people, have the supreme power in this nation". The constitution set up a state council consisting of 21 members while executive authority was vested in the office of " Lord Protector of the Commonwealth "; this position was designated as a non-hereditary life appointment. It also required the calling of triennial Parliaments , with each sitting for at least five months. A modified version of the Humble Petition with the clause on kingship removed was ratified on 25 May. This finally met its demise in conjunction with the death of Cromwell and the Restoration of the monarchy. Other examples of European constitutions of this era were the Corsican Constitution of and the Swedish Constitution of All of the British colonies in North America that were to become the 13 original United States, adopted their own constitutions in and , during the American Revolution and before the later Articles of Confederation and United States Constitution , with the exceptions of Massachusetts, Connecticut and Rhode Island. The Commonwealth of Massachusetts adopted its Constitution in , the oldest still-functioning constitution of any U. Democratic constitutions Constitution of May 3, painting by Jan Matejko , What is sometimes called the "enlightened constitution" model was developed by philosophers of the Age of Enlightenment such as Thomas Hobbes , Jean-Jacques Rousseau , and John Locke. The model proposed that constitutional governments should be stable, adaptable, accountable, open and should represent the people i. This Constitution also limited the executive authority of the hetman, and established a democratically elected Cossack parliament called the General Council. Corsican Constitutions of and were inspired by Jean-Jacques Rousseau. The latter introduced universal suffrage for property owners. The United States Constitution , ratified June 21, , was influenced by the writings of Polybius , Locke , Montesquieu , and others. The document became a benchmark for republicanism and codified constitutions written thereafter. On March 19, the Spanish Constitution of was ratified by a parliament gathered in Cadiz , the only Spanish continental city which was safe from French occupation. The Spanish Constitution served as a model for other liberal constitutions of several South-European and Latin American nations like, for example, Portuguese Constitution of , constitutions of various Italian states during Carbonari revolts i. The leader of the national emancipation process was the Portuguese prince Pedro I , elder son of the king of Portugal. Pedro was crowned in as first emperor of Brazil. The country was ruled by Constitutional monarchy until , when finally adopted the Republican model. In Denmark , as a result of the Napoleonic Wars , the absolute monarchy lost its personal possession of Norway to another absolute monarchy, Sweden. However the Norwegians managed to infuse a radically democratic and liberal constitution in , adopting many facets from the American constitution and the revolutionary French ones; but maintaining a hereditary monarch limited by the constitution, like the Spanish one. The first Swiss Federal Constitution was put in force in September with official revisions in , , , , and The Serbian revolution initially led to a proclamation of a proto-constitution in ; the full-fledged Constitution of Serbia followed few decades later, in

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4: Project MUSE - The European Company Law Action Plan Revisited

Loveland's introduction to constitutional law renders the subject comprehensible in political and historical as well as legal terms. This third edition builds on the expanded content of the second, and also emphasises the importance of human rights and devolution issues.

But this wide swath of case law and scholarship has focused nearly exclusively on formal entrenchment: This Article demonstrates that political actors also entrench themselves and their policies through an array of functional alternatives. By enacting substantive policies that strengthen political allies or weaken political opponents, by shifting the composition of the political community, or by altering the structure of political decision making, political actors can achieve the same entrenching results without resorting to the kinds of formal rule changes that raise red flags. Recognizing the continuity of formal and functional entrenchment forces us to consider why public law condemns the former while ignoring or pardoning the latter. Appreciating the prevalence of functional entrenchment also raises a broader set of questions about when impediments to political change should be viewed as democratically pathological and how we should distinguish entrenchment from ordinary democratic politics. Introduction In politics, winning is only the first step. Thus we see parties, politicians, and prevailing coalitions continually strategizing to lock in their gains, battening down their offices and policies against the winds of political change. In the context of election law, attempts by temporarily prevailing political parties, incumbent politicians, and electoral majorities to solidify their hold on office by gerrymandering electoral districts, selectively restricting the franchise, or using campaign finance regulation to suppress the political speech of opponents have been the target of sustained criticism by scholars and some skeptical attention on the part of courts. Here again, the entrenchment of political outcomes is viewed as self-evidently illegitimate: Consider recent changes to public-sector labor law. Labor unions generally provide support to Democratic candidates, mobilizing pro-Democratic voters and funding the logistical and organizational infrastructure of Democratic campaigns. Seeking to defend their hold on power against Democratic challengers, Republican officeholders have enacted restrictive labor legislation for the purpose of weakening unions. In case the purpose of these measures was not apparent, the new restrictions exempted all the unions that had endorsed the Republican Governor in the previous election. President Obama is going to have a. They used labor law instead. Or consider Social Security, a program that is notorious for its resistance to reform or retrenchment. The program is not protected by any legal barrier to repeal or special election rules favoring its supporters. Rather, the program mobilized and empowered its defenders to stave off subsequent political attacks. Put differently, Social Security is entrenched not formally, but functionally. This was no accident. In developing the program, President Franklin D. He wanted to entrench [S]ocial [S]ecurity so deeply in our institutional life that it would be politically impossible for his opponents to repeal it. A vast literature in the social sciences explores the multifarious means by which political actors insulate themselves and their policies from political change. Yet there has been almost no recognition that the functional entrenchment strategies being described serve the same purposes as the formal entrenchment techniques that public law regulates. Nor is there recognition that the democratic concerns invoked against formal entrenchment are equally applicable when identical outcomes are achieved functionally. If locking in political arrangements and binding the hands of future decision makers is a democratically dubious enterprise, then what are we to make of constitutionalism? One of the primary purposes of the Constitution and constitutional law, after all, is to entrench rights, rules, and structures of government against ordinary political change. To be sure, the entrenched authority of the Constitution has provoked generations of handwringing about the antidemocratic implications of constitutional constraints on present majority rule. On the whole, however, constitutional entrenchment is widely accepted. Indeed, it is celebrated, for its contributions to democratic stability, rights protection, and the historical continuity of the American political community. What is it, then, that leads courts and scholars to treat constitutional entrenchment as a qualitatively different phenomenon than

entrenchment at the electoral and legislative levels? In sum, the existing picture of political entrenchment in public law is both partial and internally inconsistent. Courts and scholars have maintained an oddly myopic focus on entrenchment strategies that operate through explicit legal rules aimed at processes of political change, while turning a blind, or at least uncritical, eye to the vastly more expansive domain of political entrenchment. And even within that limited field of vision, public law has regarded legislative, electoral, and constitutional entrenchment as distinct and self-contained phenomena, ignoring both their functional and normative similarities. To illustrate, imagine a political coalition committed to stringent and sustained environmental regulation to prevent climate change. Finally, imagine that the coalition fears that its hold on power will be fleeting, and that antiregulatory political forces will eventually regain dominance in federal politics and seek to reverse the environmental policies enacted by their predecessors. Here are four strategies the coalition might contemplate to entrench their program against repeal. Least likely, it could attempt to enact a constitutional amendment that guarantees certain measures of environmental protection. Operating at the sub-constitutional level, it could attempt to enact an unrepealable environmental statute. Finally, it might pursue a range of functional entrenchment strategies. It could create a tradeable emissions program that would facilitate the formation of interest groups with a stake in preserving and expanding the prevailing regulatory regime. It might try to drive polluting industries offshore and out of the American political process. Or it could delegate expansive regulatory authority to a politically sympathetic agency like the Environmental Protection Agency, which might be more insulated from change than the political branches. All of these different strategies might be viewed by the coalition as functional substitutesâ€”more or less interchangeable mechanisms for accomplishing the same basic purpose. But public law would view them as quite distinct, as a matter of both legal rules and normative democratic theory. This Article questions what, if anything, justifies this differential treatment. At a descriptive level, it catalogues and compares the range of legal and political techniques through which parties, politicians, and policies are insulated against contestation and change. At a normative level, it raises questions about whether and when political entrenchment of various kinds should be regarded as a matter of concern in public law and what exactly the concern should be. More specifically, the Article proceeds as follows. Part I surveys how the phenomenon of political entrenchment has been defined and regulated as a matter of public law. Entrenchment comes into view when political actors intentionally create legal impediments to political change. Beyond the special case of constitutionalism, public law has recognized and regulated this behavior primarily in two contexts. One is election law, where scholars have increasingly viewed the entrenchment of incumbent officeholders, political parties, and majority coalitions as the central problem that legal regulation of the political process should be designed to solve. Although courts have not yet fashioned doctrinal tools aimed explicitly at preventing or remedying entrenchment, judges and Justices have joined in the scholarly skepticism and in some cases have found ways of striking down election rules that seemed to have the purpose and effect of suppressing democratic competition and protecting power holders against political challenge. The doctrinal prohibition on entrenchment is more explicit in the second context of legislative entrenchment. It has long been understood that legislatures are not permitted to enact unrepealable statutes or to insulate statutes against repeal or revision by way of supermajority rules or other special procedural requirements. The blurry boundaries of this prohibition have been interpreted inconsistently by judges and scholars, who have invoked it to cast doubt on a whole range of laws, from government contracts to framework statutes and the Senate filibuster. Courts and scholars have understood electoral and legislative entrenchment as separate and independent phenomena, but it may be more illuminating to view them as pieces of a larger puzzle. Political actors use electoral entrenchment to accomplish indirectly what legislative entrenchment accomplishes directly, namely, insulating substantive policy outcomes against shifting political preferences. Electoral and legislative entrenchment as well as constitutional entrenchment are created by means of formal legal rules governing processes of political changeâ€”the rules governing voting and elections, the enactment or repeal of legislation, and constitutional adoption and amendment. Yet, as Part II describes, politicians, parties, and policies can be entrenched through functional, political mechanisms just

as readily as through formal, legal ones. Developing and drawing upon a wide range of examples, this Part synthesizes three general mechanisms of functional entrenchment. First, politicians, parties, and temporarily prevailing coalitions can enact substantive policies that strengthen political allies or weaken political opponents. Second, they can enact policies or programs that change the composition of the political community, selecting in allies or selecting out opponents. Third, they can shift the locus of political decision making to an actor or institution that is responsive to allies or unresponsive to opponents. These functional strategies appear to be close substitutes for formal electoral, legislative, and constitutional entrenchment, and there is every reason to believe they are widely used by political actors to accomplish the same ends. Why does public law view formal entrenchment as a form of democratic failure and an attractive target for legal regulation while treating functional entrenchment largely as a matter of normative and legal indifference? Part III takes up this question, considering whether the apparent inconsistency can be explained or rationalized. Perhaps formal entrenchment is more harmful to democratic values, less susceptible to benign or beneficial uses, or simply easier to identify and police? A considers these possibilities but finds them less than fully persuasive. The remainder of Part III goes further in a skeptical direction. A unifying theme of the discussion in Part IIIâ€”amplified in the Conclusionâ€”is the need for a broader perspective on impediments to political change and assessments of their costs and benefits or democratic legitimacy. The progression of the argument along these lines leads to a shift in perspective that it may be helpful to foreshadow. Our argument is that on anyplausible understanding of entrenchment, there will be innumerable political phenomena that fit the bill, beyond the narrow band of formal entrenchment. By appreciating the potential breadth of the category of entrenchment, this Article not only expands our understanding of that phenomenon but also ultimately calls into question its meaning and utility. What Is Political Entrenchment? At the level of constitutionalism, the relevant objects of stasis and change include the structure of government, the boundaries and allocation of governmental powers, and the set of rules and rights prohibiting specific governmental actions. At the subconstitutional level, political change can mean change in which politicians or parties are elected to office or change in the substantive policy outcomes generated by these power holders and their supporters. Impediments to political change can take a number of different forms. Public lawyers tend to focus on formal, procedural barriers to change, such as the Article V requirements of dual supermajorities for constitutional amendment or a hypothetical statute that deems itself unrepealable. The legal rules governing political change through the democratic process are also a common target of entrenchment concerns. Parties that disfranchise or suppress the political speech of opponents, incumbent legislators who gerrymander electoral districts to ensure their own reelection, and dictators who outlaw opposition parties or cancel elections altogether are all engaged in projects of political entrenchment, manipulating the ground rules of the democratic process in order to retain their hold on power. As we shall emphasize, however, manipulating formal rules is not the only way to prevent change. After all, dictators can imprison or shoot their opponents rather than disfranchise them. Less dramatically, parties, politicians, and policies can create political, rather than legal, impediments to change. Recall the introductory example of labor law reform: Or recall the example of Social Security: Political entrenchment implies not just the absence of political change but some kind of special constraint on the usual processes of political change. Thus, the persistence of politicians or parties in office, or the preservation of particular policies over long periods of time, is not necessarily proof of entrenchment. If politicians, parties, or policies are retained simply because they continue to be popular among the electorate, this would not be viewed as entrenchment. The perception that Social Security is entrenched stems from the view that, in contrast to prohibitions on murder, a present majority might not vote to reenact the program in anything like its current form. The program persists, in this view, because it is now defended by a powerful interest group, brought into being by the program itself, which has proven capable of preventing present majority preferences from prevailing. Other kinds of impediments to political change blur the boundary between entrenchment and ordinary politics. Suppose that Social Security persists not just because of interest group mobilization but because of its increasing popularity over time, as Americans have learned from their

experience under the program that mandatory savings for retirement is more beneficial than they initially imagined. One could view this dynamic of endogenous preference change as a mechanism of entrenchment on the theory that this kind of path-dependent increase in political support should count as a special impediment to ordinary political change. Or suppose that critical support for preserving Social Security stems from the expectation among workers that the earmarked taxes they have paid into the program are now owed to them by the government upon retirement, or by the reliance of many Americans on the existence of Social Security payments to support their retirement, leading them not to save through other vehicles. For the purposes of this Article, however, we will work with a more limited definition of entrenchment. Rather than regarding some kinds of shifts in preferences as creating entrenchment barriers, we shall take individual political preferences, regardless of how they have been shaped or transformed, as given. Only impediments to giving effect to present majority will, such as supermajority rules for revising statutes or political dynamics like the mobilization of a powerful interest group, will be taken as examples of entrenchment.

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5: Table of contents for Constitutional law, administrative law, and human rights

IV: The Human Rights Act -- Scots and Welsh devolution -- Conclusion: entrenchment of fundamental law revisited."@en. "Constitutional law, administrative law, and human rights: a critical introduction"@en.

Hin-Yan Liu Constitutional Entrenchment: The supremacy of parliament within the UK has traditionally meant that it is unable to bind its successors, thus frustrating legislative attempts at entrenchment. Three important commonwealth cases suggest a possibility of successful procedural entrenchment, but an essential difference â€" the supremacy of the UK parliament â€" is likely to prevent this transplant into the UK. The availability of European Community law supremacy hints at the possibility of legislative entrenchment but its boundaries have not been established. The Notes also discusses the importance of entrenching fundamental rights as well as potential pitfalls. Introduction Entrenchment is the legal protection of certain values from subsequent repeal and is divided into two types: The former method provides the strongest protection and effectively places certain subject-matters beyond the legislative capability of parliament through an appeal to higher principles or sources of law. As an issue of morality, entrenchment is capable of either protecting certain fundamental rights from tyranny, or perpetuating anachronistic ideals which are out of touch with contemporary values. In identifying values suitable for legal entrenchment, the denial of similar values of this privilege may be difficult to justify and could itself become another source of injustice. This is followed by a review of three important commonwealth cases which indicate a possibility of viable procedural entrenchment within the constitutional arrangement of the UK, but important differences are illustrated which challenge its applicability. It is suggested that a weak form of procedural entrenchment is indeed possible, albeit ill-defined within the UK system. Part IV comments on the desirability of legally entrenching fundamental rights but raises some attendant hazards. Part V finally offers brief concluding thoughts on the issue explored in this Note. In the UK, the Glorious Revolution of established that sovereignty lay with parliament resulting in a political sovereignty5 as distinguished from a constitutional sovereignty which has its base upon a sovereign text. Sir Ivor Jennings argued that sovereignty is granted by the common law, which is inferior to parliament, allowing it to alter the basis of its own existence, and thus special procedures for repeal must be followed since the foundation of statutory power would have been changed. The orthodox response to these cases would be to distinguish them from the domestic situation. The parliament of New South Wales in Trethowan was a subordinate legislature in that it derived its authority from the Colonial Laws Validity Act of the Westminster parliament. Thus, the sovereign legislature empowered the subordinate legislature to do what it could not do itself â€" to bind its successors. Craig notes that there are two broad opposing lines of authority governing the relation of Community 19 Ibid Wade suggests that there has been a technical revolution in the courts since there has been a significant shift away from traditional understanding and interpretation. The repeal of constitutional statutes was possible through the direct intent of parliament, which is still capable of abrogating any statute, presumably still on the basis of a simple majority. The second limb of his argument draws a fine distinction but it appears to refute the argument that implied repeal had indeed been affected by Factortame. If this is true, this distinction would limit implied repeal to the point of absurdity and render the doctrine practically useless generally, as such distinctions could be drawn between cases ad infinitum so that even cases upon the same subject matter could be shown not to conflict to, and therefore not apply the doctrine. It would, therefore, appear that courts after Factortame are capable of setting aside statutes conflicting with the ECA although it is unclear whether the revolution as suggested by Wade occurred, or whether there was a distinction to be drawn between constitutional and ordinary statutes as proposed by Laws LJ. While it seemed that entrenchment was not possible, the ECA has mysteriously altered the position, and its new boundaries have not been fully established. The Importance of Entrenching Fundamental Rights There may be a case for entrenching fundamental rights. John Laws argues that it is a fundamental principle that there must be basic rights in a democratic society, and that if a society allows those rights, they must be protected from political

power by limiting those powers. This is because if such 39 [] 14 SLT Questions of Legal Possibility and Moral Desirability in the United Kingdom rights could be abolished by the government, they will not be rights as such, but merely privileges. No Statute can confer this power upon Parliament, for this would be to assume and act upon the very power that is to be conferred. Geoffrey Marshall uses the words of Justice Jackson of the US Supreme Court that basic rights must not be put to the vote, and advocates an absolute brand of entrenchment, because any form of procedural entrenchment is, at its core, still a vote. Sydney Kentridge observes that the European Convention on Human Rights47 appears to be a lot different than a purely British Human Rights law, since it is designed to be incorporated into different nations with differing traditions. Although statute is above the common law, the courts have been able to protect certain rights, as the House 43 Ibid Practice and Principles Hart Publishing, Oxford Despite the arguments for entrenchment, there are many possible problems that it could lead to. Woolf LJ, for instance, warned that: The issues involving the Hong Kong Bill [of Rights] should be approached with realism and good sense and kept in proper proportion. If this is not done, the Bill will become a source of injustice rather than justice and will be debased in the eyes of the public. Similarly, the relative strength of these values might be misapplied in favour of unappealing parties: Conclusion The incapacity of parliament to bind its successors in the orthodox view may be related to common law principles, which allow for the unrestricted development of the law, suggesting that there may be a shared principle behind the concepts. The system as a whole would, therefore, be more likely to be coherent if orthodox principles were followed. The possibility of entrenchment is also likely to lead to arbitrary distinctions and allow room for individual discretion in cases concerning fundamental rights. Orthodox theories avoid these potentials for serious injustices by being absolute in holding that there cannot be entrenchment. Democratic principles have been invoked to support entrenching fundamental rights,53 tying fundamental rights with the notion of democracy. Thus, from the same premise, the more immediate concern of democracy would be to keep the legislature free of entrenched values, so as to be able to respond to the wishes of its citizens from which it derives authority to govern. The courts have been shown to protect fundamental rights by declaring allegiance to some higher form of law than the law made by parliament. 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. Parliament has also, for the time being at least, limited its own powers by the European Communities Act and, in a different way, by the Human Rights Act It is possible that other qualifications may emerge in due course. The notion of democracy has been invoked to support both arguments, but it more directly supports the orthodox stance. This is weighed against the possibility of significant and prolonged injustice stemming from entrenched measures and renders it morally unacceptable.

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6: Constitutionalism (Stanford Encyclopedia of Philosophy)

This is the third edition of "Constitutional Law, Administrative Law and Human Rights - A Critical Introduction". The book provides a clear introduction to the subject of public law, with the emphasis on material drawn from political theory, political science and social history.

They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in lawâ€¦I know of only one authority, which might justify the suggested method of construction. Anderson [] AC , a case involving the relationship of the courts and the State and the help it can give to the executive in times of national emergency? The grounds for the detention were that they encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo and associated themselves with persons who have adopted a policy of violence as a means of achieving political aims in those regions. Baffour Akoto and Others were arrested and detained on the 10th and 11th November, , under an order made by the President and signed on his behalf by the Minister of the Interior under section 2 of the Act. Their application to the High Court for writs of habeas corpus and subjiciendum was refused on the grounds of lack of jurisdiction. Nkumsah] who signed the order for and on behalf of the Governor-General was actuated by malice. Re Akoto centred on whether or not the Parliament of Ghana or the Constitution was sovereign and supreme. Then were the balancing effects of the fundamental human rights and freedoms as provided for under the Constitution as against the legislative manoeuvres designed to forestall the security of the State. Dr Dankwa talks of Constitutional supremacy- arguing that PDA was made in excess of the power conferred on Parliament by or under the Constitution with respect to Article 13 1 and until the PDA is repealed by the people, a freedom and justice shall not be honoured and maintained, b no person should suffer discrimination on grounds of political belief, and c no person should be deprived of freedom of speech or of the right to move and assemble or of the right of access to the courts. The limitations are that a Parliament cannot alter any of the entrenched articles in the Constitution unless there has been a referendum in which the will of the people is respected; b Parliament can however of its own volition, increase, but not diminish the entrenched articles; c the articles which are not entrenched can only be altered by an Act which specifically amends the Constitution. Dankwa disagreed and pleaded with the Supreme Court to invoke its judicial power under section 2 of Article 42 of the Constitution to declare the Preventive Detention Act invalid on the grounds that it was made in excess of the power conferred on Parliament. The grounds of detention served upon the detainees contain particulars of the previous acts upon which the conclusion of the Governor-General is based. The Ruling The affidavits disclosed all the facts relevant for determining whether the writ should issue or not. Rule 14 of Order 59 does not oblige a judge to make a formal return in every case. He is entitled to dispose of the case on the affidavits. Dicta of Goddard, LJ. Home Secretary, ex parte Greene [] 3 All E. Upon production of the order the only question which has to be considered is its legality. If the order is lawful the detention is lawful: The declaration does not constitute a bill of rights and does not create legal obligations enforceable in a court of law; The effect of the Article 20 of the Constitution is that Parliament is sovereign and the legislative powers are qualified only with respect to the entrenched Articles therefore; The Preventive Detention Act, , is therefore, not contrary to the Constitution and Parliament is competent to pass such an act even in peace time The Reasons for the Judgement Korsah- the Chief Justice, delivering the judgement of the Supreme Court on his own behalf; Van Lare and Akiwumi, JJ. The grounds of detention served upon the said detainees contain particulars. Accordingly, it was not accepted that the High Court judge, on hearing the application was obliged to have released the suspects under rule 14 of Order 59 of the Supreme [High] Court Civil Procedure Rules, or to have ordered for a formal return to the writ. Thus the justices in Re Akoto said: Home Secretary, ex parte Greene. Home Secretary, ex parte

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Lees the applicants themselves exhibited to their affidavit copies of the orders under which they were detained, and no question was raised as to the accuracy of the copies. However, cases may arise where detained, and no question was raised where persons who are detained, whether under defence regulations or otherwise, do not, and perhaps cannot, inform the court of the order or warrant under which they are detained. One of the crucial grounds under which a decision of a judge or a court could be challenged is where a wrong law or rule had been wrongly applied or invoked as the basis for his decision. Akoto had been found to be farce. It was also not true that the Ghanaian Parliament of with all its entrenched provisions and special powers bestowed on the First President here, Articles 1 1 ; 8 and 55 was as sovereign and supreme as that of the United Kingdom. View all posts by:

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7: The Re Akoto and The Supreme Court Revisited

] Constitutional Entrenchment: Questions of Legal Possibility and Moral Desirability in the United Kingdom law and national law Factortame (No.2)29 contained dicta from the House of Lords of a general nature regarding sovereignty as it misapplied the later Merchant Shipping Act (MSA) in favour of the earlier ECA, violating the.

Understood in this way, all states have constitutions and all states are constitutional states. Anything recognizable as a state must have some means of constituting and specifying the limits or lack thereof placed upon the three basic forms of government power: Suppose it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure. The constitution of this state might then be said to contain only one rule, which grants unlimited power to Rex. He is not legally answerable for the wisdom or morality of his decrees, nor is he bound by procedures, or any other kinds of limitations or requirements, in exercising his powers. Whatever Rex decrees is constitutionally valid. They mean not only that there are norms creating legislative, executive and judicial powers, but that these norms impose significant limits on those powers. But constitutional limits come in a variety of forms. They can concern such things as the scope of authority e. Compare a second state in which Regina has all the powers possessed by Rex except that she lacks authority to legislate on matters concerning religion. Suppose further that Regina also lacks the power to implement, or to adjudicate on the basis of, any law which exceeds the scope of her legislative competence. We have here the seeds of constitutionalism as that notion has come to be understood in Western legal thought. In discussing the history and nature of constitutionalism, a comparison is often drawn between Thomas Hobbes and John Locke who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty e. But no one can command himself, except in some figurative sense, so the notion of limited sovereignty is, for Austin and Hobbes , as incoherent as the idea of a square circle. Whether this appeal to popular sovereignty provides Austin with an adequate means of dealing with constitutional democracies is questionable. But if we identify the commanders with the people themselves, then we seem inexorably led to the paradoxical result identified by H. Hartâ€”the commanders are commanding the commanders. Roughly speaking, we might define sovereignty as the possession of supreme and possibly unlimited normative power and authority over some domain, and government as those persons or institutions through whom that sovereignty is exercised. Once some such distinction is drawn, we see immediately that sovereignty might lie somewhere other than with the government and those who exercise the powers of government. And once this implication is accepted, we can coherently go on to speak of limited government coupled with unlimited sovereignty. As Locke might have said, unlimited sovereignty remains with the people who have the normative power to void the authority of their government or some part thereof if it exceeds its constitutional limitations. Though sovereignty and government are different notions, and normally apply to different entities, it nevertheless seems conceptually possible for them to apply to one and the same individual or institution. Anything less than such an ultimate, unlimited sovereign would, given human nature and the world we inhabit, destroy the potential for stable government and all that it makes possible. Entrenchment According to most theorists, another important feature of constitutionalism is that the norms imposing limits upon government power must be in some way, and to some degree, be entrenched, either legally or by way of constitutional convention. Most written constitutions contain amending formulae which can be triggered by, and require the participation of, the government bodies whose powers they limit. But these formulae invariably require something more than a simple decision on the part of the present government, through e. Sometimes constitutional assemblies are required, or super-majority votes, referendums, or the agreement of not only the central government in a federal system but also some number or percentage of the governments or regional units within the federal system. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would, in reality, be any such limitations. Consider Regina once again. Were she entitled, at her

discretion, to remove and perhaps later reinstate the constitutional restriction preventing her from legislating on some religious matter on which she had strong views, then it is perhaps questionable whether Regina could sensibly be said to be bound by this requirement. Of course this constitutional meta-rule or convention is itself subject to change or eliminationâ€”a fact that raises a host of further puzzles. For example, does such an act require application of the very rule in questionâ€”i. Entrenchment may be an essential element of constitutional regimes, but it would seem that constitutions neither can nor should be entrenched against the actions of a sovereign people. Writtenness Some scholars believe that constitutional norms do not exist unless they are in some way enshrined in a written document e. But most accept that constitutions or elements of them can be unwritten, and cite, as an obvious example of this possibility, the constitution of the United Kingdom. One must be careful here, however. Though the UK has nothing resembling the American Constitution and its Bill of Rights, it nevertheless contains a number of written instruments which have, for many centuries, formed central elements of its constitution. Magna Carta C. Furthermore, constitutional limits are also said to be found in certain principles of the common law, explicitly cited in landmark cases concerning the limits of government power. The fact remains, however, that historically the constitution of the UK has largely taken unwritten form, suggesting strongly that writtenness is not a defining feature of constitutionalism. Why, despite the existence of seemingly obvious counter-examples, might someone be led to think that constitutional norms must be written rules, as opposed to more informal conventions or social rules? One possible reason[10] is that unwritten rules and conventions are sometimes less precise and therefore more open to interpretation, gradual change, and ultimately avoidance, than written ones. If this were true, then one might question whether an unwritten rule could, at least as a practical matter, serve adequately to limit government power. But there is no reason to accept this line of argument. Long standing social rules and conventions are often clear and precise, as well as more rigid and entrenched than written ones, if only because their elimination, alteration or re-interpretation typically requires widespread changes in traditional attitudes, beliefs and behaviour. And these can be very difficult to bring about. Montesquieu and the Separation of Powers Does the idea of constitutionalism require, as a matter of conceptual or practical necessity, the division of government powers urged by Montesquieu and celebrated by Americans as a bulwark against abuse of state power? But how, it might be asked, can she be the one qua judge who determines whether her legislation satisfies the prescribed constitutional limitation? Perhaps Bishop Hoadly was right when he said in a sermon before the English King: Although some constitutional limits, e. Regina might argue that a decree requiring all shops to close on Sundays the common Sabbath does not concern a religious matter because its aim is a common day of rest, not religious observance. That constitutions often raise such interpretive questions gives rise to an important question: Does the possibility of constitutional limitation on legislative and executive power require, as a matter of practical politics, that the judicial power by which such limitations are interpreted and enforced reside in some individual or group of individuals distinct from that in which these legislative and executive powers are vested? In modern terms, must constitutional limits on a legislative body like Parliament, the Duma or Congress, or an executive body like the President or her Cabinet, be subject to interpretation and enforcement by an independent judiciary? Marbury v Madison settled this question in the affirmative as a matter of American law, and most nations follow Marbury and Montesquieu in accepting the practical necessity of some such arrangement. But it is not clear that the arrangement truly is practically necessary, let alone conceptually so. Bishop Hoadly notwithstanding, there is nothing nonsensical in the suggestion that X might be bound by an entrenched rule, R, whose interpretation and implementation is left to X. This is, arguably, the situation in New Zealand where the courts are forbidden from striking down legislation on the ground that it exceeds constitutional limits. Observance and enforcement of these limits are left to the legislative bodies whose powers are nonetheless recognized as constitutionally limited and subject to whatever pressures might be imposed politically when state actions are generally believed to violate the constitution. It is important to realize that what rule, R, actually requires is not necessarily identical with what X believes or says that it requires. Nor is it identical

with whatever restrictions X actually observes in practice. That constitutional limits can sometimes be avoided or interpreted so as to avoid their effects, and no recourse be available to correct mistaken interpretations and abuses of power, does not, then, imply the absence of constitutional limitation. But does it imply the absence of effective limitation? Perhaps so, but even here there is reason to be cautious in drawing general conclusions. And whatever their faults, there is little doubt that many Parliaments modeled on the British system typically act responsibly in observing their own constitutional limits. Constitutional Law versus Constitutional Convention The idea of constitutionalism requires limitation on government power and authority established by constitutional law. But according to most constitutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law. Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of constitutional conventions which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers. An example of a British constitutional convention is the rule that the Queen may not refuse Royal Assent to any bill passed by both Houses of the UK Parliament. Perhaps another example lies in a convention that individuals chosen to represent the State of Florida in the American Electoral College the body which actually chooses the American President by majority vote must vote for the Presidential candidate for whom a plurality of Floridians voted on election night. Owing to the fact that they are political conventions, unenforceable in courts of law, constitutional conventions are said to be distinguishable from constitutional laws, which can indeed be legally enforced. It includes constitutional conventions as well. We must further recognize the possibility that a government, though legally within its power to embark upon a particular course of action, might nevertheless be constitutionally prohibited from doing so. Should she violate one of these conventions, she would be acting legally, but unconstitutionally, and her subjects might well feel warranted in condemning her actions, perhaps even removing her from officeâ€”a puzzling result only if one thinks that all there is to a constitution is constitutional law. Constitutional Interpretation As we have just seen, there is often more to a constitution than constitutional law. As we have also seen, constitutional norms need not always be written rules. Despite these important observations, two facts must be acknowledged: Differences of view on these matters come to light most forcefully when a case turns on the interpretation of a constitutional provision that deals with abstract civil rights e. As we shall see, stark differences of opinion on this issue are usually rooted in different views on the aspirations of constitutions or on the appropriate role of judges within constitutional democracies. Theories of constitutional interpretation come in a variety of forms, but they all seem, in one way or another, to ascribe importance to a number of key factors: The roles played by each of these factors in a theory of constitutional interpretation depend crucially on how the theorist conceives of a constitution and its role in limiting government power. Simplifying somewhat, there are two main rival views on this question. On the one side, we find theorists who view a constitution as foundational law whose principal point is to fix a long-standing framework within which legislative, executive and judicial powers are to be exercised by the various branches of government. Such theorists will tend towards interpretative theories which accord pride of place to factors like the intentions of those who created the constitution, or the original public understandings of the words chosen for inclusion in the constitution. On such a fixed view of constitutions, it is natural to think that factors like these should govern whenever they are clear and consistent. And the reason is quite straight forward. From this perspective, a constitution not only aspires to establish a framework within which government powers are to exercised, it aspires to establish one which is above, or removed from, the deep disagreements and partisan controversies encountered in ordinary, day to day law and politics. It aspires, in short, to be both stable and morally and politically neutral. To be clear, in saying that a constitution aspires, on a fixed view, to be morally and politically neutral, I in no way mean to deny that those who take this stance believe that it expresses a particular political vision or a set of fundamental commitments to certain values and principles of political morality. All constitutional theorists will agree that constitutions typically enshrine,

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indeed entrench, a range of moral and political commitments to values like democracy, equality, free expression, and the rule of law. But two points need to be stressed. First, fixed views attempt to transform questions about the moral and political soundness of these commitments into historical questions, principally concerning beliefs about their soundness. The task is not to ask: What do we now think about values like equality and freedom of expression? Rather, it is to ask: What did theyâ€”the authors of the constitution or those on whose authority they created the constitutionâ€”in fact think about those values? So stability and neutrality are, on fixed views, served to the extent that a constitution is capable of transforming questions of political morality into historical ones.

8: Constitution - Wikipedia

1 Optimal Entrenchment of Legal Rules Michael D. Gilbert January 4, ABSTRACT Should law respond readily to society's evolving views, or should it.*

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