

## PRELIMINARY WARNINGS ON “CONSTITUTIONAL” IDOLATRY

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By

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“Men possess thoughts, but symbols possess men”.<sup>1</sup>

Contemporary societies covet the notion of a written constitution. Yet should Britain choose to draft one, can I offer this important suggestion: *please*, call it anything but a “Constitution”. This statement is only slightly made in jest; in fact, it is quite serious. Constitutional fetishism,<sup>2</sup> constitutional worship<sup>3</sup> or “constitutional idolatry”,<sup>4</sup> is nothing to take lightly. While there has been a copious amount of commentary on the prospects and potential form of a UK written constitution, in addition to its history and evolution, the possibility of constitutional idolatry becoming a significant factor throughout the citizenry, in the political arena, and especially in constitutional review and adjudication, appears to have been left out of the discussion.<sup>5</sup> This is unfortunate, because the enactment of a codified Constitution will have an impact upon all these aspects in one way or another, and the potential development of some form of constitutional worship should be further discussed and debated before any action is taken.

Eighteenth and nineteenth century Britons, as Sedley recognises, would probably not have given the same puzzled look when asked about their constitution, considering the “belief that a constitution is a document and that we do not have one is a comparatively recent phenomenon”.<sup>6</sup> Yet signs increasingly point to some type of written constitutional document developing in the UK.<sup>7</sup> Without one codified document the British constitution remains a diverse combination of statutes, common law, customs, manuals, parliamentary rules, and other entities. The “flat” nature of law in the UK contributes to a unique and dynamic legal system. As Norton writes, “[t]here is no clear or formal dividing line between what constitutes a core component of the constitution and what does not”.<sup>8</sup> A codified Constitution would change this significantly, incorporating into the legal landscape a more hierarchical and potentially stagnate structure. Furthermore, and importantly to this piece, there’s little question such a document would threaten the notion of parliamentary sovereignty,<sup>9</sup> and Britain’s distinctively structured and widely recognised “political constitution”.<sup>10</sup> In addition to these overarching changes, the effects of

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<sup>1</sup> M. Lerner, “Constitution and Court as Symbols” (1937) 46(8) *Yale Law Journal* 1290, 1293. For this quotation Lerner was indebted to Professor Hermann Kantorowicz, University of London.

<sup>2</sup> Lerner, “Constitution and Court as Symbols” (1937) 46(8) *Yale Law Journal* 1294-1305.

<sup>3</sup> F. I. Schechter, “The Early History of the Tradition of the Constitution” (1915) *American Political Science Review* 9(4), 707-734.

<sup>4</sup> M. Klarman, “A Skeptical View of Constitution Worship”, Constitution Day lecture, Johns Hopkins University (16 Sept 2010) at <http://balkin.blogspot.tw/2010/09/skeptical-view-of-constitution-worship.html>.

<sup>5</sup> Throughout the article I use “constitutional idolatry”, “constitutional fetishism” and “constitutional worship” interchangeably.

<sup>6</sup> S. Sedley, “No Ordinary Law” (1998) 30(11) *London Review of Books* 20.

<sup>7</sup> A. Blick, “Codifying – or not codifying – the UK constitution: A Literature Review”, House of Commons Political and Constitutional Reform Committee (2011) pp. 17-24.

<sup>8</sup> P. Norton, “Introduction: A Century of Change” in P. Norton (ed) *A Century of Constitutional Reform* (West Sussex: Wiley, 2011), p. 2.

<sup>9</sup> V. Bogdanor and S. Vogenauer, “Enacting a British Constitution: Some Problems” (2008) P.L. 38, 53-57.

<sup>10</sup> J.A.G. Griffith, “The Political Constitution” (1979) 42 M.L.R. 1-21.

constitutional idolatry could arise and become problematic.<sup>11</sup> This article focuses on three such problems: i) an over willingness to assert the “constitutional” or “unconstitutional” labels regarding issues of governance and other societal problems may be developed by politicians, the media, and the general public, leading to a devaluation – or oversimplification – of constitutional discussion and debate; ii) judges using “constitution” as a rhetorical device for expanding judicial power, and also giving undue weight to the opinions of the founders or writers of such a document, negating contemporary viewpoints (including their own); and iii) a lack of incentive by the people – as opposed to the courts – to enact constitutional change.

While I remain sceptical of many (overly) positive assertions regarding the grandeur of such documents, there are certainly valid arguments for enacting written constitutions. Delineating the structure of the state and operations of governance, entrenching widely held fundamental values and rights, and expressing the form and content of state power are among some of the major reasons for enacting a constitution. The Human Rights Act 1998 and devolution legislation, in addition to other significant documents (acts, codes, manuals, etc.), have already provided the UK with a sense of what a formal Constitution may entail. Further, without such a codified document the UK is potentially exposed to constitutional tumult, based on the whims of the electorate and the strength of parliamentary majorities. Indeed, the incoming Conservative government has proposed changing major aspects of the UK constitution, such as scrapping the Human Rights Act 1998 and potentially exiting the European Union. Nevertheless, even with a parliamentary majority these changes will be extremely difficult to accomplish, and both – at the time of publication – remain intact.

Although it is acknowledged that enacting any type of foundational document, whatever called, encompasses particular implications, this piece contends that attaching the word “constitution” to a foundational document enhances such consequences, leading to a more distinctive “constitutional” fetishism. Difficulties arise because over centuries the word “constitution” has evolved from a largely structure-based meaning into a widely expansive symbolic meaning. Beyond merely delineating the structure of a state, the word now carries a variety of connotations. Some see it as the ultimate illustration of “we the people” popular sovereignty or as a vindication of the rule of law, while others see it as the completion or ultimate formation of a state or a government.<sup>12</sup> Indeed contemporary constitutions, and especially Constitutions, serve highly symbolic functions that can manifest into significant issues for law, politics and the wider democratic state. Nowadays the word “constitution” is often used as a legal, political, and psychological truncheon: it has been employed to have ordinary documents masquerade as constitutions, been brazenly used to hollow out jurisdiction, and also been applied to have legislators think in legal, as opposed to political, terms.<sup>13</sup> Given some of the rhetoric in the UK surrounding the possibility of a written

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<sup>11</sup> However the effects of constitutional idolatry do not have to be negative; some may well have a positive impact.

<sup>12</sup> Thomas Paine famously wrote that a constitution “is a thing antecedent to a government” (M. Loughlin, *The Idea of Public Law* (Oxford: OUP, 2004), p. 46).

<sup>13</sup> Regarding the latter point, Tushnet believes this happens because of “judicial overhang”: when lawmakers and others become apathetic to constitutional matters arising in the parliamentary process, believing the judiciary will remedy any such mistakes (M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: PUP, 1999) pp. 57-65; M. Tushnet, *Weak Courts: Strong Rights* (Princeton: PUP, 2009) pp. 81-82).

constitution coming into being (i.e., “A New Magna Carta”, “Constitution Carnival”, “Commission for Democracy”),<sup>14</sup> problems of “constitutional” fetishism could become substantially more relevant if a founding British document is enacted.

Presently constitutions are “more widely accepted than at any other point in modern political history”,<sup>15</sup> but not all jurisdictions have a written “Constitution” per se. Some, such as Hong Kong and Germany, have “Basic Law”.<sup>16</sup> Others, such as Hungary and Vatican City, have “Fundamental Law”. In some jurisdictions higher law is known as a collection of “Organic Law”;<sup>17</sup> while in others a “National Charter” or “Covenant” is recognised.<sup>18</sup> Of course, in some states primary statutory law can be “constitutional” (e.g., Britain, New Zealand). But those terms are not the only options, and nor have they been previously.<sup>19</sup>

The UK may have a particular historical interest in not labelling any written document a “Constitution”, especially considering how preceding constitutional and quasi-constitutional documents have been titled. Britain’s, and often thought of as democracy’s, first constitutional document was known as the Magna Carta (“Great Charter” or “Big Charter”). The document “is widely thought of as a precursor to modern declarations of independence and constitutions”.<sup>20</sup> But other documents have been uniquely named. The only official written constitution Britain ever had, however briefly, was named the “Instrument of Government”,<sup>21</sup> implemented by Oliver Cromwell in 1653.<sup>22</sup> Between 1649-1660 several attempts were made to devise a written constitution, but none were called a “constitution”; the documents used “terms such as covenant, instrument, agreement, model, paramount or fundamental law”.<sup>23</sup> Next came the modern-sounding Bill of Rights 1689, which further restricted the king’s powers while enhancing parliament’s. The Act of Settlement 1701 followed, which though a “considerable achievement” that went some way to ensuring judicial independence, may have had more symbolic than substantive effects.<sup>24</sup> The Acts and Treaty of Union between Scotland and England (1707) also had constitution-like effects, including expressed fundamental values; but while they

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<sup>14</sup> Citations in order of examples: Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014) HC 463; LSE Professor Conor Gearty’s “Crowdsourcing the UK’s Constitution” project at <http://blogs.lse.ac.uk/constitutionuk/>; Blackburn, “Enacting a Written Constitution for the United Kingdom” 36(1) *Statute Law Review* 1, 21.

<sup>15</sup> M. Loughlin, “The Constitutional Imagination” (2015) 78(1) *M.L.R.* 1, 2.

<sup>16</sup> Macau, Israel, and Saudi Arabia also use Basic Law.

<sup>17</sup> France’s organic laws contain more power than statutes but do not have “constitutional” status. Spain and Taiwan have similar organic laws.

<sup>18</sup> See, e.g., the Palestinian National Authority.

<sup>19</sup> Although I attempt to use examples below from jurisdictions that employ alternative constitutional labels, it should be noted that an empirical examination of such phenomena, which would certainly be interesting, is outwith the scope of this article.

<sup>20</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008) p. 1.

<sup>21</sup> M. Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: OUP, 2013), p. 49.

<sup>22</sup> There is dispute over this. Gordon notes the UK has had two written Constitutions, the second being the “Humble Petition and Advice”, written in 1857 to replace the Instrument of Government (Gordon, *Repairing British Politics* (2010), p. 15, n. 33). However, Gordon does not elaborate on this, and I have found no other text that claims the Humble Petition and Advice as an “official” written Constitution.

<sup>23</sup> G. Sartori, “Constitutionalism: A Preliminary Discussion” (1962) *American Political Science Review* 56(4), 853, 860.

<sup>24</sup> Alison, *English Historical Constitution* (2007), pp. 81-83.

were “[c]leary of momentous impact”,<sup>25</sup> throughout the years they have not been treated as an entrenched “constitution” by governmental organs.<sup>26</sup>

More recent proposals have also refrained from using “constitution”. Tony Benn called his 1991 proposal the “Commonwealth of Britain Bill”.<sup>27</sup> The most modern manifestation of a quasi-constitutional document came in the form of the Human Rights Act 1998. That same year Scotland gained what has been widely regarded as its own partial “written constitution”, but which is known simply as the Scotland Act 1998. Interestingly, at the turn of the century some statutory law began to be overtly labelled “constitutional” in nature: both the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010 provided significant changes to Britain’s governmental structure. Nevertheless, finding a way around a written “Constitution” has been, and remains, in the UK’s best interests.

This article is divided into four primary sections. The first explores how the word “constitution” has changed meanings over time. Once used primarily to refer to a country’s form or arrangement of government,<sup>28</sup> the word now carries a tremendous amount of weight. It also discusses how the legal, political and psychological effects of a written “Constitution” go beyond being firmly entrenched positive law. The following section explains why a written document with “constitution” on its face may have implications for the judiciary, including: placing increased constitutional review in the hands of judges and also allowing the document to be seen as the ultimate interpretative device. Next, constitutions can sometimes turn into stagnate entities (e.g., the US Constitution is a prime example).<sup>29</sup> Scholars contend this occurs because of constitutional amendment rules or divided politics, but I argue a significant cognitive element is also involved. Although Weiler<sup>30</sup> demonstrates how the word “constitution” can be used as an enabling device to gather public interest and increase discussion in particular situations, the converse can also be true: the majesty attached to “Constitutions” can sometimes provide citizens a disincentive to change such documents. The considerable amount of constitutional change the UK experienced over the past couple decades would not have been possible with a written constitution, especially not an enduring document seen as a prominent national symbol. Finally, constitutional reform discussion often only discusses levels of “constitutional” documents while neglecting more sensible options, such as incremental organic laws.

Throughout the article I often use examples from America to demonstrate the power of constitutional idolatry. This is done not because the UK and US are on similar

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<sup>25</sup> C. M. G. Himsworth and C. M. O’Neill, *Scotland’s Constitution: Law and Practice* (2nd ed)(West Sussex: Bloomsbury Professional, 2009), p. 39.

<sup>26</sup> Wicks, *The Evolution of a Constitution* (2006), pp. 51-52. Although Himsworth and O’Neill raise the argument the treaty should be treated as a written constitution, they also note the many “formidable counter-arguments” against such a notion. (Himsworth and O’Neill, *Scotland’s Constitution* (2009), p. 40)

<sup>27</sup> *Commonwealth of Britain Bill* (HMSO: London, 1991).

<sup>28</sup> Lutz, “From Covenant to Constitution in American Political Thought” (1980) 10(4) *Publius* 101, 105.

<sup>29</sup> See B. Ackerman, “The Living Constitution” (2007) 120 *Harvard Law Review* 1737, 1741 (“a funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way. This is no small problem for a country that imagines itself living under a written Constitution”).

<sup>30</sup> J. H. H. Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 181.

constitutional trajectories or because they share a common predilection for unifying political symbols, but because the birth of modern constitutionalism arose in late 18th century America, and its worldwide impact has been profound. Additionally, for over two centuries and more America's Constitution has sown deep roots throughout many facets of contemporary society, and constitutional idolatry has in many ways become a civil, secular religion. Examining the effects of such a unique phenomenon of constitutional fetishism could aid the UK, and especially those advocating a modern symbolic constitution, when discussing the ramifications of a codified document.

## The weighty nature of “constitution”

In its modern form the term “constitution” remains relatively young.<sup>31</sup> Seventeenth and sometimes eighteenth century uses of the word do associate it with law and statues, among other things, but it was “not used to refer to a specific document”.<sup>32</sup> Lord Bolingbroke noted in 1735 that “[b]y Constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community hath agreed to be governed”.<sup>33</sup> Historically, it has meant the form in which a state is organised, and “especially as to the location of sovereign power”.<sup>34</sup> Even Aristotle, often said to be the first constitutional comparativist, used the word *politeia*, which does not mean “constitution”, but “the way in which a polity is patterned”.<sup>35</sup> In contemporary discussion within Britain over a written constitution many commentators appear to desire not a *politeia* but a modern-day “constitution”, which, as Pryor notes, are often “reified as much for their rhetoric, ‘original’ appearance and supposed uniqueness as for their constitutive effects”.<sup>36</sup>

This article primarily discusses the word “constitution” from a legal and political perspective. However separating the legal and political functions of the word from its more personal (individual) connotations is also extremely difficult, if not impossible. Sometimes commentators, including judges and other legal actors, talk as if the legal, political, and personal meanings are one in the same, or inherently intertwined through a national text. I believe this overlap is dangerous, and can be especially so in regard to interpreting such texts. Yet the phenomenon of combining (or perhaps confusing) these multiple meanings is also not surprising, considering:

Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our

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<sup>31</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) *American Political Science Review* 56(4), 853, 859.

<sup>32</sup> Lutz, “From Covenant to Constitution in American Political Thought” (1980) 10(4) *Publius* 101, 114.

<sup>33</sup> Viscount Bolingbroke, *On Parties* (1735) 108 as quoted in D. S. Lutz, “From Covenant to Constitution in American Political Thought” (1980) 10(4) *Publius* 101, 114.

<sup>34</sup> Lutz, “From Covenant to Constitution in American Political Thought” (1980) 10(4) *Publius* 101, 113.

<sup>35</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56(4) *American Political Science Review* 853, 860.

<sup>36</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008), p. 165.

constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community or as a union”.<sup>37</sup>

The modern conception of a “constitution” has largely been attributed to the American Constitution of 1787,<sup>38</sup> which included a Bill of Rights and began with the words “We the People”, and also the 1789 French Declaration of Rights.<sup>39</sup> Both formed in the midst of violent revolutions, from this point forward the idea of a “constitution” radically changed how people think about the word, its meanings, and the power of subsequent documents.<sup>40</sup> Constitutions no longer merely encapsulated the “entire body of laws, institutions, and customs that comprised” a state, but the idea of “*the people* constituting a state”.<sup>41</sup> It then followed that some form of written document, “in visible form”,<sup>42</sup> would be produced and displayed. It was this incorporation of “the people” into modern constitutions that critically changed the fundamental meaning of the word, and these notions of popular sovereignty have endured.<sup>43</sup> For many, including those in America, the Constitution is considered a form of civil religion, or scripture.<sup>44</sup> Although valid questions remain as to the rhetoric versus reality of the US Constitution,<sup>45</sup> the document remains held in exceptionally high esteem, as does the Supreme Court, the supposed “guardians of the Constitution”. Despite the fifteen constitutions in France since their 18th century revolution,<sup>46</sup> the Declaration of Rights (1789) and the notion of popular sovereignty have also endured, and aspects of the former have even been incorporated into the most recent 1958 constitution.<sup>47</sup>

One of the major differences between historical and modern constitutions is that modern “[c]onstitutional texts are performative: they perform an action, rather than only describe an event or make a statement”.<sup>48</sup> In describing the essence of such documents, Pryor states:

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<sup>37</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 184.

<sup>38</sup> Loughlin, “The Constitutional Imagination” (2015) 78(1) *M.L.R.* 1, 2, 16.

<sup>39</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56(4) *American Political Science Review* 853, 860.

<sup>40</sup> Loughlin, *The Idea of Public Law* (2004), p. 46, 120.

<sup>41</sup> Loughlin, *The Idea of Public Law* (2004), pp. 120-121. Emphasis is mine.

<sup>42</sup> Loughlin, *The Idea of Public Law* (2004), p. 120, quoting Thomas Paine, (Thomas Paine, *Rights of Man, Common Sense and Other Political Writings*, Mark Philp ed. (Oxford: OUP, 1995), p. 122.

<sup>43</sup> However under some regimes (e.g., People’s Republic of China, North Korea) constitutions can be merely statements, or purely ornamental.

<sup>44</sup> H. P. Monaghan, “Our Perfect Constitution” (1981) 56(2-3) *New York University Law Review* 353-396;

T. C. Grey, “The Constitution as Scripture” (1984) 37(1) *Stanford Law Review* 1-25.

<sup>45</sup> D. Oliver, “Written Constitutions: Principles and Problems” (1992) 45(2) *Parliamentary Affairs* 135, 139. Oliver takes issue with the US Constitution’s “we the people” rhetoric.

<sup>46</sup> R. L. Maddox, *Constitutions of the World* (London: Routledge, 1996), p. 84.

<sup>47</sup> French const., preamble (“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004”.)

<sup>48</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008) p. 5.

“These written texts, like all writing, are therefore much more than *aides-mémoire*. They actively constitute and shape the laws, the history and the subjectivity of a nation. ...

These texts in turn help constitute a new body politic and establish a new narrative of origin – or history – for that nation”.<sup>49</sup>

The notion of performative constitutional texts stems from the fact that modern constitutions establish a hierarchy of laws, often policed by the judiciary.<sup>50</sup> Therefore the subsequent laws and history of a nation are to a significant extent shaped by that original, fundamental document. Loughlin has recently touched on the performative nature of such texts, acknowledging “the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape – political reality”.<sup>51</sup>

Given this modern change in meaning, it is unsurprising that the word also contains considerable symbolic value. When listing the arguments for a written constitution, the Commons Constitutional Reform Committee report notes that “[i]t would become a symbol and expression of national identity today and a source of national pride”.<sup>52</sup> There is little doubt this would be the case; after all, the report is brazenly entitled: “A New Magna Carta?”.<sup>53</sup> But that has not been the only disconcerting rhetoric. Constitution UK (Prof Conor Gearty’s organization) recently teamed up with the organisation Unlock Democracy, for an event entitled “Unlock Magna Carta”.<sup>54</sup> Additionally, Robert Blackburn labelled his proposed constitutional commission the “Commission for Democracy”.<sup>55</sup> Thus it appears the mere possibility of a “constitution” has encouraged a curious salivation *for* democracy, as if it had not already been realised. Outwith such bombast, questions remain as to whether Britain needs a written text to be such a visible and recognisable symbol, and if so, how powerful a symbol that text would be. The word “constitution” certainly elevates the status of legal or political arguments, and at times has an “enormous” impact when used.<sup>56</sup> Joseph Weiler aptly noted the power of the term when writing on the inappropriateness with which it was used to name the Treaty establishing a Constitution for Europe.<sup>57</sup> He wrote, “the treaty had to masquerade as a constitution in order to achieve the sought-after result”,<sup>58</sup> further stating that “the mere name of the document, rather than its content, has resulted in

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<sup>49</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008) p. 23.

<sup>50</sup> Loughlin, *The Idea of Public Law* (2004), p. 121.

<sup>51</sup> Loughlin, “The Constitutional Imagination” (2015) 78(1) M.L.R. 1, 3.

<sup>52</sup> Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014) HC 463, p. 19.

<sup>53</sup> Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014) HC 463.

<sup>54</sup> This event took place in London on 25 March 2015.

<sup>55</sup> Blackburn, “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) *Statute Law Review* 1, 21.

<sup>56</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173.

<sup>57</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173-174.

<sup>58</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 177.



a level of public debate and public discourse, notably referenda, which defines the process as never before in the course of European integration”.<sup>59</sup>

Should Britain decide to use the word on the face of a written document, such legal and extra-legal effects should not be easily dismissed, given that the power of language on legal and political processes is innate, and profound.<sup>60</sup> As Lerner noted in the early 20th century, humanity has “always used symbols in the struggle for power, but only latterly have we grown aware generally of their importance”.<sup>61</sup> The word “constitution” carries a tremendous amount of force; from a legal and political perspective it is often difficult to speak in more consequential terms. Writing in 1960 Sartori noted the following:

“Legal terminology...shares the same destiny as political terminology in general: that is, it tends to be abused and corrupted. And this is all the more the case in a time in which politicians have become ever more conscious of the ‘power of words’.

In our minds, constitution is a ‘good word.’ It has favorable emotive properties, like freedom, justice or democracy. Therefore, the word is retained, or adopted, even when the association between the utterance ‘constitution’ and the behavioural response that it elicits (e.g., ‘The constitution must be praised, for it protects my liberties’) becomes entirely baseless. More precisely, the political exploitation and manipulation of language takes advantage of the fact that the emotive properties of a word survive—at times for a surprisingly long time—despite the fact that what the word denotes, *i.e.*, the ‘thing,’ comes to be a completely different thing”.<sup>62</sup>

Such language effects would only be heightened under a written “Constitution”, as a hierarchical structure of law is implemented and “constitutional” arguments and problems take precedence over other legal and political matters. The United States is especially attuned to this type of language in regard to their enduring Constitution.

In 1937 Max Lerner, editor of *The Nation*, wrote that “[e]very tribe needs its totem and its fetish, and the Constitution is ours”.<sup>63</sup> Indeed, the US Constitution has so successfully become a symbol of national pride and is worshipped so widely among citizens that it is now often used as a political weapon. Even slightly questioning its provisions is sometimes akin to political heresy.<sup>64</sup> One of the most visceral examples of constitutional fetishism can

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<sup>59</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 181.

<sup>60</sup> See generally, D. Mellinkoff, *The Language of the Law* (Eugene, OR: Resource Publications, 2004); J. M. Conley and W. M. O’Barr, *Just Words: Law, Language and Power* (Chicago: University of Chicago Press, 1998); M. Edelman, *The Symbolic Uses of Politics*, 2nd ed (Chicago: University of Illinois Press, 1985); S. Lukes, *Power: A Radical View* (New York, NY: Palgrave, 1974). I have previously noted the power of language in the legislative/statutory context (B. C. Jones, “Manipulating Public Law Favorability: Is It Really This Easy?” (2013) 2 *British Journal of American Legal Studies* 511-531; B. C. Jones, “Westminster’s Impending Short Title Quandary” (2013) P.L. 223-232; B. C. Jones, “Do Short Bill Titles Matter? Surprising Insights from Westminster and Holyrood” (2012) 65 *Parliamentary Affairs* 448-462).

<sup>61</sup> Lerner, “Constitution and Court as Symbols” (1937) 46 (8) *Yale Law Journal* 1292.

<sup>62</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56 *American Political Science Review* 853, 855.

<sup>63</sup> Lerner, “Constitution and Court as Symbols” (1937) 46(8) *Yale Law Journal* 1294.

<sup>64</sup> B. Palmer, Founding Fathers Fetish, *Slate* (4 Oct 2012), at [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/10/mitt\\_romney\\_constitution\\_worship\\_when\\_did\\_politicians\\_stop\\_questioning\\_the\\_constitution\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/10/mitt_romney_constitution_worship_when_did_politicians_stop_questioning_the_constitution_.html).

be found in the relatively recently formed United States “Tea Party”. This political faction prides themselves on being the bearers of “constitutional” values, branding opposition to their ideals as constitutional violations. They have even gone so far as to encourage members to carry the document with them at all times.<sup>65</sup> For all intents and purposes the Republican Party has, sometimes begrudgingly and other times not, adopted the Tea Party, in addition to much of the group’s constitutional rhetoric. Elected Tea Party politicians caucus with Republicans, and the latter now often claim their party is the bearer of constitutional government. In a prominent example regarding “constitutional” acts of desperation, House Republicans decided to sue President Obama for overstepping his constitutional powers because he was executing a law that had been passed by Congress and subsequently challenged and ultimately deemed valid by the Supreme Court.<sup>66</sup> This particular legal action by House Republicans was widely acknowledged as political theatre, and was even akin to “impeachment light” by some media outlets, considering at the time there was nonsensical talk of full-scale impeachment of President Obama. Further, other valid and important constitutional arguments Republications had against the President at the time (e.g., the collection of citizen metadata, the use of drones, etc.) got suppressed because of such baseless “constitutional” rhetoric. Yet the political bantering about as regards “constitutional values” and “constitutional protectors” is preposterous: both Democrats and Republicans have major constitutional difficulties at times, and neither can claim ultimate “constitutional guardian” status. The unfortunate irony, however, is that the document which transformed the modern organisation and governance of democratic states to be situated around “we the people”, is now conveniently used as a hollow political truncheon.

But the Tea Party is merely the latest example of such “constitutional” infatuation; America’s Constitution has been worshipped since its enactment. Grey writes “[j]ust as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as sovereign, at least in secular matters, and the Constitution as the most authoritative legal expression of that popular will...it has been, virtually from the moment of ratification, a sacred symbol, the most potent emblem (along with the flag) of the nation itself”.<sup>67</sup> While America may not have a national church, “the worship of the Constitution would serve the unifying function of a national civil religion”.<sup>68</sup> The notion that constitutions are a sacred, almost religious document (i.e., a “covenant”) contains some linguistic foundations. Pryor writes that such a phenomenon may be inevitable, given that “[a] religious idiom therefore persists, despite the sometimes deliberately secular tone of modern constitutional texts”.<sup>69</sup>

Presently UK constitutional values are not worshipped by the citizenry, not overtly used as political weapons, and certainly not used as legal tactics against ministers or others. Political parties have platforms and may value certain issues above others, but the accusation of unconstitutional proposals, bills, or laws is not lightly and casually brought

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<sup>65</sup> Economist, The perils of constitution-worship (23 Sept 2010), at <http://www.economist.com/node/17103701>.

<sup>66</sup> J. W. Peters, “House Votes to Sue Obama for Overstepping Powers” *New York Times* (30 July 2014), A15, at <http://nyti.ms/1ocvpYu>.

<sup>67</sup> Grey, “The Constitution as Scripture” (1984) 37 *Stanford Law Review* 1, 3.

<sup>68</sup> Grey, “The Constitution as Scripture” (1984) 37 *Stanford Law Review* 1, 18.

<sup>69</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008) p. 5.

about. Should the UK adopt a written constitution, such circumstances could easily change. Individuals or groups may start claiming to be guardians or protectors of such a document, and “constitutional” could be used as a proxy for “right or wrong” moral, political, and legal values. Therefore use of the word on any document needs to be thoroughly considered, given the discrepancies between its historical and modern meanings. As Sartori writes,

“Yet we now refrain from saying ‘this is what the term constitution *ought* to mean,’ even though we are well aware of the fact that ‘constitution’ no longer bears a common acceptance and even though we are in a good position to realize that a situation of ambiguity and confusion is being deliberately fostered by political double-talk and insincerity, with the precise purpose of deceiving the audience ...

I am not advocating, therefore, the preferability of one type of constitutional *telos* in relation to another. I am simply saying that it is a scientific requirement to discuss whether it is proper to use ‘constitution’ where, in order that the public (and even, at times, the expert) be not deceived, we should *not* use this term.”<sup>70</sup>

## Judicial implications

At some level judicial implications would result if the UK adopted a codified constitution.<sup>71</sup> In part this is because some constitutional claims would become justiciable,<sup>72</sup> and a form of constitutional legalism would emerge.<sup>73</sup> Barber and Tucker have previously written about how power would be shifted to the courts.<sup>74</sup> I do not hope to revisit their basic arguments here, but merely expand on them. Below are two significant factors to keep an eye on in regard to “constitutional” fetishism: the expansion of constitutional review and the task of constitutional interpretation.

## Expansion of judicial constitutional review

American evolution of judicial review provides an interesting example as to how a written “Constitution” may affect parliamentary sovereignty. In the early years of the Republic the Supreme Court declined to strike down congressional laws. *Marbury v Madison*<sup>75</sup> changed this, “justif[ying] judicial review on the ground that the Constitution was written law—a legal document”.<sup>76</sup> From this point forward the “practice of judicial review has largely rested” on this belief.<sup>77</sup> Since judicial review “was not granted by the text of the

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<sup>70</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56(4) *American Political Science Review* 853, 859. Emphasis in original.

<sup>71</sup> House of Commons Political and Constitutional Reform Committee, “Constitutional role of the judiciary if there were a codified constitution”, (2013-2014), HC 802.

<sup>72</sup> D. Oliver, “Written Constitutions: Principles and Problems” (1992) 45(2) *Parliamentary Affairs* 142-146.

<sup>73</sup> Loughlin, *The Idea of Public Law* (2004), pp. 47-52.

<sup>74</sup> N. W. Barber, “Against a Written Constitution” (2008) P.L. 13-15; A. Tucker, “Constitutional Writing and Constitutional Rights” (2013) P.L. 345-362.

<sup>75</sup> 5 U.S. 137 (1803).

<sup>76</sup> Grey, “The Constitution as Scripture” (1984) 37 *Stanford Law Review* 1, 15 (“Much of the rhetoric justifying judicial review invokes the definite and objective character of a written constitution”.)

<sup>77</sup> Grey, “The Constitution as Scripture” (1984) 37 *Stanford Law Review* 1, 14.

constitution itself”, Marshall relied “on more indirect arguments”.<sup>78</sup> Inevitably rhetoric was one of these, as Marshall incorporated such lines as: “the Constitution is written”,<sup>79</sup> “the very foundation of all written Constitutions”,<sup>80</sup> and “in America where written Constitutions have been viewed with so much reverence”.<sup>81</sup> These were powerful statements in 1803, and given the evolution of the word “constitution” and the splendour with which it has come to be used, stand even more powerfully now. Additionally, it is worth noting that in *Marbury* Justice Marshall vociferously repeated (over sixty times) the word “Constitution” in defence of judicial review and in lieu of other popular terms at the time, such as “fundamental law”, “superior law”, or “paramount law”.<sup>82</sup> His decision extolling the virtues of the American Constitution is one of the most influential and widely cited judicial decisions in history. Such judicial ruptures are not unheard of in modern times. In 1995 the Israeli Supreme Court, explicitly relying on *Marbury*’s logic, decided its Basic Law had “supra-legal” constitutional status and abruptly turned the country from “a state based on the English model of parliamentary sovereignty” into a “constitutional state”,<sup>83</sup> thus considerably enhancing judicial review.<sup>84</sup> It therefore seems that “constitutional” desire, even in jurisdictions that use alternative naming, could be inherently difficult to suppress. This is especially true if that desire coincides with an increase in judicial authority, considering “the precise constitutional jurisdiction and powers of the courts”<sup>85</sup> are hardly easily settled matters under any written constitution.

The Commons literature review on codifying the constitution noted that most of those proposing codified constitutions “appear to envisage constitutional supremacy as supplanting Parliament; with judges able to rule acts of Parliament incompatible with the constitution and strike them down”.<sup>86</sup> Note the intriguing use of “constitutional” as opposed to “judicial” supremacy in that statement, which appears designed to mitigate such a drastic transition in governance. Should this change happen the UK would have to address at length the “central obsession”<sup>87</sup> of contemporary constitutional scholarship: the counter-majoritarian difficulty.<sup>88</sup> This arduous task has led to a divide among scholars and practitioners over strong versus weak judicial review, the true constitutional guardians, and more consequentially, the proper arrangement and mechanics of government. Perhaps potential turf battles in the UK would not be too fierce if a document expressly authorised the judiciary, or perhaps the Supreme Court, to perform constitutional review (the US

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<sup>78</sup> A. Tucker, “Constitutional Writing and Constitutional Rights” (2013) P.L. 352.

<sup>79</sup> *Marbury v Madison*, 5 U.S. 137 (1803), p. 176.

<sup>80</sup> *Marbury v Madison*, 5 U.S. 137 (1803), p. 178.

<sup>81</sup> *Marbury v Madison*, 5 U.S. 137 (1803), p. 178.

<sup>82</sup> These terms are used in the decision, albeit infrequently.

<sup>83</sup> Navot, “Israel” in *How Constitutions Change* (2013), p. 198.

<sup>84</sup> Y. Rabin and A. Gutfeld, “*Marbury v. Madison* and Its Impact on Israeli Constitutional Law” (2007) 15 *Univ. of Miami International & Comparative Law Review* 303, 318-330.

<sup>85</sup> Blackburn, “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) *Statute Law Review* 1, 6.

<sup>86</sup> A. Bick, “Codifying – or not codifying – the UK constitution” (2011) House of Commons Political and Constitutional Reform Committee, p. 4.

<sup>87</sup> E. C. Dawson, “Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage” (2013) 16 *University of Pennsylvania Journal of Constitutional Law* 97, 100.

<sup>88</sup> A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed)(New Haven, CT: Yale University Press, 1986)

Constitution does not do so). However even if this is inserted that does not solve the intractable problems associated with the counter-majoritarian difficulty and democratic governance.

Some commentators appear to believe parliamentary sovereignty is incompatible with “we the people” popular sovereignty.<sup>89</sup> But it is unclear how replacing parliamentary sovereignty with an increase in judicial authority resolves the problem. The argument seems to be: adding “we the people” constitutionalism (i.e., enacting a Constitution) increases popular sovereignty; a fiction that has been decisively and thoroughly challenged.<sup>90</sup> Indeed, the judicialisation of “we the people” popular sovereignty is an ironic and unfortunate occurrence. For all intents and purposes in Westminster, the fully-elected Commons controls the legislative agenda (with the backing of the executive, of course). The Parliament Acts of 1911 and 1949 set this in place by ending the Lords’ veto of primary legislation, based around the belief that the elected government should be the foundational element of parliamentary sovereignty.<sup>91</sup> While there are still lingering difficulties with the Lords, the notion of parliamentary sovereignty does not conflict with popular sovereignty;<sup>92</sup> if anything, through representative government, it validates it. Further, the idea that “we the people” popular sovereignty often entails providing unelected judges the power to strike down acts sanctioned by elected representatives remains one of the most inconsistent realities of 21st century constitutionalism. Ultimately, in many democracies operating under such circumstances, “we the people” can often equate to “we the judiciary”.

## The ultimate interpretative device?

Another important question is how a “Constitution” would be interpreted by the judiciary. Given how the American Constitution evolved in terms of its cultural adoration, this practice remains highly controversial, with the main arguments being “over what [judges] should interpret and what interpretative attitudes they should adopt”.<sup>93</sup> Unsurprisingly, constitutional fetishism is evident in such interpretive exercises. A prominent example is currently spearheaded by Supreme Court Justice Antonin Scalia. His “originalist/textualist” theory has become highly significant in constitutional interpretation throughout America’s judiciary and legal scholarship.<sup>94</sup> The philosophy is based around the idea that language and intent should be strictly construed, and “understood in the contexts of the society that adopted it”<sup>95</sup> (i.e. constitutional meaning is fixed to when it was adopted). Although this approach can certainly be regarded as a form of constitutional fetishism, reasonable

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<sup>89</sup> Gordon, *Repairing British Politics* (2010).

<sup>90</sup> See, e.g., E. S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988).

<sup>91</sup> C. Ballinger, *The House of Lords 1911-2011: A Century of Non-Reform* (Oxford: Hart, 2012), p. 3.

<sup>92</sup> See, e.g., M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart, 2015), pp. 49 (“parliamentary and popular sovereignty share a common democratic basis”).

<sup>93</sup> Grey, “The Constitution as Scripture” (1984) 37 *Stanford Law Review* 1.

<sup>94</sup> See, e.g., D. L. Drakeman, “What’s the Point of Originalism” (2014) 37 *Harvard Journal of Law & Public Policy* 1123-1150.

<sup>95</sup> P. Brest, “The Misconceived Quest for Original Understanding” (1980) 60 *Boston University Law Review* 204, 208.

arguments exist for texts to be interpreted with these techniques in mind, as opposed to allowing judges to determine the meaning of words based on contemporary understandings. A converse approach, “living constitutionalism”, also remains popular among judges and scholars: this “stems from recognition that any written legal text and any set of constitutional provisions, however introduced, at the end of the day produces different normative outcomes when the context in which they are embedded and to which they are to be applied significantly changes”.<sup>96</sup>

The direct and indirect consequences of originalism—and more widely, the popular embrace of such Constitutional fetishism—have proved significant, in part because ambiguous constitutional phrases have permitted the justices wide interpretative latitude.<sup>97</sup> The second amendment’s “right to keep and bear arms” provides a good example.<sup>98</sup> While there is some debate as to whether this applies merely to a “well regulated militia” (or should even be applicable at all in the 21st century), in *District of Columbia v Heller*<sup>99</sup> the Supreme Court made clear that this phrase allows the citizenry to keep and bear arms, no matter if states, counties or cities had previously banned such weapons based on evolving standards of public safety regarding firearm regulation. *Heller* was authored by Justice Scalia, and is sometimes regarded as “the triumph” of originalist doctrine.<sup>100</sup> Although firearm violence in the US has steadily declined in recent years, over 11,000 people still die from firearm related homicides each year,<sup>101</sup> and mass shootings remain a common occurrence.<sup>102</sup> Of course, to attribute firearm violence in America to one specific constitutional interpretative theory is unfair, and this much is acknowledged. However there is little doubt that the theory and its larger popular embrace has at least indirectly contributed to the continuance and promotion of the right to keep and bear arms in 21st century America, even at the expense of such evolving societal safety standards.<sup>103</sup> Such promotion and acceptance largely stems from constitutional worship of an antiquated document and its authors. As regards this, Weiler notes the following:

“[T]here is also an exquisite irony in a constitutional ethos that, while appropriately suspicious of older notions of organic and ethnic identity, at the very same time implicitly celebrates a supposed unique moral identity, wisdom, and, yes,

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<sup>96</sup> C. Fusaro and D. Oliver, “Towards a Theory of Constitutional Change”, in Oliver and Fusaro, *How Constitutions Change: A Comparative Study* (2011) p. 406.

<sup>97</sup> For an interesting take on this, see J. Rosen, “If Scalia Had His Way” *New York Times* (8 Jan 2011), WK1, at <http://www.nytimes.com/2011/01/09/weekinreview/09rosen.html>.

<sup>98</sup> US Const., amend II.

<sup>99</sup> 554 U.S. 570 (2008).

<sup>100</sup> R. B. Seigel, “Dead Or Alive: Originalism As Popular Constitutionalism In Heller” (2008) 122 *Harvard Law Review* 191-245; A. Gura, “Heller and the Triumph Of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson” (2008) 56 *UCLA Law Review* 1127-1170.

<sup>101</sup> M. Planty and J. L. Truman, “Firearm Violence, 1993-2011” (2013) US Bureau of Justice Statistics, at <http://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

<sup>102</sup> M. Follman, G. Aronson, D. Pan, “A Guide to Mass Shootings in America” *Mother Jones* (24 May 2014) at <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

<sup>103</sup> L. Greenhouse, “Three Defining Opinions”, *New York Times* (13 July 2008), at WK4, <http://www.nytimes.com/2008/07/13/weekinreview/13greebox.html>; see also D. G. Savage, “Supreme Court Finds History Is a Matter of Opinions”, *Los Angeles Times* (13 July 2008), at <http://articles.latimes.com/2008/jul/13/nation/na-scotus13>).

superiority of the authors of the constitution—the people, the constitutional demos, whenever it wears the hat of constituent power—and those who interpret it.”<sup>104</sup>

These powerful historical/originalist arguments also tend to distort the legal, political, and personal features of “constitutionalism”, making it appear as if the US constitutional text is indeed coupled with the *current* cultural character or common disposition of the American people themselves (or at least what they should strive to achieve). Such problems could be mitigated, at least to some extent, with the use of alternative terminology. For example, a phrase such as “our Constitution” carries much more weight, symbolically and substantively, than the phrase “our Basic Law”.

Within the UK issues such as guns appear relatively fixed for the time being. Entrenching other rights, however, such as the right to marry the person of your choosing, could prove invaluable. But other important issues of constitutional significance might be less suitable for entrenchment, such as the UK relationship with the European Community, the role of the monarchy, etc. Many have noted that the Human Rights Act 1998 provided the judiciary with enhanced review powers for statutes.<sup>105</sup> However judges still cannot strike down primary legislation, but merely provide a statement of incompatibility with the HRA. Even though judges could be said to have “human rights” in their best interests, incompatibility statements by the judiciary happen infrequently. One wonders whether such restraint will hold if the judges now have a “Constitution” to uphold, especially one that implements constitutional supremacy and serves as a celebrated national symbol of sovereign authority.

## Constitutional change

The Commons report also notes that the current unwritten constitution is “evolutionary and flexible in nature, more easily enabling practical problems to be resolved as they arise and individual reforms made, than would be the case under an entrenched constitutional document”.<sup>106</sup> Over the past century, and especially in the past couple decades, the UK has undergone a significant amount of constitutional change.<sup>107</sup> Implementation of the Human Rights Act 1998, devolution for Scotland, Wales and Northern Island, and establishment of constitutional committees in Parliament, in addition to a Supreme Court, demonstrates the vitality and dynamic nature of constitutionalism in Britain. Although establishing a written document could entrench specific rights or special processes, such a document would make future changes inherently more difficult, because it could “thus only be

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<sup>104</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 186.

<sup>105</sup> R. Bellamy, “Political constitutionalism and the Human Rights Act” (2011) 9 *International Journal of Constitutional Law* 86, 87; D. Oliver, “United Kingdom”, in Oliver and Fusaro, *How Constitutions Change: A Comparative Study* (2013) pp. 350-352.

<sup>106</sup> R. Blackburn, “Mapping the Path towards Codifying - or Not Codifying - the UK Constitution” in Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014), HC 463, p. 24.

<sup>107</sup> P. Norton, “Introduction: A Century of Change” in P. Norton (ed) *A Century of Constitutional Reform* (West Sussex: Wiley, 2011).

changed by special procedures”.<sup>108</sup> However the UK “constitution has endured ... *because of its capacity for change*”.<sup>109</sup> Flexibility is one of the most advantageous aspects of the current structure, and one of the most frustrating aspects of jurisdictions with written constitutions. For example, the US Constitution has been labelled “impossible to amend”,<sup>110</sup> and the Canadian Constitution is said to be at a “standstill”.<sup>111</sup>

Yet some are concerned that the UK constitution is too easily changed, and the processes that produce such change have become flawed.<sup>112</sup> Indeed, constitutional change in the UK does not always occur in optimal fashion. In a 2011 report the Lords Constitution Committee noted many flaws with the current system, including a lack of formalised processes and insufficient scrutiny.<sup>113</sup> The same committee noted similar difficulties in a 2009 report about fast-track legislation.<sup>114</sup> In addition to other problems, these are serious concerns that should be addressed, but whether they are serious enough to sacrifice flexibility for rigidity has not yet been fully comprehended.

More should be said about the supposed “impossibility” or difficulty of amending constitutions. A relatively significant literature exists on comparative constitutional amendment procedures,<sup>115</sup> and although much of it does an adequate job of explaining the difficulties from a procedural, rule-based perspective, most all of it fails to touch on the intrinsic value of Constitutions as an impediment to amendment.<sup>116</sup> As the earlier material highlights, contemporary societies (some more than others) covet constitutions, often viewing them as significant sources of symbolism and national pride. Amending these documents could be especially difficult for societies that view them in such magisterial terms. Therefore another hurdle to the amendment of constitutions operates at a cognitive level, represented in the connection citizens have with the Constitution, as opposed to ordinary statutes. Statutes are often attached to the ordinary business of politics and law-making, while Constitutions are often viscerally connected to their authors or enactors (sometimes public demigods), larger national identities, and commonly, supreme or

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<sup>108</sup> F. F. Ridley, “There is no British constitution: A dangerous case of the emperor’s clothes” (1988) 41(3) *Parliamentary Affairs* 340, 343.

<sup>109</sup> Norton, “Introduction: A Century of Change” in Norton (ed) *A Century of Constitutional Reform* (2011), p. 2. Emphasis is mine.

<sup>110</sup> See E. Posner, “The U.S. Constitution Is Impossible to Amend”, *Slate* (5 May 2014), at [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/05/amending\\_the\\_constitution\\_is\\_much\\_too\\_hard\\_blame\\_the\\_founders.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html).

<sup>111</sup> T. Kahana, “Canada”, in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (2013) p. 39.

<sup>112</sup> Blackburn, “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) *Statute Law Review* 1, 5; see also Andrew Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (Oxford: Hart, 2015), p. 4.

<sup>113</sup> Lords Constitution Committee, *The Process of Constitutional Change* (18 July 2011), HL Paper 177.

<sup>114</sup> Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (7 July 2009), HL Paper 116.

<sup>115</sup> For a review of the literature, see R. Dixon, “Constitutional amendment rules: a comparative perspective” in T. Ginsburg and R. Dixon, *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011) pp. 96-111.

<sup>116</sup> R. Dixon, “Constitutional amendment rules: a comparative perspective” in Ginsburg and Dixon, *Comparative Constitutional Law* (2011) p. 107 (“[t]he more the population is attached to or identifies with the constitution, the greater the burden of persuasion facing those attempting to achieve change via constitutional amendment”).



constitutional courts. Modifying the latter is akin to altering the national identity: past, present, and future. Given such looming characteristics, long-standing Constitutions serving considerably symbolic functions could be difficult to amend. In this situation citizens may pass constitutional authority to the judiciary, preferring incremental “amendments” by a constitutional court; thus again bringing about the counter-majoritarian difficulty.

Whether states that use non-constitutional labels are more amenable to constitutional change is difficult to determine, given that each jurisdiction contains a distinct cultural history and holds unique political, legal and general values. Nevertheless, a provisional look at such prospects could be valuable for future endeavours. Germany, which uses the Basic Law label, regularly amends its constitution. In 2010, sixty years after its adoption, there were already 55 amendments.<sup>117</sup> Meanwhile as of 2014 Israel had amended its Basic Law, established in 1958, a total of 81 times.<sup>118</sup> But countries such as France, which amended its 1958 Constitution twenty-three times in the first fifty years of its existence,<sup>119</sup> and South Africa, seventeen amendments since 1997,<sup>120</sup> demonstrate that “Constitutionalising” constitutions may not always provide barriers to change. Nevertheless, the French and South African Constitutions are relatively young (both less than 60 years old) compared to the American Constitution (over two and a quarter centuries old). Should the French and South African documents survive, it will be interesting to see how future generations of each country’s citizens connect with and treat their respective Constitutions, given that both are attached to iconic figures (Charles de Gaulle and Nelson Mandela, respectively), and coincided with one fundamental shift (the end of apartheid in South Africa) and a milder, but not insignificant, shift (an indefinite end to constitutional tumult in France).

The current avant-garde expression is to speak in terms of “constitutional moments”.<sup>121</sup> But constitutional maintenance, which occurs through active constitutional surveillance and assessment, is also crucially important. The past two decades have demonstrated that the UK performs quite well in this regard: in particular the current select committees mentioned above do a respectable job of such assessment and maintenance. Unlike in more inflexible jurisdictions, “constitutional moments” in the UK do not need to be made or contrived ... they evolve organically, as they have done for centuries. A modern “Constitution”, or even a lesser constitutional document, could change that.

## Potential options

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<sup>117</sup> D. Grimm, “The Basic Law at 60 – Identity and Change” (2010) 11 *German Law Journal* 33.

<sup>118</sup> Constitute Project, University of Chicago, Annotated copy of 2014 Israeli Basic Law (emailed to author). Major amendments came in sixteen separate years. Also, Israel has added three sections to their Basic Law since its adoption in 1958: “Human Dignity and Liberty”; “Freedom of Occupation”; “The Government”.

<sup>119</sup> M. A. Rogoff, “Fifty years of constitutional evolution in France: The 2008 amendments and beyond” (2011) *Jus Politicum*, available at <http://www.juspoliticum.com/Fifty-years-of-constitutional,391.html>.

<sup>120</sup> South African Constitution (1996), available at <http://www.justice.gov.za/legislation/constitution/constitution.htm>.

<sup>121</sup> See D. Oliver, “Politics, Law and Constitutional Moments in the UK”, in D. Feldman (ed) *Law in Politics, Politics in Law* (Oxford: Hart, 2013) pp. 239-256.

Ultimately, Britain must decide what it wants: a contemporary Constitution that also serves as a potent national symbol, a statutory/code outline and explanation of governmental processes, or the status quo. The first two options have come to be known as the “big bang” and “incremental” approaches, respectively.<sup>122</sup> The Commons Constitutional Committee investigated three options:

- (1) Constitutional Code – a document sanctioned by Parliament but without statutory authority, setting out the essential existing elements and principles of the constitution and workings of government.
- (2) Constitutional Consolidation Act – a consolidation of existing laws of a constitutional nature in statute, the common law and parliamentary practice, together with a codification of essential constitutional conventions.
- (3) Written Constitution – a document of basic law by which the United Kingdom is governed, including the relationship between the state and its citizens, an amendment procedure, and elements of reform.<sup>123</sup>

The “constitutional code” or “constitutional consolidation act” options, although relatively moderate from a legal perspective, appear unduly symbolic, almost resembling the European Constitutional Treaty that Weiler so thoroughly lambasted.<sup>124</sup> He argued that “constitution” was used to make an average treaty more significant, writing that the “final ironic twist is that this [the use of ‘Constitution’] elevated legitimacy and de facto constitutional status will have been given to an instrument whose form and content hardly merit such constitutional resplendence”.<sup>125</sup> Will the same thing happen to a British constitution that codifies “lesser” documents or the status quo? Expectations of a symbolic, unifying written constitution have already been planted throughout the UK.<sup>126</sup> Although either may go some way to entrenching governmental operations, and perhaps even a few of the unique/customary aspects of British constitutional law, the “code” and “consolidation act” proposals will probably not satisfy those coveting such a document, even if “constitution” is on its face. Indeed, Barber has already noted “[t]here is little to be gained” by codifying the status quo.<sup>127</sup>

That being said, similarly-situated jurisdictions that have constitutionalised limited reform or the status quo have not encountered many difficulties. New Zealand retains an unwritten constitution, but enacted the Constitution Act 1986 in order to “describe what

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<sup>122</sup> D. Oliver, “Towards a Written Constitution”, in C. Bryant, *Towards a new constitutional settlement* (London: The Smith Institute, 2007), p. 146.

<sup>123</sup> R. Blackburn, “Mapping the Path towards Codifying - or Not Codifying - the UK Constitution” in Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014), HC 463, p. 29.

<sup>124</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173-190.

<sup>125</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 181.

<sup>126</sup> See Prof Gearty’s “Crowdsourcing the UK’s Constitution” note 5 above.

<sup>127</sup> Barber, “Against a Written Constitution” (2008) P.L. 12.

exists rather than being truly constitutive”.<sup>128</sup> Weak-form judicial review remains the norm, and even though judges can issue statements of incompatibility, these have no legal effect on the legislative process.<sup>129</sup> In terms of the country’s constitutional evolution, “[t]here is a different arena of constitutional development in which proposals for change are not explicitly promoted ... statutes and values, or practices, simply evolve to have certain importance and sanctity that earns the label ‘constitutional’”.<sup>130</sup> Additionally, Australia has a century-old Constitution that lacks a bill of rights, but excessive constitutional worship does not appear to have taken hold, and the courts on the whole appear more deferential to parliament.

If the UK decides to draft a written “Constitution” it should first provide a temporary text that could eventually become a formal constitution. Then it would not be saddled with a document that grows unworkable or unpractical. Furthermore, a temporary Basic Law could allow for changes to be made before official enactment, and could also leave open the possibilities of not enacting an official constitution or scrapping the Basic Law completely after a certain period of time. This incremental strategy (similar to how the Israeli Basic Law developed, pre-1995) might fit the UK at the moment, considering the prospects of further devolution or independence by Scotland, Wales, and Northern Ireland. However the Israeli example provides a sober cautionary example of how unyielding “constitutional” desire could also be problematic.

An even lesser incremental approach, however, would be the most prudent solution for the time being. A collection of “organic laws” for various departments, agencies and public bodies (e.g., the Prime Minister, the Cabinet, etc.) could be developed, being built upon or amended as Parliament sees fit. This would expand Britain’s written but uncodified constitution, and would be a sensible incremental step in the direction of a more unified constitutional structure.

## Conclusion

“Even when voiced by the greatest humanists, the military overtones are present. We have been invited to develop a patriotism based on our modern, liberal, constitutions. The constitutional patriot is invited to defend the constitution”.<sup>131</sup>

It appears that even in this day and age, constitutional distrust remains alive and well. What I hope to have accomplished here has been to warn about the dangers of constitutional fetishism, and especially the symbolic act of inscribing a “Constitutional” document into the UK’s current structure. After all, “capital-C Constitutions are not always the Solon-like documents they are sometimes made out to be”.<sup>132</sup> However if it turns out what I have

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<sup>128</sup> P. Rishworth, “New Zealand”, in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (2013) p. 243. In fact Rishworth notes “there was no talk of public consultation or referendum; nor was it politically partisan”.

<sup>129</sup> J. Waldron, “The Core of the Case Against Judicial Review” (2006) 115 *Yale Law Journal* 1346, 1356.

<sup>130</sup> Rishworth, “New Zealand”, in Oliver and Fusaro (eds), *How Constitutions Change: A Comparative Study* (2013) p. 255.

<sup>131</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173, 185.

<sup>132</sup> King, *The British Constitution* (2007), p. 8.

actually done is cautioned against the dangers of judicial supremacy, including “pass[ing] political decisions out of the hands of politicians and into the hands of judges and other persons”,<sup>133</sup> then I will consider my former objective accomplished.

Contemporary use of the word “constitution” contains extraordinary power, but also a vast, ambiguous emptiness. This much was certainly evident to Weiler<sup>134</sup> and Satori.<sup>135</sup> Even though such documents are often flawed,<sup>136</sup> marginalise groups in society with less power and influence,<sup>137</sup> and may become problematic due to fetishism or idolatry, such texts continue to be the strongly desired norm. Regardless, the notion that one symbolic document can unite citizens into a patriotic whole, and continue to do so within evolving democratic problems and pressures, all while remaining flexible and beneficial, is eighteenth century naiveté manifested in twenty-first century idealism. If this is what the British public desires (i.e., “A New Magna Carta”),<sup>138</sup> then go ahead, have your best crack at it.

But if the result of all this righteous discussion produces a document that merely codifies what is mostly already written, then I would like to return to where I began, and say: *please, call it anything but a Constitution.*

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<sup>133</sup> Griffith, “The Political Constitution” (1979) 42 M.L.R. 1, 16.

<sup>134</sup> Weiler, “On the power of the Word: Europe’s constitutional iconography” (2005) 3 *International Journal of Constitutional Law* 173-190.

<sup>135</sup> Sartori, “Constitutionalism: A Preliminary Discussion” (1962) 56(4) *American Political Science Review* 853.

<sup>136</sup> Klarman, “A Skeptical View of Constitution Worship”, Constitution Day lecture, Johns Hopkins University (16 Sept 2010).

<sup>137</sup> Pryor, *Constitutions: Writing Nations, Reading Difference* (2008).

<sup>138</sup> Commons Political and Constitutional Reform Committee, *A New Magna Carta* (10 July 2014), HC 463.