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## SOVEREIGNTY IN COMPARATIVE PERSPECTIVE: CONSTITUTIONALISM IN BRITAIN AND AMERICA

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*In this James Madison Lecture, the Lord Chancellor, Lord Irvine of Lairg, observes that the American system of constitutional supremacy and judicial review shares many common features with the British unwritten constitution's emphasis on parliamentary sovereignty without judicial review. While the two systems are often described as polar opposites, Lord Irvine argues that both operate in a context of democratic government and translate substantially identical commitments to popular sovereignty into distinct, yet related, approaches to constitutionalism.*

### INTRODUCTION

“The American Constitutions,” said Thomas Paine, “were to liberty, what a grammar is to language: they define its parts of speech, and practically construct them into syntax.”<sup>1</sup> The central role which was played by James Madison, whose memory this Lecture commemorates, in the construction of the U.S. Constitution is too well known to require elaboration this evening. It suffices to note that, as one American commentator recently put it, Madison’s championing of the amendment of the Constitution was an accomplishment which “entitles him to be remembered as father of the Bill of Rights even more than as father of the Constitution.”<sup>2</sup>

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\* Lord High Chancellor, United Kingdom of Great Britain and Northern Ireland. This is the revised text of the thirty-first annual James Madison Lecture on Constitutional Law delivered at New York University School of Law on October 17, 2000.

<sup>1</sup> Thomas Paine, *The Rights of Man* (1791), reprinted in *Two Classics of the French Revolution* 270, 334 (1989).

<sup>2</sup> Leonard W. Levy, *Origins of the Bill of Rights* 34 (1999). For background information on the inception of the U.S. Bill of Rights, see generally *id.* at 1-43.

In the speech which he made to Congress introducing the Bill of Rights,<sup>3</sup> Madison acknowledged that “paper barriers” have their limitations. But he also observed that, because “they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community,” they are an important means by which “to control the majority from those acts to which they might be otherwise inclined.”<sup>4</sup> By thus recognizing the potential of a Bill of Rights, Madison effected, for America, the constitutionalization of liberty—a process which, in the ensuing two hundred years, many other legal systems rightly have emulated.

I hesitate, however, to categorize the United Kingdom simply as one of those “other” jurisdictions. Of course, ever since Independence, there has existed a *formal* separation between our two systems. But the linkages of legal *culture* which connect them have proved more resilient. That is hardly surprising, not least because of the shared common law foundation on which modern English and American law both rest.<sup>5</sup> More specifically, many of the rights which were enshrined first in the state constitutions and, later, in the federal Constitution share much in common with the values articulated in English constitutional texts.

For instance, section 39 of the Magna Carta, which provided that “[n]o freeman shall be . . . imprisoned . . . except by the lawful judgment of his peers or by the law of the land,”<sup>6</sup> was clearly a forerunner of the Due Process Clause in the U.S. Bill of Rights.<sup>7</sup> There are equally self-evident parallels between the provision in the 1689 Bill of Rights requiring “that the freedom of speech . . . ought not to be impeached or questioned”<sup>8</sup> and the guarantee enshrined in the U.S. Constitution’s First Amendment. More generally, the writings of English philosophers had a fundamental impact on the theory of government which took root in America, as the relationship between the Declaration of Independence and the work of John Locke illustrates.<sup>9</sup>

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<sup>3</sup> For the full text of Madison’s celebrated speech, see 5 *The Roots of the Bill of Rights* 1016 (Bernard Schwartz ed., 1971).

<sup>4</sup> *Id.* at 1030.

<sup>5</sup> See generally Lord Irvine of Lairg, *The Common Origins of English and American Law*, Inner Temple Lecture to the Inner Temple, London (Mar. 22, 2000) (transcript available at <http://www.open.gov.uk/lcd/speeches/2000/2000fr.htm>).

<sup>6</sup> Magna Carta § 39 (1215), reprinted in 1 *The Roots of the Bill of Rights*, *supra* note 3, at 8, 12.

<sup>7</sup> U.S. Const. amend. V; see also *id.* amend. XIV.

<sup>8</sup> Bill of Rights (1689), reprinted in 1 *The Roots of the Bill of Rights*, *supra* note 3, at 41, 43.

<sup>9</sup> See especially John Locke, *The Second Treatise of Civil Government* (J.W. Gough ed., Basil Blackwell 1946) (1690).

But in spite of the fact that we share so much in common, there are also obvious differences. My purpose this evening is to focus on one particular point of distinction between the British and American legal systems: the divergence between the American notion of *constitutional supremacy* and the British doctrine of *parliamentary sovereignty*. That distinction has long been viewed as symbolizing a fundamental difference of outlook between the United States and Britain on constitutional matters generally, and more specifically on the status of civil rights in our respective legal systems. I intend to examine the background to that divergence, before going on to suggest that recent developments in the United Kingdom emphasize that the distinction between the two concepts, although real, should not be exaggerated.

## I

### PARLIAMENTARY SOVEREIGNTY

Let me begin with the notion of parliamentary sovereignty.<sup>10</sup> The nuances of that principle are the focus of one of the most contentious areas of academic—and, on occasion, judicial—debate in English constitutional law.<sup>11</sup>

The sovereignty principle has not always been rigidly endorsed. In particular, certain judicial dicta from the early seventeenth century questioned whether the courts owed unqualified loyalty to Parliament's enactments. Most famously, in *Dr. Bonham's Case*,<sup>12</sup> Chief Justice Coke said that the common law could "controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."<sup>13</sup> However, by the time he came to

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<sup>10</sup> The work of Sir William Wade remains, for many, the classic exposition of sovereignty theory in the British context. See H.W.R. Wade, *The Basis of Legal Sovereignty*, 1955 Cambridge L.J. 172; Sir William Wade, *Sovereignty—Revolution or Evolution?*, 112 L.Q. Rev. 568 (1996).

<sup>11</sup> The debate has been prompted both by the implications of European Union membership and, more generally, by a feeling in some quarters that the effective protection of fundamental rights is somehow incompatible with sovereignty theory. For a useful overview of the first aspect of the debate, see P.P. Craig, *The Sovereignty of the United Kingdom Parliament After Factortame*, 11 Y.B. Eur. L. 221 (1991). On the debate's other dimension, see Geoffrey Marshall, *Parliamentary Sovereignty: The New Horizons*, 1997 Pub. L. 1; Richard Mullender, *Parliamentary Sovereignty, the Constitution and the Judiciary*, 49 N. Ir. Legal Q. 138 (1998).

<sup>12</sup> 77 Eng. Rep. 646 (K.B. 1610).

<sup>13</sup> *Id.* at 652. Similar sentiments were expressed by Chief Justice Hobart in *Day v. Savage*, 80 Eng. Rep. 235, 237 (K.B. 1614) ("[E]ven an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self.").

write his *Institutes*, Coke's views had become markedly more orthodox, and he accepted that Parliament possessed a "transcendent and abundant" jurisdiction which could not be "confined . . . within any bounds."<sup>14</sup> The correctness of that view was placed beyond doubt by the Revolution at the end of the seventeenth century.<sup>15</sup>

Although there exist myriad definitions of the doctrine of parliamentary sovereignty, the most enduring is that supplied by Albert Venn Dicey, the Victorian jurist and Vinerian Professor of Law at Oxford University. Writing in 1885, he described the Westminster Parliament as having "the right to make or unmake any law whatever," adding, for the avoidance of doubt it seems, that "no person or body is recognized by the law of England as having a right to override or set aside" its legislation.<sup>16</sup> Although much of Dicey's (still influential) work has been criticized by many modern British commentators, I note with interest that, in an authoritative recent book on sovereignty, Jeffrey Goldsworthy concludes that Dicey's definition is still "basically sound."<sup>17</sup> Indeed, for the last three hundred years British courts have not questioned Parliament's capacity to enact any legislation which it chooses. As Lord Reid remarked:

The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution . . . . [S]ince the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.<sup>18</sup>

It is true that some British judges now question—extracurricularly—whether sovereignty theory is apposite to the United Kingdom at the turn of the millennium.<sup>19</sup> In my view these criticisms are misplaced

It is worth noting, however, that some historians suggest that Coke was arguing merely in favor of a particular approach to *interpretation*, rather than for a judicial power to *quash* such legislation. See, e.g., J.W. Gough, *Fundamental Law in English Constitutional History* 40-41 (1955). Gough attributes a similar interpretation to the previously quoted passage from *Day*. *Id.* at 38-39.

<sup>14</sup> Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts* 36 (London, W. Clarke & Sons 1817) (1644).

<sup>15</sup> See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament* 142-220 (1999).

<sup>16</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 40 (E.C.S. Wade ed., 9th ed. 1956) (1885).

<sup>17</sup> Goldsworthy, *supra* note 15, at 11.

<sup>18</sup> *British Rys. Bd. v. Pickin*, 1974 A.C. 765, 782 (appeal taken from Eng. C.A.).

<sup>19</sup> See Sir John Laws, *The Constitution: Morals and Rights*, 1996 Pub. L. 622 [hereinafter *Laws, Constitution*]; Sir John Laws, *Law and Democracy*, 1995 Pub. L. 72 [hereinafter *Laws, Law and Democracy*]; Sir Stephen Sedley, *Human Rights: A Twenty-First Century Agenda*, 1995 Pub. L. 386; Lord Woolf of Barnes, *Droit Public—English Style*, 1995 Pub. L. 57. For similar sentiments, expressed in the New Zealand context, see Sir Robin Cooke, *Fundamentals*, 1988 N.Z. L.J. 158. For rebuttals of the views of Sir John Laws (who is the

because they fail to appreciate that the notion of sovereignty is, in large measure, a function of the *context* within which it subsists. I shall argue that it is the *evolution* of that context which keeps fresh the idea of sovereignty, and which ultimately renders it an appropriate feature of the British constitution at the beginning of the twenty-first century. And I will suggest that it is that same evolutive context which reveals a *measure* of similarity between the British concept of parliamentary sovereignty and the American theory of constitutional supremacy, although those two ideas are, and will remain, *distinct*.

## II

### CONSTITUTIONAL SUPREMACY

#### A. *The Notion of Constitutional Supremacy*

Of course, legislative sovereignty has never been a feature of the U.S. legal system. By 1787, eight of the thirteen colonies had incorporated judicial review into their constitutions. It is ironic that the views expressed by Sir Edward Coke in *Dr. Bonham's Case*, although they had fallen out of favor in England by that time, were relied on in the *Writs of Assistance Case* in 1761,<sup>20</sup> and may have played some part in persuading the colonies to provide for judicial review in their constitutions.

The status of the Constitution as a higher order of law, prior and superior to the powers of the legislative branch, was articulated very clearly by Supreme Court Justice Samuel Chase in the case of *Calder v. Bull* in 1798.<sup>21</sup> "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul," said Justice Chase.<sup>22</sup> "An act of the Legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."<sup>23</sup>

I note, however, that although constitutional review is as central to constitutionalism in America as parliamentary sovereignty is in the United Kingdom, some voices have been raised against it ever since its inception in *Marbury v. Madison*.<sup>24</sup> One such voice was that of

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most enthusiastic judicial critic of parliamentary sovereignty), see J.A.G. Griffith, *The Brave New World of Sir John Laws*, 63 *Mod. L. Rev.* 159 (2000); Lord Irvine of Lairg, *Response to Sir John Laws*, 1996 *Pub. L.* 636.

<sup>20</sup> See Maurice H. Smith, *The Writs of Assistance Case* 359-62 (1978).

<sup>21</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>22</sup> *Id.* at 387-88 (emphasis omitted).

<sup>23</sup> *Id.* at 388 (emphasis omitted).

<sup>24</sup> 5 U.S. (1 Cranch) 137 (1803). For a useful account of the historical context in which *Marbury* was decided, see Robert G. McCloskey, *The American Supreme Court* 1-34 (2d ed. 1994).

Judge John Gibson. In the dissenting opinion which he delivered in the case of *Eakin v. Raub* in the Pennsylvania Supreme Court in 1825,<sup>25</sup> he observed that

[T]he Constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way. . . . But it is a fallacy to suppose that they can come into collision *before the judiciary*. . . . The Constitution and the *right* of the legislature to pass the act may be in collision. But is that a subject for judicial determination?<sup>26</sup>

Although the jurisprudence of the Supreme Court has provided a clear, affirmative answer to this question, it is striking that the debate about the correctness of *Marbury*—both in terms of its fidelity to the intention of the Framers and, more broadly, whether it is desirable in normative terms—is still going on, two hundred years after the decision.<sup>27</sup>

### B. *The Flexible Nature of Constitutional Supremacy*

It is certainly not my intention this evening to attempt to evaluate the appropriateness of constitutional review in the United States,<sup>28</sup> although I *will* have something to say later about constitutional review in the United Kingdom. Instead, my purpose is simply to draw attention to the clear parallel which exists between the ongoing debate in America about the powers of the courts in relation to the Constitution,<sup>29</sup> and the discourse in Britain concerning the desirability of parliamentary sovereignty. Although our respective legal systems begin from different starting points—constitutional paramountcy and legislative supremacy—the two debates address essentially the same questions: How much power should the courts have over the other branches of government? And in what circumstances, if any, is it appropriate for the judicial branch to overrule elected legislators and administrators in order to safeguard individual or group interests?

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<sup>25</sup> 12 Serg. & Rawle 330 (Pa. 1825).

<sup>26</sup> *Id.* at 347-48.

<sup>27</sup> For recent contributions to that debate, see Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (1990); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>28</sup> It is, however, an interesting question whether the United States would have been a less fair and just society had the courts not assumed the power of constitutional review. Compare Ronald Dworkin, *Law's Empire* 356 (1986) (arguing that judicial review has made U.S. society more just), with Robert A. Dahl, *Democracy and Its Critics* 189-91 (1989) (questioning effectiveness of judicial review to protect human rights).

<sup>29</sup> See, for example, the seminal contribution to this debate made by Ronald Dworkin, *Taking Rights Seriously* 131-49 (1977).

The fact that this same debate is ongoing within both the British and American legal systems points towards an important fact which is sometimes overlooked. Constitutional supremacy and parliamentary sovereignty are often perceived as concepts which are polemically opposed to one another, given that the former *limits* legislative power and *entrenches* fundamental rights, while the latter embraces formally *unlimited* power and *eschews* the entrenchment of human rights. However, the better view is that they represent two different parts of a continuum, each reflecting differing views about how the judiciary and the other institutions of government ought to interrelate.

This conceptualization follows (in part) from the fact that the notions of constitutional and legislative supremacy are themselves *elastic*. For instance, there exists a spectrum of opinions about precisely what constitutional supremacy ought to mean in the U.S. context. Although it is firmly settled that the U.S. Constitution *does* amount to a superior set of laws which *are* judicially enforceable,<sup>30</sup> this still leaves great scope for flexibility.<sup>31</sup> For instance, by 1858, the Supreme Court had held only two pieces of federal legislation to be unconstitutional.<sup>32</sup> The record of the Court in those early years contrasts sharply with the much more activist approach which was adopted by, for instance, the Warren Court.<sup>33</sup>

Such variation, over time, of the level of activism<sup>34</sup> which is evident in the Supreme Court's decisions reflects (among other things)<sup>35</sup>

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<sup>30</sup> Academic debate notwithstanding. See *supra* note 27.

<sup>31</sup> Perhaps the most vivid illustration of this flexibility is to be found in the Supreme Court's case law on the constitutionality of racial segregation. As is well known, the Court held in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that the "separate but equal" policy was not incompatible with the Constitution. However, in the celebrated case of *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court came to the opposite conclusion. Chief Justice Warren concluded that the policy deprived the plaintiffs, and "others similarly situated," of the "equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 495.

<sup>32</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>33</sup> For a useful survey of historical and quantitative research on the judicial policies of the U.S. Supreme Court, see David G. Barnum, *The Supreme Court and American Democracy* 74-105 (1993).

<sup>34</sup> A discussion of the various meanings ascribed to the term "activism" can be found in Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 *Judicature* 236 (1983). For a comparative analysis of the notion of activism in the fundamental rights context, see Lord Irvine of Lairg, *Activism and Restraint: Human Rights and the Interpretative Process*, 1999 *Eur. Hum. Rts. L. Rev.* 350.

<sup>35</sup> Of course, changes in the decisionmaking trends of the Supreme Court are also influenced by a large number of other factors. The study of such matters forms a discrete discipline in American legal scholarship and is beyond the scope of this Lecture. For analysis of the influences which shaped decisionmaking in the Supreme Court during its first two centuries, see, for example, David P. Currie, *The Constitution in the Supreme Court:*

changing judicial (and societal) conceptions of how the judiciary and the other branches should interrelate—and, in particular, of how the balance should be struck between, on the one hand, judicial intervention and, on the other hand, legislative and executive autonomy. This position is, of course, as inevitable as it is desirable. As Chief Justice Marshall remarked in *McCullough v. Maryland*,<sup>36</sup> constitutions are “intended to endure for ages to come, and consequently, [must] be adapted to the various crises of human affairs.”<sup>37</sup> Thus the necessary generality of a Bill of Rights makes it at once both timeless and evolutive. It follows that, while constitutional supremacy is a fixed feature of the U.S. Constitution, the concept is a flexible one, the precise meaning of which is, ultimately, a product of contemporary legal and political thought. The notion of parliamentary sovereignty is, I will argue, similarly elastic.

This flexibility which inheres in the ideas of constitutional and legislative supremacy goes some way towards dispelling the myth that each is the antithesis of the other. Since they are each *catholic* principles which accommodate a *range* of views concerning institutional interrelationship, it is meaningless to suggest that they are inevitably opposed to one another. That is why I suggested earlier that the two theories are best thought of as different parts of a *spectrum* of views concerning how judges should relate to the other branches of government. I will return, later, to these *linkages* between the two theories.

### III

#### TRADITIONAL POINTS OF DIVERGENCE

First, however, let me consider in more detail the *divergence* between the American principle of constitutional supremacy and British adherence to parliamentary sovereignty. There are important clues in the *historical* context which will help to illuminate the *contemporary* relationship between the two theories. In particular, I wish to examine some of the key points of divergence which, traditionally, have been treated as preeminent in establishing a clear distinction between them. However, I will also suggest that the tide of history substantially has eroded some of those differences. Certainly, distinctions still

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The First Hundred Years 1789-1888 (1985); David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888-1986* (1990); McCloskey, *supra* note 24.

<sup>36</sup> 17 U.S. (4 Wheat.) 315 (1819).

<sup>37</sup> *Id.* at 413 (emphasis omitted); see also Alexander Hamilton, Third Speech at New York Ratifying Convention (June 28, 1788), in 5 *Papers of Alexander Hamilton* 114, 118 (Harold C. Syrett ed., 1962) (“Constitutions should consist only of general provisions: The reason is, that they must necessarily be permanent, and that they cannot calculate for the possible changes of things.”).



remain, but they are more subtle, and less obvious, than once they were.

### A. *Philosophical Roots*

The foremost method by which constitutional and legislative supremacy traditionally have been differentiated is by reference to their philosophical roots.<sup>38</sup> Those roots are relatively clear so far as the U.S. notion of constitutional supremacy is concerned. As Chief Justice Marshall observed in 1821, “[t]he people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.”<sup>39</sup> Thus, the state and federal institutions acquire their legitimacy from the popular consensus which the constitutional texts evidence. In this sense, popular sovereignty is the *fundamental* principle, while constitutional supremacy is its *derivative*.

Later in this Lecture,<sup>40</sup> I will suggest that constitutional primacy is merely *one* possible derivative of popular sovereignty, and that, viewed in its contemporary setting, legislative supremacy also gives effect to the notion of sovereignty residing in the people. Historically, however, that is not the philosophical foundation on which the principle of parliamentary sovereignty was founded. Some writers suggest that the principle emerged through the translation of *religious* ideas about authority into a more *secular* conception of political sovereignty.<sup>41</sup> Whether or not this was so, one point is clear. The *origins* of the doctrine of legislative supremacy did not lie in a political philosophy which sought to give effect to any conception of popular sovereignty. This is plain, given that it was not until the nineteenth century (at the earliest) that it became possible, with the passing of the Reform Acts, to articulate any sort of normative democratic justification for the sovereign power wielded by Parliament.<sup>42</sup>

From this primary distinction between the models of constitutional and parliamentary supremacy there flowed a number of other differences. Let me mention just two.

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<sup>38</sup> See generally Roger Cotterrell, *The Symbolism of Constitutions: Some Anglo-American Comparisons*, in *A Special Relationship? American Influences on Public Law in the UK* 25, 27-28 (Ian Loveland ed., 1995). These themes are also touched upon by P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* 1, 3-9 (1990).

<sup>39</sup> *Cothens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389 (1821).

<sup>40</sup> See *infra* Part IV.A.

<sup>41</sup> E.g., John Neville Figgis, *The Divine Right of Kings* 258-59 (2d ed. 1914).

<sup>42</sup> See *infra* Part IV.A for a discussion of reform of the electoral franchise.

### B. *The Relationship Between the Citizen and the State*

First, the adoption of constitutional supremacy—and, hence, of popular sovereignty as the fundamental principle—served to place the relationship between the citizen and the state on a very different foundation in the United States from that which obtained in England. In particular, the *dynamic* of the relationship was different. Constitutional paramountcy reflects the notion of social compact, of a population which is engaged in the political process, and upon whose license the continued existence of the institutions of government depends. Thus it invokes the idea of participatory democracy.

In contrast, the concept of parliamentary sovereignty called to mind a more hierarchical structure of superiors and subordinates.<sup>43</sup> Since Parliament's sovereign power did not derive, in the first place, institutionally from the will of the people, there was little or no sense in which that power was felt to be held "on trust" for the community at large.

### C. *Legal Theory: Positivist and Normative Perspectives*

Secondly, the traditional manner of distinguishing between legislative and constitutional supremacy has important implications when it is mapped onto the broader canvas of legal theory. Viewed in its *original* form, the doctrine of parliamentary sovereignty presented a visage which was relentlessly positivist<sup>44</sup> in outlook.<sup>45</sup> It constituted legal positivism in its paradigm form. By articulating a constitutional theory which demands unqualified judicial loyalty to every Act of Parliament, it appeared to institutionalize the distinction between, on the one hand, legal validity and, on the other hand, considerations of morality.

As the great British judge, Lord Reid, remarked:

It is often said that it would be unconstitutional for the United Kingdom to do certain things, meaning that the moral[ ] . . . [or]

<sup>43</sup> See Cotterrell, *supra* note 38, at 39.

<sup>44</sup> Space precludes detailed discussion of the meaning of positivism. It is used, in the present context, in a general sense to describe that approach to legal and constitutional theory that treats legal and moral validity as distinguishable issues. E.g., H.L.A. Hart, *The Concept of Law* 185-93 (2d ed. 1994).

<sup>45</sup> As one commentator has noted:

No greater testimony exists to the power and resilience of positivism in modern legal thought than the debate between constitutional lawyers about the nature of parliamentary sovereignty. At the root of almost all analyses of the nature and scope of the doctrine lies an unquestioned separation of legal from political principle.

T.R.S. Allan, *The Limits of Parliamentary Sovereignty*, 1985 Pub. L. 614, 614 (footnote omitted).

other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But . . . [i]f Parliament chose to do any of them the courts could not hold the Act . . . invalid.<sup>46</sup>

Viewed in this way, the doctrine of parliamentary sovereignty turns the pure theory of legal positivism into legal reality.

Constitutional supremacy, of course, is not amenable to such analysis. The fact that the Bill of Rights enjoys the status of fundamental law precludes a purely positivist approach to adjudication in America. Here, it is impossible to divorce legal validity from considerations of political and social morality. The existence of an entrenched Constitution enjoins an approach which embraces an ineluctable connection between questions of law and questions of morality.

Looked at in this manner, the divide between positivist and normative models of adjudication underscores still further the perceived distinction between the notions of constitutional and legislative supremacy.

#### IV

#### A MEASURE OF CONVERGENCE?

So much for *traditional perceptions*. What of *present realities*? I wish to demonstrate, in the time which remains, that although the picture I have just painted once may have described accurately the distinction between our two constitutional systems, it is now nothing more than an outdated caricature. In particular, I shall return to the idea which I sketched earlier: that sovereignty, meaningless in abstract terms, is a creature of contemporary political and legal context. I will argue that, once this fundamental point is appreciated, it becomes apparent that the distinction between legislative and constitutional supremacy is *real*, but markedly more *subtle* than it once was.

Let me consider some specific features of modern British constitutionalism that fundamentally have changed the context within which the notion of parliamentary sovereignty must be understood and which, as a result, have important implications for any comparison of the principles of constitutional and legislative supremacy.

##### A. *The Modern Basis of Parliamentary Sovereignty*

As a matter of legal history, the philosophical foundations on which those two concepts stand have been viewed as the fundamental

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<sup>46</sup> *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 723 (P.C. 1968) (appeal taken from S. Rhodesia).

point of distinction.<sup>47</sup> In particular, the idea that parliamentary sovereignty (unlike constitutional primacy) neither derived from nor depended upon an underlying popular consensus traditionally has exerted a strong influence on English constitutional theory. As Dicey put it, writing at the turn of the last century:

[T]he courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or kept alive in opposition to the wishes of the electors.<sup>48</sup>

At the beginning of the twenty-first century, the British doctrine of parliamentary sovereignty rests on rather different foundations. In common with most British constitutional developments, the change was evolutionary rather than revolutionary.<sup>49</sup> In particular, it was effected by gradual reform of the electoral franchise. Before 1832, the right to vote in general elections in the United Kingdom was based largely on property qualifications and extended to only five percent of the adult population. The passing of the "Great Reform Act"<sup>50</sup> in 1832 precipitated a period of fundamental reform which lasted for a full century.<sup>51</sup> Even by 1910, however, only twenty-eight percent of the total adult population enjoyed the right to vote.<sup>52</sup> The most far-reaching changes occurred in 1918:<sup>53</sup> Residency (as opposed to property entitlement) became the organizing principle, and, thanks to the sacrifices made by the "suffragettes," women over thirty years of age acquired voting rights.<sup>54</sup>

Those reforms demonstrate the emergence of representative and participatory democracy as the primary principle of constitutional and political theory in Britain. They evidence a paradigm shift in how the relationship between the state and the individual is conceptualized in

<sup>47</sup> See *supra* Part III.A.

<sup>48</sup> Dicey, *supra* note 16, at 73-74.

<sup>49</sup> For further discussion of the typology of constitutional change in Britain, see Lord Irvine of Lairg, *Constitutional Change in the United Kingdom: British Solutions to Universal Problems*, National Heritage Lecture at the U.S. Supreme Court (May 11, 1998) (transcript available at <http://www.open.gov.uk/lcd/speeches/1998/1998fr.htm>).

<sup>50</sup> Reform Act of 1832, 2 & 3 Will. 4, c. 65, §§ I, IV (Eng.).

<sup>51</sup> Additional legislation was enacted in 1867 and 1884 that further widened the electoral franchise. See Representation of the People Act, 1884, 48 & 49 Vict., c. 3 (Eng.); Representation of the People Act, 1867, 30 & 31 Vict., c. 102 (Eng.).

<sup>52</sup> David Butler & Anne Sloman, *British Political Facts 1900-1979*, at 227 (5th ed. 1980).

<sup>53</sup> Those changes were effected by the Representation of the People Act of 1918, 7 & 8 Geo. 5, c. 64 (Eng.).

<sup>54</sup> In 1928, the franchise was broadened further by extending voting rights to women aged over twenty-one. See Equal Franchise Act of 1928, 18 & 19 Geo. 5, c. 12 (Eng.).

the United Kingdom. In this way, the process of electoral reform fundamentally has changed the environment within which parliamentary sovereignty subsists, transforming the doctrine into the vehicle by which the modern commitment to democracy is institutionalized. Thus, the legal sovereignty exercised by Parliament now is viewed as deriving its legitimacy from the fact that Parliament's composition is, in the first place, determined by the electorate in whom ultimate political sovereignty resides.<sup>55</sup>

Indeed, this conception of sovereignty finds clear expression in the principle known as the Salisbury Convention.<sup>56</sup> In 1945, the Labour Party won an overall majority of seats in the House of Commons, yet the House of Lords was dominated by unelected Conservative peers who had inherited their seats. In a debate in the Upper Chamber, the then Viscount Cranborne argued that it would be "constitutionally wrong" for the House of Lords to prevent the manifesto commitments of the elected Government from being enacted into law.<sup>57</sup> That argument was broadly accepted, and the Salisbury Convention thus emerged, according to which the unelected Chamber does not vote against legislation which seeks to give effect to electoral pledges that have been endorsed by the majority of voters.<sup>58</sup>

The present Government is pursuing a thoroughgoing process of constitutional renewal.<sup>59</sup> As part of that program, it has abolished the right of hereditary peers to sit in the House of Lords, subject to a temporary right of ninety-two to remain.<sup>60</sup> Although further reform of the Upper Chamber is presently being considered and is not yet

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<sup>55</sup> A.V. Dicey acknowledged the emergence of political sovereignty alongside the theory of parliamentary sovereignty, see, e.g., Dicey, *supra* note 16, at 82-85, although he was, perhaps, somewhat reluctant to embrace the full implications of their interaction.

<sup>56</sup> Although enunciated in its modern form in 1945 by the then Viscount Cranborne, the principle is known as the Salisbury Convention because it is founded upon the "mandate" doctrine that was developed by the Third Marquess of Salisbury in the late nineteenth century.

<sup>57</sup> See 137 Parl. Deb., H.L. (5th ser.) (1945) 47 (remarks of Viscount Cranborne); see also 137 Parl. Deb., H.L. (5th ser.) (1945) 613-14 (remarks of Viscount Cranborne).

<sup>58</sup> Formulated more precisely, the Convention requires that the House of Lords not oppose bills on their second or third readings. It also is accepted widely that the Upper Chamber should not subject draft legislation covered by the Salisbury Convention to "wrecking amendments" that undermine the fundamental principles on which a bill is founded.

<sup>59</sup> For details of the Government's reform program vis-à-vis the House of Lords, see generally *Modernising Parliament: Reforming the House of Lords*, 1999, Cm. 4183, available at <http://www.official-documents.co.uk/document/cm41/4183/4183.htm>. The reform program also encompasses the conferral of greater protection on human rights; the devolution of governmental power to Scotland, Wales, and Northern Ireland; the enactment of freedom of information legislation; and the establishment of a new strategic authority for Greater London.

<sup>60</sup> See House of Lords Act 1999, c. 34, § 2(2) (Eng.).

firmly settled, the Royal Commission, which recently undertook a thorough investigation of this subject, has recommended clearly that the House of Lords can best fulfill its role as a Second Chamber if it is *not* fully elected.<sup>61</sup> Consequently, the Salisbury Convention, or a modern successor to that principle, will remain necessary in order to articulate the idea that, while the House of Lords has a pivotal role to play both in the legislative process and in holding the executive to account, the *elected* House of Commons is, in the final analysis, the senior partner.<sup>62</sup>

This view of how the two Houses of Parliament should relate to each other, which the Salisbury Convention institutionalizes and which lies at the heart of the present reform program, acknowledges that the legitimacy of Parliament's legislative power is rooted firmly in the will of the electorate, for whom that power is held on trust.<sup>63</sup> This, in turn, clearly illustrates that the doctrine of parliamentary supremacy, seen from a modern perspective, is properly to be viewed as an expression of the political sovereignty of the people.

We therefore reach the position that the theories of government which obtain in both America and the United Kingdom are founded on the idea of popular sovereignty. The important implication of this is that, viewed from a contemporary perspective, the principles of constitutional and parliamentary supremacy are rooted in the same basic political philosophy which recognizes that government depends, for its legitimacy, on the imprimatur of the people.<sup>64</sup> In this sense, the two theories are distinct species of the same genus. They constitute different methodologies by which the ultimate aspiration—to fully representative, participatory, and therefore legitimate governance—is translated into practical reality.

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<sup>61</sup> See *A House for the Future*, 2000, Cm. 4534, at 7, available at <http://www.officialdocuments.co.uk/document/cm45/4534/4534.htm>.

<sup>62</sup> The Royal Commission on the Reform of the House of Lords shares this view. See *id.* at 39-40.

<sup>63</sup> The Parliament Acts enacted from 1911 to 1949, which provide, in certain circumstances, for the passage of legislation without the consent of the House of Lords, similarly institutionalize a conception of parliamentary sovereignty that roots its legitimacy firmly in the mandate conferred upon Parliament by the electorate.

<sup>64</sup> The arrival of British constitutional theory at this position has led some commentators to suggest that the democratic principle is prior—and therefore superior—to the doctrine of parliamentary sovereignty. See, e.g., T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993); Laws, *Constitution*, *supra* note 19; Laws, *Law and Democracy*, *supra* note 19; Woolf, *supra* note 19. As I have indicated elsewhere, that is a view that I do not share. The fate of fundamentally antidemocratic legislation would, in the final analysis, be resolved in the political, not the judicial, arena. See Lord Irvine of Lairg, *Judges and Decision-Makers: The Theory and Practice of Wednesday Review*, 1996 *Pub. L.* 59.

It is, perhaps, unsurprising that constitutional primacy was the solution which was preferred here, given that the Framers were starting from scratch and wished to constitute the United States on a different footing from that which obtained in the United Kingdom.<sup>65</sup> In contrast, the British constitution is the product of evolution. That defining characteristic of British constitutionalism explains why, in the United Kingdom, the preferred solution has been to retain parliamentary sovereignty, but gradually to change the political and legal environment within which the principle exists. In that evolutive manner, the theory of parliamentary sovereignty, like the principle of constitutional supremacy, has come to represent the primacy which is attached to representative, democratic government, which is surely the most fundamental of all the values which our two countries have in common.

### *B. Sovereignty, Constitutionalism, and Fundamental Rights*

Thus far, I have been concerned with the common foundation which, viewed from a contemporary standpoint, the notions of constitutional and parliamentary sovereignty share. Let me turn, now, to the more specific issue of human rights protection.

I began my Lecture this evening by remarking upon the immense contribution which James Madison made to the adoption here of the Bill of Rights. The primacy which, as a result, U.S. law accords to fundamental rights is perceived in other countries as the preeminent characteristic of the American Constitution. It is also regarded as a graphic practical illustration of the perceived fundamental divergence between the theories of parliamentary sovereignty and constitutional supremacy. I wish to challenge the correctness of that perception.

#### *1. Political and Legal Control Mechanisms*

It is clear that our respective constitutions begin from different starting points. The U.S. system, through its constitutional texts, articulates a positive approach to human rights: They are marked out, from the very beginning, as sacrosanct. In contrast, the United Kingdom has traditionally adopted a negative approach to fundamental rights. This is based upon the principle of legality: the idea that the citizen enjoys the freedom to do as he or she pleases and that any interference with individual liberties must be justified by law.<sup>66</sup> The

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<sup>65</sup> For a sophisticated and innovative analysis of the constitutional settlement adopted by the American Founders, see Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000).

<sup>66</sup> The *locus classicus* of this approach is, of course, the decision in *Entick v. Carrington*, 95 *Eng. Rep.* 807 (K.B. 1765). The infringement of the individual's rights in

primary focus of the British system therefore has been on the legislative process, given that the locus of the citizen's freedom is ultimately traced by Parliament's enactments. Thus arose the notion of the self-correcting democracy, according to which the protection of individuals' rights was effected by the political mechanisms of ministerial responsibility and parliamentary scrutiny. This focus on *political*, rather than *legal*, accountability underscored the distinction between the British and American approaches. The point was captured well by Lord Wright, who remarked that, because "Parliament is supreme," there exist in the British constitution "no guaranteed or absolute rights. The safeguard of British liberty [therefore lies] in the good sense of the people and in the system of representative and responsible government which has been evolved."<sup>67</sup>

However, although it is true that English law traditionally has emphasized political, rather than legal, control of government, this certainly does not mean that it has pursued the former to the exclusion of the latter. English judges have long recognized that, although Britain adheres to a version of the democratic principle which places enactments of the elected legislature beyond judicial control, Parliament "does not legislate in a vacuum."<sup>68</sup> Instead, it "legislates for a European liberal democracy founded on the principles and traditions of the common law."<sup>69</sup> The courts therefore approach all legislation on the well-founded presumption that Parliament intends to legislate consistently with such principles. By such interpretative means, the judiciary has been able to confer a high degree of protection on a range of fundamental norms, such as access to justice,<sup>70</sup> judicial review,<sup>71</sup> and rights of due process.<sup>72</sup>

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that case was held to be unlawful because no legal provision permitted their infraction, and a general plea of "state necessity" was rejected.

<sup>67</sup> *Liversidge v. Anderson*, 1942 A.C. 206, 260-61 (1941) (appeal taken from Eng. C.A.).

<sup>68</sup> *Regina v. Sec'y of State for the Home Dep't, ex parte Pierson*, 1998 A.C. 539, 587 (appeal taken from Eng. C.A.) (Steyn, L.J.).

<sup>69</sup> *Id.*; see also Lord Steyn, *Incorporation and Devolution: A Few Reflections on the Changing Scene*, 1998 Eur. Hum. Rts. L. Rev. 153, 154-55.

<sup>70</sup> See, e.g., *Regina v. Sec'y of State for the Home Dep't, ex parte Leech*, 1994 Q.B. 198 (Eng. C.A. 1993); *Regina v. Lord Chancellor, ex parte Witham*, 1998 Q.B. 575 (1997). For a discussion of access to justice and the interpretative process, see Mark Elliott, *Reconciling Constitutional Rights and Constitutional Orthodoxy*, 56 Cambridge L.J. 474 (1997).

<sup>71</sup> See, preeminently, *Anisminic Ltd. v. Foreign Comp. Comm'n*, [1969] 2 A.C. 147 (1968) (appeal taken from Eng. C.A.), in which the House of Lords vouchsafed, by interpretative means, the availability of judicial review of administrative action.

<sup>72</sup> The law of judicial review, which safeguards a broad range of due process rights, takes effect as a consequence of judicial interpretation of enabling legislation, based on the presumption that Parliament wishes basic standards of fairness and rationality to be respected by those agencies upon which it confers power. For a detailed discussion of this "modified ultra vires doctrine" as the juridical basis of judicial review, see Mark Elliott,



Consequently, although British courts cannot strike down legislation,<sup>73</sup> they can often, by interpretative means, bring legislation which appears to be inconsistent with fundamental rights into line with them. This emphasizes the point, to which I alluded earlier, that the notion of sovereignty is meaningless unless it is viewed within a particular context. The rule of law, and the values on which it is based, form a fundamental part of the constitutional environment within which the British doctrine of legislative supremacy subsists. In particular, it gives rise to an interpretative framework which is biased strongly in favor of fundamental rights and which thus shapes the context which gives color to Parliament's enactments.<sup>74</sup> Moreover, British courts have long been willing to take account of the European Convention on Human Rights in a number of contexts.<sup>75</sup> For instance, it is used to aid the construction of ambiguous legislation<sup>76</sup> and can influence the development of the common law when it "is not firmly settled."<sup>77</sup> It guides the courts when judicial discretion is exercised<sup>78</sup> and when they are called upon to decide what public policy demands, as well as taking effect in the United Kingdom by operation of European Union law.<sup>79</sup>

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The Constitutional Foundations of Judicial Review (forthcoming 2001); Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 Cambridge L.J. 129 (1999); see also *Judicial Review and the Constitution* (Christopher Forsyth ed., 2000).

<sup>73</sup> Unless it is irreconcilably inconsistent with directly effective European Union law. See *Regina v. Sec'y of State for Transp., ex parte Factortame Ltd.*, [1991] 1 A.C. 603 (1990) (appeal taken from Eng. C.A.).

<sup>74</sup> T.R.S. Allan has written extensively about the relationship between parliamentary sovereignty and the rule of law. See Allan, *supra* note 64; T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 Cambridge L.J. 111 (1985); Allan, *supra* note 45; T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics, and Revolution*, 113 L.Q. Rev. 443 (1997).

<sup>75</sup> See 573 Parl. Deb., H.L. (5th ser.) (1996) 1465-67 (remarks of Lord Bingham); Murray Hunt, *Using Human Rights Law in English Courts* 207-61 (1997); Francesca Klug & Keir Starmer, *Incorporation Through the Back Door?*, 1997 Pub. L. 223, 224-25.

<sup>76</sup> See, e.g., *Regina v. Sec'y of State for the Home Dep't, ex parte Brind*, [1991] 1 A.C. 696 (1991) (appeal taken from Eng. C.A.).

<sup>77</sup> *Attorney-Gen. v. British Broad. Corp.*, 1981 A.C. 303, 352 (appeal taken from Eng. C.A.) (Fraser, L.J.); see also *Rantzen v. Mirror Group Newspapers* (1986) Ltd., 1994 Q.B. 670 (Eng. C.A. 1993); *Derbyshire County Council v. Times Newspapers Ltd.*, 1992 Q.B. 770 (Eng. C.A. 1992).

<sup>78</sup> See, e.g., *Regina v. Khan (Sultan)*, 1997 A.C. 558 (1996) (appeal taken from Eng. C.A.) (exclusion of evidence in criminal proceedings), *rev'd sub nom. Khan v. United Kingdom*, Times (London), May 23, 2000, Law Report, at 18 (Eur. Ct. Hum. Rts. 2000); *Attorney-Gen. v. Guardian Newspapers Ltd.*, [1987] 1 W.L.R. 1248 (H.L. 1987) (appeal taken from Eng. C.A.) (provision of discretionary relief).

<sup>79</sup> For the European Court of Justice's case law, see principally, *Case 4/73, J. Nold, Kohlen- und Boustoffgroßhandlung v. Commission*, 1974 E.C.R. 491; *Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125. For analysis, see, for example, Lord Browne-Wilkinson, *The*

The perception of Britain as a self-correcting democracy, in which the rights of the individual are protected entirely by *political* rather than *legal* means, therefore has never been wholly accurate. Like the American principle of constitutional supremacy, the British doctrine of parliamentary sovereignty, understood within its proper setting, embraces both political and legal control of government, although the respective systems strike different balances between those two mechanisms.

## 2. *The Human Rights Act 1998*

It has, however, been clear for some time that the balance struck in the United Kingdom has been premised on an outdated—and exaggerated—view of the efficacy of political accountability.<sup>80</sup> The former Prime Minister, John Major, remarked in a major speech opposing a Bill of Rights for Britain that “[w]e have no need of a Bill of Rights because we have freedom.”<sup>81</sup> This, however, overlooks the fact that constant effort is required in order to ensure that such freedom is preserved in the face of the legislative and executive activity associated with modern governance, both of which are well capable of trampling on basic human rights.

For precisely these reasons, the present Government introduced a Human Rights Act.<sup>82</sup> The legislation was enacted in 1998 and, after an intensive period of judicial training and preparation across Government, was implemented on October 2, 2000. It places public authorities under a new duty to respect fundamental rights,<sup>83</sup> and requires the Government to draw Parliament’s attention to any new draft legislation which is likely to compromise civil liberties.<sup>84</sup> Most fundamentally, the Act directs the courts to interpret legislation compatibly with

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Infiltration of a Bill of Rights, 1992 Pub. L. 397; Nicholas Grief, *The Domestic Impact of the European Convention on Human Rights as Mediated Through Community Law*, 1991 Pub. L. 555.

<sup>80</sup> See, for example, the substantial number of judgments against the United Kingdom in the European Court of Human Rights. For discussion of the U.K. record before the Court, see A.W. Bradley, *The United Kingdom Before the Strasbourg Court 1975-1990*, in *Edinburgh Essays in Public Law 185* (Wilson Finnie et al. eds., 1991).

<sup>81</sup> Robert Shrimley, *Future of the Constitution: Major Pledges to Defend “Freedoms,”* *Daily Telegraph* (London), June 27, 1996, at 6, 1996 WL 3960465.

<sup>82</sup> Human Rights Act, 1998, c. 42 (Eng.). See generally *Rights Brought Home: The Human Rights Bill, 1997*, Cm. 3782, <http://www.official-documents.co.uk/document/hof-fice/rights/rights.htm>; Lord Irvine of Lairg, *The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights*, 1998 Pub. L. 221.

<sup>83</sup> Human Rights Act § 6(1) (“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”).

<sup>84</sup> See *id.* § 19 (requiring government either to make “written statement of compatibility” with Convention rights, or to note its inability to make such statement).

human rights whenever this is possible.<sup>85</sup> And when that is not possible, a “declaration of incompatibility” may be issued,<sup>86</sup> which should lead to the offending legislation being amended by means of a “fast-track” procedure.<sup>87</sup>

The Act does *not*, however, confer on British courts any authority to *quash* legislation which is irreconcilable with human rights norms.<sup>88</sup> Nevertheless, the issue of a declaration of incompatibility is very *likely* to prompt the amendment of defective legislation. This follows because such a declaration is likely to create considerable political pressure in favor of the rectification of national law and because a litigant who obtains such a declaration is likely to secure a remedy before the European Court of Human Rights if a remedy is not forthcoming domestically. Consequently, while British courts will not possess the power to strike down legislation which is incompatible with human rights, their power to issue a declaration of incompatibility is substantial, given that, in pragmatic terms, it very probably will lead to the amendment of defective legislation. In this *practical* sense, the Human Rights Act does introduce a *limited* form of constitutional review which is able fully to coexist with the theory of parliamentary sovereignty.<sup>89</sup> It also reconciles the dual democratic imperatives of governance *by the majority* in a manner which respects *minority interests*.<sup>90</sup>

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<sup>85</sup> Id. § 3.

<sup>86</sup> Id. § 4.

<sup>87</sup> Id. § 10.

<sup>88</sup> In contrast, full constitutional review *does* exist vis-à-vis the enactments of the Scottish Parliament, given that certain matters (e.g., the competence to legislate on reserved matters or in contravention of the European Convention on Human Rights) lie beyond its powers. See Scotland Act, 1998, c. 46, § 29 (Eng.). Nevertheless, the position that obtains in Scotland remains distinguishable from that existing in the United States, given that the Scotland Act does not displace the capacity of the Westminster Parliament to legislate for Scotland on any matter (irrespective of whether it is reserved or devolved). Id. § 28(7). The possibility therefore remains for legislation (enacted by Westminster) to operate validly in Scotland notwithstanding its incompatibility with the Human Rights Act 1998.

<sup>89</sup> An approach to human rights that preserves the legislature's ultimate capacity to attenuate them also has been favored by a number of other common law countries. For instance, the New Zealand Bill of Rights Act, 1990 (N.Z.), <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1990/an/109.html>, requires legislation to be interpreted consistently with fundamental rights, see id. § 6, but leaves the legislature's power to restrict such rights ultimately intact, see id. § 4. Similarly, Section 33(1) of the Canadian Charter of Rights and Freedoms permits legislative derogation from human rights provided that the derogation is explicit. See Canada Act, 1982, c. 11, sched. B, pt. I, § 33(1) (Eng.).

<sup>90</sup> See further 582 Parl. Deb., H.L. (5th ser.) 1234 (1997) (remarks of Lord Irvine of Lairg).

### 3. *British Constitutionalism and Legal Theory*

I will conclude, in a moment, by considering the broader significance of these developments for the relationship between the principles of constitutional and legislative supremacy. First, however, let me return to a specific point which I raised earlier.

I noted that the sovereignty principle may appear to institutionalize a relentlessly positivist approach to law and adjudication: By commanding unyielding judicial fealty to every enactment of Parliament, it may seem to enshrine legal positivism in its paradigm form, apparently effecting a rigid separation between questions of legality and considerations of morality. To reach such a conclusion would be, however, to misunderstand the meaning of both positivism and sovereignty.

If positivism is simplistically defined as a theory which divorces questions of *validity* from considerations of morality, then sovereignty is, on any view, positivist in nature. However, the line which distinguishes adjudication on the *validity* of legislation from questions of *interpretation* is not watertight. Once this is appreciated, it becomes apparent that the British constitution is able to embrace sovereignty theory without institutionalizing a purely positivist conception of law. The *interpretative* framework which exists in the U.K. legal order is based on a system of morality which can be traced back to the roots of the common law—which jealously guards the liberty of the individual—and whose most recent manifestation is to be found in the explicit commitment to fundamental rights contained in the Human Rights Act.<sup>91</sup> This reflects an approach which, far from being exclusively positivist, embraces an ineluctable connection between the meaning of law and the framework of values—based preeminently on respect for the rights and liberties of the individual—on which the British legal system is founded.

In this sense, the British and American legal systems both embrace approaches to adjudication which accept a connection between law and morality, albeit that that linkage is given different institutional effect by each system. While the emphasis here is on morality (as it is given expression through the Supreme Court's interpretation of the Bill of Rights) as a determinant of the *validity* of legislation, the emphasis in the United Kingdom is on morality as a determinant of the *meaning* of legislation. Thus, while the ultimate objective of connecting law with morality is shared by our respective legal systems, the

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<sup>91</sup> For a more detailed discussion of the manner in which the Human Rights Act will institute an approach to adjudication that is more explicitly moral, see Irvine, *supra* note 82, at 229.

manner in which that goal is realized differs in order to reflect our distinct constitutional arrangements. This, in turn, reiterates one of my central themes this evening: That, while the principles of constitutional and legislative supremacy *are* clearly different, that divergence is often subtle rather than straightforward. It is to that theme that I finally return.

### CONCLUSION

At first glance, it seems self-evident that American adherence to constitutional supremacy and British attachment to parliamentary sovereignty define a gulf which separates our respective approaches to constitutionalism. My purpose, this evening, has been to suggest that, while the two theories are clearly different, their divergence in formal terms should not be permitted to obscure a *measure* of convergence at the level of substance.

This follows because one of the defining characteristics of both theories is that their meaning ultimately is determined by the broader legal and political environment within which they subsist. Although the degree of their conceptual distinction is sufficient to ensure that they do not *overlap*, their inherent elasticity and context-sensitivity make it unduly simplistic to postulate a bright-line distinction between them. This conclusion applies with equal force both to their underlying foundations and their practical implications.

As I discussed earlier, reform of the British electoral franchise during the nineteenth and early twentieth centuries fundamentally changed the philosophical and political foundations on which parliamentary sovereignty rests, turning the doctrine into the vehicle which, like constitutional supremacy, gives effect to a notion of popular sovereignty. Thus, legislative and constitutional supremacy both institutionalize a theory of government which rests on the same philosophical basis, although they represent different interpretations of how that theory ought to be given effect.

Context is equally central to an appreciation of more practical matters, such as the protection which the theories of constitutional and legislative supremacy afford to fundamental rights. Viewed superficially, the former appears to render human rights absolutely secure, while the latter seems to make them precarious in the extreme. The position, however, is less straightforward in reality. The practical capacity of a written constitution to protect human rights is ultimately dependent upon the broader context within which it exists: "If the

judges are not prepared to speak for it, a constitution is nothing."<sup>92</sup> It is the willingness of American judges to give practical effect to the Bill of Rights which has turned an aspirational text into enforceable law.

Equally, the extent to which parliamentary sovereignty renders human rights precarious is a function of the broader constitutional setting. As I argued earlier, the evolution of the context within which sovereignty theory exists has impacted fundamentally upon its implications for human rights protection. In particular, the new Human Rights Act creates an environment within which it is much more difficult, legally<sup>93</sup> and politically,<sup>94</sup> for Parliament to exercise its sovereignty in a manner which is inconsistent with civil liberties.

The fact that the United Kingdom does not embrace constitutional review continues to distinguish our system from that which applies here. But although such differences are important, they should not be allowed to obscure the fact that our respective systems share so much in common. The value of representative and participatory democracy lies at the very heart of both the American and British constitutional orders. And we share an appreciation of the importance of individual liberty whose roots can be traced back as far as the Magna Carta.

Writing in *The Federalist* in 1788, James Madison said that

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.<sup>95</sup>

Those words ring just as true today as they did two centuries ago. And the commitment to democratic and accountable government which they reflect remains the most fundamental of the many enduring factors which connect constitutionalism in Britain and America.

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<sup>92</sup> Sir Stephen Sedley, *The Sound of Silence: Constitutional Law Without a Constitution*, 110 L.Q. Rev. 270, 277 (1994).

<sup>93</sup> This follows because the logical effect of section 3 of the Act is to introduce very clear statutory language as a condition precedent to legislative interference with human rights. See Human Rights Act, 1998, c. 42, § 3 (Eng.) (requiring that, insofar as possible, legislation be read to comply with Convention rights, thereby resulting in clarification of statutory language). The use of such language therefore has become a *legal* requirement that must be satisfied before Parliament is able to infringe fundamental rights.

<sup>94</sup> The Act makes it more difficult *politically* for Parliament to qualify human rights because, first, the use of clear language, see *supra* note 93, and the § 19 statement of compatibility scheme, will draw parliamentary and public attention to the rights implications of draft legislation (and, therefore, will require the Government to justify the attenuation of human rights); and second, significant political pressure in favor of amendment is likely to attend a judicial declaration of incompatibility under § 4.

<sup>95</sup> *The Federalist* No. 57 (James Madison).