
HUMAN RIGHTS IN THE BRITISH CONSTITUTION: A PRISONER OF HISTORY?

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As the debate in the United Kingdom over the possible repeal of the Human Rights Act continues, the key question facing constitutional scholars is whether introducing a British Bill of Rights is at all possible under current constitutional circumstances. This Article attempts to make a contribution from a comparative historical perspective. First, a comparative historical study of the emergence of bills of rights in liberal democracies seeks to uncover the historical conditions for the establishment of entrenched bills of individual rights. This study utilizes the method of prototypical cases, focusing on the emergence of entrenched bills of rights and relevant enforcement mechanisms in the United States, Germany, and Canada. Second, the applicability of these historical conditions to the UK of the early twenty-first century will be analyzed. As a model of “weak-form” judicial review, the Human Rights Act so far seems to have failed to establish a consensus over how human rights are best protected in the UK. This Article aims to answer the question of whether human-rights protection in the UK remains a prisoner of seventeenth-century British constitutional history.

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I. INTRODUCTION

The situation surrounding the protection of human rights in the United Kingdom remains curiously ambiguous. To be clear, the recent proposal by the current Conservative government of the UK of a “British Bill of Rights” does not seem to conform to the usual understanding of a bill of rights.¹ Neither is the perspective that the current UK Human Rights Act 1998 be seen as a bill of rights universally embraced.² Due to the complexity of the subject and the limited available scope, this Article does not attempt to present a roadmap for the introduction of a bill of rights in the UK nor does it seek to decisively argue for the superiority of an entrenched bill of rights. This Article aims instead to highlight specific experiences of other countries in order to make a modest contribution to lifting the current confusion over the Conservative proposal for a British Bill of Rights.³

Part II explains the background to the controversy. Part III consists of case studies of the genesis of charters of rights in three countries. This Article utilizes the method of prototypical cases,⁴ focusing on the emergence of entrenched bills of rights in the United States, Germany, and Canada. Each case not only respectively represents a different culture of constitutional review, but also an example of a significant development in the global history of fundamental-rights protection. Even though the UK is not a federal country, it nevertheless is a state containing strong regional nationalist tendencies. The study of federal countries is thus more appropriate than the study of unitary states. Part IV seeks to apply the observed patterns in these case studies to the current UK context to determine which factors could prompt the UK to break with the legacies of its seventeenth-century constitutional history and introduce an entrenched bill of rights.

1. FRANCESCA KLUG, *A MAGNA CARTA FOR ALL HUMANITY: HOMING IN ON HUMAN RIGHTS* 205 (2015).

2. CHARLES O.H. PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHT INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES* 21 (2007).

3. For a strong critique of the UK government's proposals to repeal the Human Rights Act, see CONOR GEARTY, *ON FANTASY ISLAND* (2016).

4. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 256 (2014).

II. HUMAN RIGHTS IN THE UNITED KINGDOM

A. *The English Tradition*

It is undeniable that the English legal tradition has made major contributions to the development of human-rights protection. According to Hersch Lauterpacht, the “American declarations of rights—and these were the principal source of the French declarations and, with them, of the constitutional practice of most States—owe their origin, in varying degrees of importance, to . . . the Magna Carta . . . the Habeas Corpus Act . . . [and] English political doctrines of freedom and toleration. . . .”⁵ It is thus surprising that despite this influence, the UK “has remained outside the orbit of the almost universal trend of safeguarding the fundamental rights of the individual in a written constitution.”⁶ As a consequence of the Glorious Revolution of 1688/1689 a “Bill of Rights” was established in England. Yet, this piece of legislation concerned the rights of Parliament, and in orthodox constitutional theory the Bill of Rights 1689 is simply a statute⁷ and therefore enjoys no special entrenched status.

In the UK of the twenty-first century, the closest equivalent to a bill of rights of the individual are the rights listed in Schedule 1 of the Human Rights Act (“HRA”) of 1998,⁸ which incorporated most of the rights contained in the European Convention on Human Rights (“ECHR”)⁹ into UK law. Paradoxically, even though the UK played a leading role in the drafting process of the ECHR, the UK government always had an ambivalent relationship to the treaty.¹⁰ It is thus unsurprising that serious steps of incorporation were taken only fifty years after ratification. What is more surprising, however, is that merely fifteen years after the HRA came into force, the repeal of the HRA is being seriously considered by the 2015 newly elected Conservative UK government.¹¹

In light of the current controversy, how have human rights traditionally been protected in the UK? Before 1998, human rights in the UK’s “flexible” and “political” constitution were protected mainly via the common law and statutory interpretation.¹² Yet, these mechanisms were not without their critics. The common-law approach has a number

5. HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 55 (1945) (footnote omitted).

6. *Id.* at 54.

7. VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 54 (2009).

8. *Id.*

9. *See id.* at 59.

10. *See* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 101 (2010).

11. Nicholas Watt, *Conservatives to Push Forward on Manifesto and Scrap Human Rights Act*, GUARDIAN (May 10, 2015, 8:58 AM), <http://www.theguardian.com/politics/2015/may/10/conservatives-to-push-forward-on-manifesto-and-scrap-human-rights-act>.

12. JOHN WADHAM ET AL., BLACKSTONE’S GUIDE TO THE HUMAN RIGHTS ACT 1998 3 (6th ed. 2011).

of weaknesses, which include its uncertain and residual character.¹³ It is true that the common law has recognized certain rights which are also found in, or indeed have led to, entrenched bills of rights in other jurisdictions and on the international level; yet, it is impossible to ascertain a complete and finite list of fundamental rights protected under the common law, thus leading to legal uncertainty.¹⁴

Common law and statutory interpretation also seem to face an insurmountable obstacle in the guise of parliamentary sovereignty. The current UK constitutional system depends on parliamentary sovereignty as the central organizing principle as a matter of “political fact.”¹⁵ According to Dicey’s classic definition, parliamentary sovereignty means that the UK Parliament can enact or repeal any law, and neither the courts nor any other institution can legally invalidate a statute.¹⁶ The roots of this fundamental constitutional doctrine can be traced to the English Civil War and the Glorious Revolution of seventeenth-century England.¹⁷ Electoral reform in the nineteenth century further cemented the power of Parliament.¹⁸ It is the centrality of parliamentary sovereignty to the UK constitutional system that has led to an ambivalent relationship between modern human-rights protection and UK constitutional government. Lord Scarman succinctly summed up the key weakness of the traditional English approach to human-rights protection in his Hamlyn Lectures of 1974:

When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced, it may be, of Parliament.¹⁹

By the 1970s, faith in the wisdom of rejecting the need for legally entrenched rights, relying instead on institutional protections against the violation of liberty and the rule of law,²⁰ seem to have come under pressure.

Yet, the birth of modern human-rights protection after World War II was not ignored by the UK. As previously mentioned, the UK played a central role in the establishment of the ECHR. Thus, since 1950, an additional element to UK human-rights protection was added through the UK’s membership in the Council of Europe and status as a signatory to

13. *See id.*

14. Colm O’Cinneide, *Human Rights and the UK Constitution*, in *THE CHANGING CONSTITUTION* 80–81 (Jeffrey Jowell et al., eds., 8th ed. 2015).

15. H.W.R. Wade, *The Basis of Legal Sovereignty*, 13 *CAMBRIDGE L.J.* 172, 188 (1955).

16. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39 (10th ed. 1959).

17. *See generally* F. GUIZOT, *HISTORY OF THE ENGLISH REVOLUTION* 5 (1848).

18. For a detailed overview of the historical development of the doctrine of parliamentary sovereignty, see JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

19. LESLIE SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* 15 (1974).

20. PARKINSON, *supra* note 2, at 25.

the ECHR. After the UK accepted the right of individual petition to the European Court of Human Rights (“ECtHR”) in 1966, human-rights protection within the UK was further opened to international scrutiny. Even though ECHR membership may have influenced the UK’s promotion of colonial bills of rights,²¹ the latter becoming official policy at the Colonial Office in 1962,²² the necessity of a bill of rights for the UK was firmly rejected.²³ Membership of the ECHR, however, did eventually lead to the recognition that human-rights protection in the UK, compared with international standards, seemed to remain unsatisfactory. The solution proposed by the newly elected Labour government of 1997 was to incorporate ECHR rights into UK domestic law via the HRA, which came into force in 2000.²⁴

B. *The Human Rights Act 1998*

As Lord Bingham already pointed out in 1993, incorporating ECHR rights into domestic law

would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore this country to its former place as an international standard-bearer of liberty and justice. It would help to reinvigorate the faith, which our eighteenth and nineteenth century forbears would not for an instant have doubted, that these were fields in which Britain was the world’s teacher, not its pupil.²⁵

In Lord Bingham’s comment, one can discern a strong desire to end the UK’s ambivalence towards modern mechanisms of human-rights protection. It can be understood as a call to emancipate human-rights protection in the UK from the shackles of seventeenth-century British constitutional history. British seventeenth-century constitutional achievements, which served as models in the eighteenth and nineteenth centuries for other countries, had, by the late twentieth century, become a barrier against the reception of post-World War II international developments in human rights. The title of the White Paper published by the government in October 1997 was thus suitably called “Rights Brought Home.”²⁶ Further integration of the UK into a robust European system of human-rights protection since 2000 was especially significant since “the UN human-rights treaties and the conclusions of the various UN review processes . . . remain marginal to the functioning of the UK’s consti-

21. A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 844–73 (2001).

22. PARKINSON, *supra* note 2, at 1.

23. *Id.* at 272.

24. O’Cinneide, *supra* note 14, at 74.

25. TOM BINGHAM, *The European Convention on Human Rights: Time to Incorporate*, in *THE BUSINESS OF JUDGING* 131, 140 (2000).

26. BOGDANOR, *supra* note 7, at 59.

tutional system.”²⁷ The enactment of the HRA in 1998 thus remains a high point in the UK’s engagement with international human-rights law.

The protection scheme under the HRA was a revolutionary constitutional innovation and is the “cornerstone” of what Bogdanor argues had become a “new British constitution”²⁸ by the early twenty-first century. The aim of the HRA was to improve the level of human-rights protection in the UK without compromising the central constitutional principle of parliamentary sovereignty. Two sections of the HRA are of crucial importance. Under Section 3 HRA, the judiciary is under a legal obligation to interpret all legislation so far as is possible in conformity with ECHR rights.²⁹ If, as is permissible under the doctrine of parliamentary sovereignty, the wording of the statute is so clear as to make such an exercise impossible, Section 4 HRA authorizes judges to issue a declaration of incompatibility.³⁰ Under this scheme, the HRA arguably has introduced a “weak-form” of constitutional review to the UK.³¹ This UK version of what has also been labelled as dialogic review³² has been praised as a “beautifully drafted”³³ solution to the dilemma between the preservation of parliamentary sovereignty and improving human-rights protection.³⁴

Not long after coming into force, however, the HRA was criticized by sections of the media and senior political figures.³⁵ Key arguments deployed against the HRA include the following: excessive minority protection at the expense of the public interest, serious defects in the institutional and structural aspects of the ECHR enforcement mechanism, and the stunting of a British “home grown” domestic-rights jurisprudence.³⁶ Yet, the UK Parliament’s response to the Strasbourg rulings have been largely positive—usually introducing primary legislation to resolve issues of incompatibility.³⁷ A dispute since 2005, however, over the UK’s blanket ban on the right of prisoners to vote “remains an open sore in the relationship between the UK and the ECHR system of rights protection, as it risks causing the UK to be in breach of its treaty obligations under the ECHR.”³⁸ A move towards greater judicial protection of human rights at the perceived expense of legislative freedom seems to sit uncomfortably

27. O’Cinneide, *supra* note 14, at 76.

28. BOGDANOR, *supra* note 7, at 62.

29. Human Rights Act 1998 c. 42, § 3 (Eng.), <http://www.legislation.gov.uk/ukpga/1998/42/section/3>.

30. BOGDANOR, *supra* note 7, at 59.

31. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2785 (2003).

32. MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 57 (2014).

33. Lord Walker of Gestingthorpe, *Lord Rodger and Statute Law*, in *JUDGE AND JURIST: ESSAYS IN MEMORY OF LORD RODGER OF EARLSFERRY* 135 (Andrew Burrows et al., eds., 2013).

34. CONOR GEARTY, *CAN HUMAN RIGHTS SURVIVE?* 97 (2006).

35. KLUG, *supra* note 1, at 179.

36. O’Cinneide, *supra* note 14, at 96–97.

37. *Id.* at 93.

38. *Id.*

with those advocating for retaining the traditional system based on parliamentary sovereignty. Relevant judicial innovations such as the concept of “constitutional statutes” have also failed to achieve lasting impact in case law.³⁹

C. *Calls for Reform*

In 2014, the Conservative Party argued that the ECtHR had developed “mission creep,” and that the HRA undermines the decision-making of UK courts, as well as the sovereignty of Parliament and democratic accountability to the public.⁴⁰ The 2014 Conservatives’ plan for change includes the following: repeal the HRA, put the text of the ECHR into primary legislation, clarify ECHR rights to reflect a balance between rights and responsibilities, break the formal link between British courts and the ECtHR, end the ability of the ECtHR to force the UK to change the law, prevent UK law from being effectively re-written through “interpretation,” limit the use of human-rights laws to the most serious cases, and limit the reach of human-rights cases to the UK.⁴¹

The proposals have been summed up under the policy of introducing a “British Bill of Rights”;⁴² however, what the contents of such a “Bill of Rights” for the individual would be, and how it would function within the UK constitutional system, remains vague and elusive. Since the Conservative proposals, criticism of these plans have been voiced not only at home, but also from abroad, including from the United Nations.⁴³ Simultaneously, progress towards offering a clear plan of action by the UK government has been slow. In the autumn of 2015, a government policy paper was promised for publication by December 2015.⁴⁴ This, however, was postponed to 2016. It was argued that a reason for the delay was the need to look into the related issue of potentially introducing a constitutional court in the UK, possibly taking the German model into account.⁴⁵ At the time of writing, the most recent proposals regarding this issue are

39. See BRICE DICKSON, *HUMAN RIGHTS AND THE UNITED KINGDOM SUPREME COURT* 29 (2013).

40. PROTECTING HUMAN RIGHTS IN THE UK: THE CONSERVATIVES’ PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS 2 (2014), <http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>.

41. Alan Mabbutt, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws*, CONSERVATIVES 5–7 (Aug. 30, 2016), https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf.

42. *Id.* at 2.

43. Owen Bowcott, *Senior UN Official Warns against UK Plans to Scrap Human Rights Act*, GUARDIAN (Oct. 12, 2015, 9:08 EDT), <http://www.theguardian.com/law/2015/oct/12/un-official-warns-against-uk-plans-scrap-human-rights-act>.

44. David Allen Green, *Whatever Happened to Repeal of the Human Rights Act?*, FIN. TIMES: DAVID ALLEN GREEN (June 2, 2015, 13:19), <http://blogs.ft.com/david-allen-green/2015/06/02/what-ever-happened-to-repeal-of-the-human-rights-act>.

45. Kate Allen, *Tories Back Away from Human Rights Pledge*, FIN. TIMES (Feb. 2, 2016, 5:23 PM), <http://www.ft.com/cms/s/0/b2f99794-c9b7-11e5-a8ef-ca66e967dd44.html#axzz3z7JdeQPJ>.

by the new Prime Minister, Theresa May, pledging to withdraw from the ECHR once the withdrawal from the EU is completed.⁴⁶

Even though human-rights reform has been a pressing concern for the Conservative Party during, and immediately after, the House of Commons election of 2015, it is currently preoccupied with implementing the outcome of the referendum on EU membership,⁴⁷ which resulted in a majority vote to withdraw from the EU.⁴⁸ Even before the so-called vote for “Brexit,” however, the dramatic changes to UK human-rights law proposed in 2014 and 2015 seem to have been drastically toned down by early 2016. During a hearing at the EU Justice Subcommittee of the House of Lords in February 2016, Minister of Justice Michael Gove admitted that any new human-rights arrangements will remain within a European system.⁴⁹ The proposals were mentioned in the Queen’s Speech 2016, but again lacked details and continue to be subject to consultations.⁵⁰

It may very well be the case that the delay in introducing a “British Bill of Rights” is caused by the UK government having to set priorities in its legislative program. Yet, the ambivalent relationship between the UK and post-World War II developments in human-rights protection mechanisms, and more specifically the controversy over the HRA, suggests more fundamental problems for the introduction of a bill of rights for the individual in the UK. In fact, if a bill of rights is to be introduced, it is unavoidable to question the current structure and uncoded nature of the UK constitution. What may have seemed a simple case of human-rights reform is actually presenting itself as a daunting task of constitutional reform which, if not handled with care, may unravel the current UK constitutional settlement. Any bill of rights worthy of its name in the modern sense is not simply a piece of primary legislation without specific constitutional safeguards. Yet, the UK constitution under the principle of parliamentary sovereignty does not, in theory, recognize any form of en-

46. Christopher Hope, *Theresa May to Fight 2020 Election on Plans to Take Britain Out of the European Convention on Human Rights After Brexit is Completed*, TELEGRAPH (Dec. 28, 2016, 10:02 PM), <http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european>.

47. For example, the High Court of England and Wales ruled against the UK government on November 3, 2016 on the issue of whether the use of prerogative powers are enough to trigger a withdrawal from the EU without the need for a vote in the House of Commons. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/r-miller-v-secretary-of-state-for-exiting-eu-amended-20161122.pdf>. On January 24, 2017 the UK Supreme Court ruled against the appeal by the UK government, thus confirming the constitutional necessity for a vote in Parliament. *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union* (Appellant) [2017] UKSC 5, <https://www.supremecourt.uk/cases/uksc-2016-0196.html>.

48. *EU Referendum Results*, BBC NEWS, http://www.bbc.com/news/politics/eu_referendum/results (last visited Jan. 15, 2017).

49. *Id.*

50. Cabinet Office, The Rt Hon David Cameron MP and Prime Minister’s Office, 10 Downing Street, Queen’s Speech 2016: background briefing notes, in *QUEEN’S SPEECH 2016*, May 2016, at 48 (May 18, 2016), <https://www.gov.uk/government/publications/queens-speech-2016-background-briefing-notes>.

trenchment,⁵¹ therefore making the introduction of a bill of rights in the modern sense theoretically impossible. Lauterpacht noted in 1945 that the supremacy of Parliament may be deliberately made to yield to the significant innovation implied in an International Bill of the Rights of Man. For the notion of natural and inalienable human rights, to which such a bill would give expression, is in fact a denial of the absolute supremacy of any earthly legislative power.⁵²

The question is therefore whether human-rights protection in the UK is to continue to remain incomplete—a prisoner of the constitutional settlement inherited from seventeenth-century England.

This Article thus seeks to make a contribution to answering this question by analyzing from a comparative perspective the genesis of entrenched bills, charters, or comprehensive provisions of individual rights in the United States, Germany, and Canada. It is hoped that by clearly identifying factors behind the establishment of these entrenched bills of rights (Part III), lessons can be learned for the UK context (Part IV).

III. BILLS OF RIGHTS IN CONTEXT

A. *The United States*

The United States Bill of Rights, which received the necessary eleven of the fourteen state ratifications to come into force in 1791, is internationally one of the most well-known bills of individual rights. The genesis of the U.S. Bill of Rights depended largely on short-term factors during the ratification process of the U.S. Constitution of 1789. Yet, long-term factors significantly contributed to the emergence of a fierce debate over the necessity of a bill of rights at the federal level.

Several long-term factors provided fertile ground for the establishment of the U.S. Bill of Rights. First, the factual freedom the North American colonies enjoyed over the century prior to the American Revolution became problematic when Britain tried to further integrate these colonies into the Empire towards the end of the eighteenth century. According to Levy, due to “New World conditions, the English legal inheritance, and skipping a feudal stage,”⁵³ the settlers in the British North American colonies “were the freest people, therefore the first colonials to rebel.”⁵⁴ Amar speaks of a “love of liberty and a belief in basic American freedoms.”⁵⁵ Evaluating the role played by “rights” in the American Revolution, Slauter argues that even though “historians have traditional-

51. JOINT COMMITTEE ON HUMAN RIGHTS, A BILL OF RIGHTS FOR THE UK?, 2007–8, HL 165–I, HC 150–I, ¶ 235 (UK), <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf> (last visited Jan. 20, 2017).

52. LAUTERPACHT, *supra* note 5, at 65.

53. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 2 (1999).

54. *Id.*

55. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 315 (2005).

ly focused attention exclusively on the Revolutionary period (1763–1789), we are now beginning to see just how crucial the rest of the century was for the development and deployment of rights talk.”⁵⁶

Second, this condition of freedom led to an early engagement with social-contract theory.⁵⁷ Government through consent, as well as the creation of government by the people, were the prevalent ideas throughout the colonies of British North America for over a century before the American Revolution.⁵⁸ The idea of inalienable natural rights coupled with social-contract theory thus produced the central philosophy of the revolutionaries—namely that “people had the legitimate right to resist and to reform governments that did not protect those inalienable rights.”⁵⁹

Third, the theory of limited government “as an outgrowth of the social compact” led to the belief that “fundamental law” should be put in writing.⁶⁰ By 1780, all of the original states had adopted a written constitution, and this “framing of the first constitutions with bills of rights ranks among America’s foremost achievements, the more remarkable because they were unprecedented and they were realized during wartime.”⁶¹ By 1787, when the adoption of the U.S. Constitution became the focus of discussion, eight bills of rights with constitutional status already existed among the original states.⁶² The absence of a U.S. Bill of Rights as part of the proposed U.S. Constitution thus became a key point of contention.⁶³ This was because, in the “quarter century between the response to the Sugar Act of 1764 and the drafting of the Bill of Rights in 1789, it had become difficult for Americans to understand or tolerate the enumeration of governmental powers without an explicit textual declaration and reservation of the rights of the people.”⁶⁴

Even though long-term factors provided persuasive arguments for the U.S. Bill of Rights, these “would have been unproductive but for the dangerous political situation”⁶⁵ that the ratification process of the U.S. Constitution found itself in. The short-term trigger for the drafting and final adoption of the U.S. Bill of Rights is to be found in the need of the Federalists to counter Anti-Federalist critique. The future “Father of the U.S. Bill of Rights,” Madison, ironically found himself in a precarious position during the elections to the first Congress. His initial opposition to the establishment of a bill of rights at the federal level nearly prevent-

56. Eric Slauter, *Rights*, in THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION 447, 449 (Edward G. Gray & Jane Kamensky eds., 2013).

57. LEVY, *supra* note 53, at 3.

58. *Id.*

59. Slauter, *supra* note 56, at 447.

60. LEVY, *supra* note 53, at 3–4.

61. *Id.* at 10–11.

62. *Id.* at 11.

63. *Id.*

64. Slauter, *supra* note 56, at 448.

65. LEVY, *supra* note 53, at 34.

ed his election. Anti-Federalists argued for a U.S. Bill of Rights, whereas prominent Federalists, such as Madison, preferred structural arrangements, such as federalism and separation of powers, to counter human imperfection and potential abuse of power by the federal government.⁶⁶ Yet, Anti-Federalist forces were strong in his home state of Virginia, and Madison failed to be selected as a senator for his state.⁶⁷ Instead, he only narrowly secured membership of the first Congress as a member of the House of Representatives by switching his position and promising to introduce a bill of rights.⁶⁸ He secured his seat against his Anti-Federalist rival Monroe by a majority of merely 366 votes.⁶⁹ If he had not given in to the Anti-Federalist demands, Madison likely would have failed to be elected to the first Congress. Once elected, Madison felt compelled to fulfill his election promise of initiating a bill of rights at the federal level. Nevertheless, even his historic speech on June 8, 1789, proposing a U.S. bill of rights, “contained not a hint that Madison himself considered a bill of rights essential or even necessary.”⁷⁰

Madison’s change of heart reflected a wider switch in position by the Federalists for the sake of “statecraft and political expediency.”⁷¹ The new strategy of the Federalists for securing the ratification of the Constitution was to persuade the people to accept the Constitution as it stood in exchange for the introduction of a U.S. Bill of Rights by the new federal government in the form of added amendments.⁷² The success of this strategy also prompted Anti-Federalists to switch positions, arguing that after ratification of the Constitution there were more important matters to be dealt with than introducing a bill of rights. This was not surprising, since

from the start of the ratification controversy, the omission of a bill of rights became an Anti-Federalist mace with which to smash the Constitution. Its opponents sought to prevent ratification and exaggerated the bill of rights issue because it was one with which they could enlist public support. Their prime loyalty belonged to states’ rights, not civil rights.⁷³

Two years after its introduction, the U.S. Bill of Rights was finally ratified by eleven out of fourteen states, thus officially adding ten amendments to the U.S. Constitution in 1791.⁷⁴

One can conclude that despite genuine support for a federal bill of rights by state conventions and key individuals such as Jefferson and Ad-

66. MARK TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 13–15 (2d ed. 2015).

67. *Id.* at 16.

68. LEVY, *supra* note 53, at 32.

69. PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT* 71 (rev. ed. 2006).

70. *Id.* at 73.

71. LEVY, *supra* note 53, at 32.

72. *See id.* at 31–32.

73. *Id.* at 14.

74. *Id.* at 40–43.

ams, the actual establishment of the Bill of Rights depended largely on short-term political tactics and maneuvering in a fight “for control over a brand new political system.”⁷⁵ As Amar argues, even though there was demand by state ratifying conventions to clarify the limits on federal power, there were also further reasons for the federal lawmakers to agree to a bill of rights: the next round of elections, the prospect of a second constitutional convention, and the need to co-opt the opposition agenda to “help achieve cohesion and enhance national security.”⁷⁶

B. Germany

The provisions on fundamental rights of the current German constitution are a direct reaction to the negation of the private sphere of the individual under Nazi totalitarianism and the atrocities perpetrated under Hitler’s regime.⁷⁷ These rights provisions, however, were not plucked from thin air nor can one argue that the period of 1945–1949 could be described as the “hour zero” for fundamental rights in German constitutional history.⁷⁸ From a long-term perspective, fundamental rights in German constitutional history experienced progress and setbacks interchangeably. The Nazi regime between 1933 and 1945 presented the most horrendous setback in terms of fundamental rights and thus prompted the founders of the Federal Republic of Germany to consciously make constitutional choices designed to prevent any future setbacks and to settle the theoretical debate over the nature of fundamental rights.

It is difficult to settle on long-term factors for the emergence of an entrenched catalog of rights in Germany. This is because the history of fundamental rights in Germany is characterized by highs and lows. Even though the notion of natural rights and natural law existed in late eighteenth-century Germany and developments in America and France were noticed, these ideas did not automatically lead to charters of fundamental rights.⁷⁹ Major progress, however, was made as a result of the revolutionary activities of 1848–1849. The result was the first German constitution with a catalog of fundamental rights, the so-called *Paulskirchenverfassung*.⁸⁰ The constitution of the Weimar Republic of 1919 also contained provisions of fundamental rights.⁸¹ When the founders of the Federal Republic of Germany were drawing up its so-called

75. IRONS, *supra* note 69, at 69, 71.

76. AMAR, *supra* note 55, at 317–18.

77. MATTHIAS JESTAEDT ET AL., DAS ENTGRENZTE GERICHT 27 (2011).

78. Friedhelm Hufen, *Entstehung und Entwicklung der Grundrechte*, in DAS GRUNDGESETZ IN INTERDISZIPLINÄRER BETRACHTUNG 42 (Hans-Peter Schneider ed., 2001).

79. KLAUS KRÖGER, GRUNDRECHTSENTWICKLUNG IN DEUTSCHLAND—VON IHREN ANFÄNGEN BIS ZUR GEGENWART 8 (1998).

80. JO ERIC KHUSHAL MURKENS, FROM EMPIRE TO UNION 146 (2013).

81. *Id.*

“Basic Law,” these precursors and their related experiences were consciously taken into account.⁸²

A large portion of experience with fundamental rights protection in German constitutional history prior to 1949, however, can be characterized as setbacks. The reactionary period following the conclusion of the Congress of Vienna in 1815 was dominated by the principle of monarchic legitimacy, and any constitutional limits on the sovereign were considered self-imposed.⁸³ Due to the refusal of the Prussian King to take up the parliamentary offer to become Emperor, the *Paulskirchenverfassung* never came into force and the project of democratic German unification collapsed. The 1871 Imperial Constitution of the German Empire, unified through wars against Austria and France, created a federal state headed by a monarch, but it did not contain a catalog of fundamental rights.⁸⁴ Even though the Weimar Constitution of 1919 created the first German Republic, complete with a constitution guaranteeing fundamental rights, the protection of these rights was far from perfect. Political instability and economic crises rocked the Weimar Republic. Gaps in the Weimar Constitution prompted key constitutional questions over judicial review of legislation, as well as the fundamental principle of equality.⁸⁵ These controversies were underfed by a fierce theoretical debate over the nature of fundamental rights, especially between Hans Kelsen and Carl Schmitt.⁸⁶

The short-term factors for the introduction of entrenched fundamental rights in 1949 are clear. Partly drawing on arguments made during the debates of the Weimar Republic, the Nazi regime had abolished the private sphere, thus casting away any notion of fundamental rights of the individual.⁸⁷ The horrendous atrocities committed under Hitler’s rule became the key trigger for placing an unquestionably entrenched catalog of fundamental rights as the first section of the German Basic Law of 1949. These constitutional provisions on fundamental rights were also partially influenced by a resurgence of natural law in legal scholarship.⁸⁸ The previous fixation with legal positivism was blamed as being partly responsible for the collapse of judicial integrity in the Weimar Republic;⁸⁹ thus, the design of the German Basic Law was not plagued by the same controversial debates over the nature of fundamental rights that had characterised the Weimar period.⁹⁰

82. *Id.*

83. KRÖGER, *supra* note 79, at 12–14.

84. MURKENS, *supra* note 80, at 146.

85. KRÖGER, *supra* note 79, at 53–58; *see also* LARS VINX, *THE GUARDIAN OF THE CONSTITUTION* (2015) (providing the first English translation of Hans Kelsen’s and Carl Schmitt’s debate on constitutional guardianship and the legitimacy of constitutional review).

86. KRÖGER, *supra* note 79, at 59–68.

87. *Id.* at 71.

88. *Id.* at 80.

89. MAXIMILIAN STEINBEIS ET AL., *DIE DEUTSCHEN UND DAS GRUNDGESETZ* 92 (2009).

90. JESTAEDT ET AL., *supra* note 77, at 13.

To conclude, progress and setbacks of the development and protection of fundamental rights in German history was intertwined with an ongoing debate over the nature of fundamental rights. The experience of Nazism led to conscious decisions between 1945 and 1949 to end the previous theoretical debates and prevent any future setbacks in the protection of fundamental rights. The result was the establishment of the “sovereignty” of fundamental rights⁹¹ under the German Basic Law of 1949. Such an institutional triumph of fundamental rights was by no means the norm in post-war Europe⁹² and “was the product of positive and negative experiences.”⁹³

C. Canada

With the introduction of the Canadian Charter of Rights and Freedoms in 1982, Canada shifted from a system of legislative supremacy to “semi-limited” government.⁹⁴ Significantly, Section 33 of the Charter has led the Canadian system of human-rights protection to be labeled as weak-form judicial review.⁹⁵ The Canadian example is thus particularly interesting for the UK. In the short-term, it was the sovereigntist referendum in Quebec of 1980 that prompted Prime Minister Elliott Trudeau to overhaul the Canadian constitutional settlement.⁹⁶ The Canadian Charter of Rights and Freedoms was a centrepiece of this reform.⁹⁷

Human rights in pre-Charter Canada were protected via a mixture of mechanisms, such as legislative interventions, presumptions in statutory interpretation, and the power of disallowance by the federal executive.⁹⁸ Some of these mechanisms, such as legislative action, remain important in the Charter era.⁹⁹ It was the Canadian Charter of Rights and Freedoms, however, which enabled challenges against entire legislative regimes and provided “symbolic prominence” for the embodiment of Canadian rights.¹⁰⁰ Thus, in 1982, Canadian courts “embarked on an entirely new venture.”¹⁰¹

The introduction of the Charter, however, was not entirely due to dissatisfaction with the pre-Charter system of rights protection.¹⁰² Cru-

91. Christian Starck, *Grundrechte und Gesetz*, in DER GRUNDRECHTSGEPRÄGTE VERFASSUNGSSTAAT 211 (Michael Sachs & Helmut Siekmann eds., 2012).

92. JESTAEDT ET AL., *supra* note 77, at 12.

93. MURKENS, *supra* note 80, at 147.

94. BAYARD REESOR, THE CANADIAN CONSTITUTION IN HISTORICAL PERSPECTIVE: 413 (1992).

95. Tushnet *supra* note 31, at 2784–85.

96. William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585, 587–89 (1985).

97. JEREMY WEBBER, THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS 174 (2015).

98. *Id.* at 176–82.

99. *Id.* at 178.

100. *Id.* at 182.

101. REESOR, *supra* note 94, at 123.

102. CHRISTOPHER P. MANFREDI, CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM: JUDICIAL POWER AND THE CHARTER 14 (1993).

cially, it was the move from biculturalism to multiculturalism that was the driving force behind the birth of the Charter.¹⁰³ As Manfredi argues, the federal government's motive of national unity via the Charter was two-fold: "first, by shifting national political debate away from regional concerns toward universal questions of human rights; and second, by subordinating provincial legislation to a document ultimately enforced by a predominantly *national* institution (the Supreme Court)."¹⁰⁴ Canadian constitutional politics had long been dominated by the division between the Anglophone and Francophone populations;¹⁰⁵ yet, as the Royal Commission on Bilingualism and Biculturalism reported in 1967 and 1969, groups which did not descend from British, Irish, or French immigrants were dissatisfied with the term of biculturalism, arguing instead for a "multicultural" Canada. Their concerns "tended to meld with the rights consciousness of the post-war period. They became an important constituency in support of a constitutionally entrenched bill of rights."¹⁰⁶ To fully understand the reasons behind the introduction of the Charter, one must therefore remember that the reforms were part of a program of Canadian nation-building¹⁰⁷—an attempt to forge a unified constitutional identity.

Why was this attempt of Canadian nation-building triggered in the early 1980s? The key event was Quebec's referendum on sovereignty-association of 1980 and Trudeau's promise to "renew federalism" and "renew the Constitution" in the event of a rejection of independence. His pledge significantly contributed to the final result of 59.56 % for the "No" vote.¹⁰⁸ Fundamental constitutional change in Canada, however, possessed an additional layer: the UK Parliament had to be involved. The British North America Act of 1867 formed Canada's constitutional foundations, and Canadian autonomy was granted via the Statute of Westminster of 1931. Both are acts of the UK Parliament. Even though by the 1970s Canada was already an independent country, its power of constitutional amendment was still limited. Any amendments to the British North America Act had to be made by the UK Parliament. Already in 1971 the provincial premiers and Prime Minister Trudeau agreed in the so-called Victoria plan to aim for "patriation" of the Canadian constitution. The UK Parliament was no longer to play a role in the Canadian constitutional amendment process.¹⁰⁹ The Victoria plan, however, failed due to provincial politics, but the project of patriation was then catapulted back to center stage by the election victory of the separatist party in Quebec in 1976,¹¹⁰ which led to the 1980 independence referen-

103. WEBBER, *supra* note 97, at 39.

104. MANFREDI, *supra* note 102, at 14.

105. WEBBER, *supra* note 97, at 35–39.

106. *Id.* at 40.

107. *Id.* at 174.

108. *Id.* at 42.

109. MANFREDI, *supra* note 102, at 12.

110. *Id.* at 13.

dum. The attempt to rein in separatism thus re-triggered the quest for patriation of the Canadian constitution by the federal government. The key result of these two short-term factors was the introduction of the Canadian Charter of Rights and Freedoms as the center piece of the Canadian Constitution Act 1982.¹¹¹

To conclude, the genesis of the Canadian Charter of Rights and Freedoms can partly be found in dissatisfaction with the existing patchwork system of human-rights protection. Yet, far more important was Trudeau's attempts at nation-building. Polarized biculturalism led to the serious threat of separatism, and thus triggered an attempted remedy via the concept of multiculturalism based on equal rights for all.

IV. A BRITISH BILL OF RIGHTS?

From the above case studies, we can see that the introduction of entrenched bills of rights can take place for a variety of reasons and do not always have to be triggered by the single desire to improve individual rights protection. Out of the three case studies above, only in Germany was the aim of preventing future human-rights violations a central short-term trigger. Only the horrific experiences of Nazism, however, ended a long and indecisive debate on the nature and enforcement of fundamental rights in Germany. In Canada and the United States, federal bills of rights were ultimately introduced in the shadow of political expediency. What lessons can be drawn from these case studies for the current British situation? The following subsections will focus on the UK and discuss the currently still-unsettled theoretical conflict between political and legal constitutionalism, separatist tendencies in Scotland, and the problem the UK faces in terms of multi-level governance in the context of the EU. The question is whether these fault lines in the UK constitution have the potential to trigger the establishment of an entrenched bill of rights and, thus, allow the UK to emancipate itself from the chains of seventeenth-century British constitutional history.

A. *Theoretical Controversy and Hard Facts*

The current controversy over the HRA, as highlighted in Part II, suggests that the constitutional status of human rights in the UK is yet unsettled. This is mainly due to the fact that two opposing schools of thought still dominate British constitutional discourse. Political constitutionalists argue that the responsibility for human-rights protection lies mainly within the political process;¹¹² whereas legal constitutionalists argue that fundamental rights are constitutional essentials and therefore

111. WEBBER, *supra* note 97, at 43.

112. John Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 17 (1979); Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. TORONTO L.J. 1, 5 (2010).

must not be entirely subject to legislative amendments.¹¹³ Parliamentary sovereignty is an integral part of political constitutionalism; yet, constitutional reforms over the past decades have pushed the UK constitution towards legal constitutionalism.¹¹⁴ With parliamentary sovereignty firmly in place at the core of the UK constitution, the theoretical conflict between political and legal constitutionalism in the UK is still very much alive and leads to positions of ambiguity in various debates of UK constitutional law.

The following passage by Adam Tomkins, a leading exponent of political constitutionalism, clearly demonstrates the core idea of this school of thought:

What is beautiful about the British constitution is that it . . . uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished. This is beautiful . . . because it is democratic; and . . . because it can actually work. Politics really can stop governments from abusing their authority. Turning instead to the courts to provide ways of holding the government to account endangers both democracy and effectiveness.¹¹⁵

Tomkins further argues that “a good deal of value is lost by moving away from the political model of constitutionalism,”¹¹⁶ and he tries to provide a modern defense of political constitutionalism through republican ideas, drawing largely on seventeenth-century constitutional history.¹¹⁷ The history, however, of the twentieth century allows for little optimism regarding the effectiveness of parliament to protect individual rights. As Ewing and Gearty have argued in their study of liberty in the UK during World War I and the Depression, “emergency rather than ordinary law was the normal state of affairs.”¹¹⁸ They point out that in

every decade under examination, constitutional principle is not only undermined at the level of theory, but is also further repudiated by constitutional practice. The executive was never wholly committed to legality, just as the legislature as an institution was largely uninterested in accountability, and the judiciary seemed more often than not positively hostile to the protection of civil liberties.¹¹⁹

The deficiencies of the UK’s practice of political constitutionalism was further exposed in the second half of the twentieth century. The

113. T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 261 (2001).

114. For an overview of the debate and an observed progress from political to legal constitutionalism, see Mark Glover & Robert Hazell, *Introduction: Forecasting Constitutional Futures*, in *CONSTITUTIONAL FUTURES REVISITED: BRITAIN’S CONSTITUTION TO 2020*, at 14–16 (Robert Hazell ed., 2008).

115. ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 3 (2005).

116. *Id.* at 39 (emphasis omitted).

117. *Id.* at 67–114.

118. K.D. EWING & C.A. GEARTY, *THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN 1914–1915*, at 415 (2000).

119. *Id.*

Commonwealth Immigration Act of 1968, which was passed within “three days amidst a tabloid frenzy . . . prevented British Asians expelled from east Africa from entering Britain at the very time they needed the protection of their UK citizenship.”¹²⁰ As Klug further argues, the UK Parliament rode “roughshod over the rights of a minority. Their most basic citizenship rights were being sacrificed to appease a populist groundswell of anti-immigrant sentiment, only to see it explode further a month later when Enoch Powell made his infamous ‘rivers of blood speech.’”¹²¹ Unlike the experiences of the first half of the twentieth century, however, the UK’s international obligations as a signatory of the ECHR and recognition of the right to individual petition to the ECtHR “exposed the existence of human rights ‘blind spots’ in UK law.”¹²² Landmark anti-terrorism court rulings after the enactment of the HRA¹²³ are further proof that empowering courts can protect unpopular minorities in the face of a parliament under immense public pressure. In times of crisis, faith in political self-restraint is “unlikely to suffice.”¹²⁴

Unless the UK adopts a codified constitution, thus completely making a transition to legal constitutionalism, parliamentary sovereignty will continue to be the foundational principle of the British constitutional settlement. With the continued existence of this principle, it is inevitable that the key source of discussion will be seventeenth-century constitutional history, and the key point of reference will be political constitutionalism, tempered with elements of legal constitutionalism. Ambiguity thus remains and no resolution of this theoretical conflict is in sight. Concerns over the possibility that the proposed British bill of rights will paradoxically lead to weaker human-rights protection,¹²⁵ and debate over whether the HRA is in fact already a British bill of rights,¹²⁶ can largely be explained by this ambiguity at the heart of UK constitutional theory. Such uncertainty may seem of little consequence in times of political stability; yet, the experience of Weimar Germany shows that in times of great political instability such confusion over legal theory can be ideologically instrumentalized. The future political stability of the UK is currently difficult to predict. For example, the overwhelming success of the Scottish National Party (“SNP”) as a purely regional party in Scotland at the UK general election of 2015,¹²⁷ thus having destroyed a traditional and

120. KLUG, *supra* note 1, at 160.

121. *Id.*

122. O’Cinneide, *supra* note 14, at 74.

123. CONOR GEARTY, LIBERTY AND SECURITY 87–91 (2013).

124. AHARON BARAK, THE JUDGE IN A DEMOCRACY 35 (2006).

125. See, e.g., Philippe Sands, *Britain, Europe & Human Rights: What Next?*, ELSON ETHICS LECTURES (2015), https://www.stgeorghouse.org/wp-content/uploads/2015/12/PS5_Elson_Ethics_Lecture_FINAL.pdf.

126. KLUG, *supra* note 1.

127. *Election 2015: SNP Wins 56 of 59 Seats in Scots Landslide*, BBC (May 8, 2015), <http://www.bbc.com/news/election-2015-scotland-32635871>.

often crucial stronghold of the Labour Party,¹²⁸ may have dealt a severe blow to the sustainability of the British two-party system.¹²⁹ The aftermath of the Brexit referendum also has the potential to destabilize political consensus. For example, there has been a reported rise in xenophobic attacks since the referendum result,¹³⁰ and open hostility towards the judiciary has been particularly severe.¹³¹

The theoretical controversy in the Weimar Republic ended only because of the horrific experiences with Nazism. It would be inaccurate and irresponsible to compare the deficiencies of British human-rights protection with the complete breakdown of fundamental-rights protection in Germany between 1933 and 1945. Such a tragedy should also not be necessary for the introduction of an entrenched bill of rights in the UK. If that were the case, it would be preferable to be content with the present system. The HRA is actually doing rather well, since “most judges and senior lawyers have not struggled to apply the HRA as intended.”¹³² It could be argued that the theoretical confusion over human-rights protection in the UK may eventually be settled over time by retaining and continuing to work with the HRA.¹³³ After all, this piece of legislation has only been in force for a little over fifteen years. Recent case law suggests that the HRA has prompted UK courts to go beyond the Strasbourg standard to develop their own unique human-rights jurisprudence.¹³⁴ Due to the foundational nature of parliamentary sovereignty for the UK constitutional system, however, and initiatives such as the Conservative proposals for a “British Bill of Rights”—which in theory is unworkable under a system of legislative supremacy if it is to be a bill of rights in substance¹³⁵—the precise nature of human-rights protection in the UK seems set to remain ambiguous. The legally unlimited legislative authority of the UK Parliament continues, and neither the HRA nor common-law constitutionalism are critical challenges.¹³⁶

128. Philip Cowley, *Political Parties and the British Party System*, in DEVELOPMENTS IN BRITISH POLITICS 104 (Richard Heffernan et al., eds., 2011).

129. See Severin Carrell & Libby Brooks, *SNP Win Stops Short of Majority as Scottish Labour Finishes Third*, GUARDIAN (May 6, 2016, 4:48 AM), <http://www.theguardian.com/politics/2016/may/06/scottish-labour-facing-third-place-after-collapse-in-vote>.

130. Harriet Sherwood et al., *Cameron Condemns Xenophobic and Racist Abuse After Brexit Vote*, GUARDIAN (June 27, 2016, 6:03 PM), <https://www.theguardian.com/uk-news/2016/jun/27/sadiq-khan-muslim-council-britain-warning-of-post-brexit-racism>.

131. Owen Bowcott, *Attacks on Brexit Judges are Bad for Democracy, Says Former Law Lord*, GUARDIAN (Nov. 28, 2016, 07:12 PM), <https://www.theguardian.com/politics/2016/nov/28/attacks-brexit-judges-bad-democracy-law-lord-hope-article-50>.

132. KLUG, *supra* note 1, at 179.

133. See Stewart Wood, *Conservatives Attacking the Human Rights Act Have Forgotten Their Party's Tradition of Defending Liberty*, TELEGRAPH (May 30, 2015, 6:01 AM), <http://www.telegraph.co.uk/news/worldnews/europe/11639548/Conservatives-attacking-the-Human-Rights-Act-have-forgotten-their-partys-tradition-of-defending-liberty.html>.

134. O'Cinneide, *supra* note 14, at 87.

135. See PARKINSON, *supra* note 2, at 4 (providing a definition of a bill of rights).

136. MICHAEL GORDON, PARLIAMENTARY SOVEREIGNTY IN THE UK CONSTITUTION 113 (2015).

Decisive clarification seems to be only possible via a break with seventeenth-century British constitutional history. The consequences of EU “Brexit,” growing regional nationalism in Scotland, Wales, Northern Ireland, and England, as well as uncertainty over the future relationship with the Council of Europe for this debate, are open to question. It is entirely possible that theoretical controversy will be eventually settled by hard facts. Just as the source of parliamentary sovereignty is attributed to it being the “ultimate political fact” of the UK constitution,¹³⁷ an entrenched UK bill of rights could be the result of events beyond the control of legal theory.

B. Multiculturalism and Nation-Building

As demonstrated above, one key factor for the genesis of the Canadian Charter of Rights and Freedoms was Trudeau’s quest for multiculturalism as a central tenet of nation-building. With rising nationalist tensions in today’s UK, there may be a case to establish an entrenched bill of rights in order to cement the relationship between England, Wales, Scotland, and Northern Ireland.

The current devolution settlement in the UK is asymmetrical, top-down, and constitutionally insecure. It is asymmetrical because of the powers given to each of the regional legislatures and executives differ,¹³⁸ and it is top-down and constitutionally insecure because devolution was created by acts of the UK Parliament, and the UK Parliament can, in theory, repeal the relevant legislation unilaterally with a simple majority.¹³⁹ The devolution framework makes it clear that the parliamentary sovereignty of the UK Parliament is preserved.¹⁴⁰ In essence, devolution was designed to contain nationalist threats to the unity of the United Kingdom. Yet, due to the constitutional insecurity of the system, nationalism has actually increased. For example, one of the consequences of the failed Scottish independence referendum of 2014 was the British government’s promise to make the Scottish Parliament “permanent in UK legislation.”¹⁴¹ Strictly speaking, though, under the system of parliamentary sovereignty, this is technically impossible. Thus, even though the Scottish 2014 referendum was promised by the Scottish Nationalist Party as a “once in a generation”¹⁴² opportunity, a second independence referendum could be triggered by the British exit from the EU,¹⁴³ as well as

137. Wade, *supra* note 15, at 188.

138. BOGDANOR, *supra* note 7, at 98.

139. See Gavin Little, *Scotland and Parliamentary Sovereignty*, 24 LEGALSTUD. 540, 542 (2004).

140. Brice Dickson, *Devolution*, in THE CHANGING CONSTITUTION 250–51 (Jeffrey Jowell et al., eds., 8th ed. 2015).

141. LORD SMITH OF KELVIN, SMITH COMMISSION, REPORT OF THE SMITH COMMISSION FOR FURTHER DEVOLUTION OF POWERS TO THE SCOTTISH PARLIAMENT 5 (2014).

142. SCOT. GOV’T, SCOTLAND’S FUTURE: YOUR GUIDE TO AN INDEPENDENT SCOTLAND i (2013).

143. Oliver Wright, *Brexit Against Scotland’s Wishes Would ‘Almost Certainly’ Trigger Independence Referendum*, WARS NICOLA STURGEON, INDEPENDENT, (Feb. 21, 2016), <http://www.independent>.

the repeal of the HRA.¹⁴⁴ Any unilateral human-rights reform by an English-dominated Conservative government, or failure in the future Brexit negotiations to take into account pro-remain majorities of Scotland and Northern Ireland, could further question the unity of the United Kingdom. Rather than speaking of a UK majority for leaving the EU, Jo Murkens of the London School of Economics has described the vote in June 2016 as a “2-2” split among the nations of the UK.¹⁴⁵ Scottish First Minister Nicola Sturgeon has made it clear that the UK government must not ignore Scottish interests during any future Brexit negotiations.¹⁴⁶

The uncertainty over the HRA particularly strains the relationship between the home nations. Human-rights provisions are an integral part of the Good Friday Agreement of 1998, which secured peace in Northern Ireland.¹⁴⁷ In the Scottish context, apart from the problems a repeal of the HRA may bring to Scottish-UK relations, it is interesting to note that the doctrine of parliamentary sovereignty is regarded by some Scottish constitutional lawyers as a purely English concept.¹⁴⁸ Constitutional differences between Scotland and the UK as a whole, therefore, have a long history and are exacerbated by the uncertainty over the HRA. Taking Canada as an example, any future attempt by the SNP to hold a second independence referendum may induce the British government to offer comprehensive constitutional reform. Two days before the 2014 referendum, specific promises were made by all three major UK party leaders for greater devolved powers for Scotland if Scottish voters rejected independence.¹⁴⁹ Some of these promises are currently in the process of being implemented, and yet, the SNP has continued to voice its dissatisfaction.¹⁵⁰ One fundamental explanation for the latter is the fact that it is simply impossible to legally guarantee Scottish regional autonomy under the current system of parliamentary sovereignty. Political promises can be made, yet ultimate legal safeguards for regional autonomy, as they exist in federal states, cannot be implemented. Thus, any further push for Scottish independence, which could be triggered by the failure of the UK

co.uk/news/uk/politics/eu-referendum-brexit-scottish-independence-vote-nicola-sturgeon-a6887366.html.

144. Nicholas Watt & Libby Brooks, *Scotland Bill May Give Holyrood Veto Over Human Rights Act Repeal*, GUARDIAN (May 28, 2015, 2:24 PM), <http://www.theguardian.com/politics/2015/may/28/scotland-bill-human-rights-act-repeal>.

145. Sebastian Mann, *Brexit: LSE Expert Says EU Referendum Was a ‘Draw’ and UK Exit Will Not Happen*, EVENING STANDARD (June 30, 2016), <http://www.standard.co.uk/news/politics/brexit-will-not-happen-after-draw-in-referendum-because-it-would-trigger-the-breakup-of-the-uk-a3284216.html>.

146. Libby Brooks & Owen Bowcott, *Scottish Government to Intervene in Article 50 Case, Says Sturgeon*, GUARDIAN (Nov 8, 2016, 4:16 PM), <https://www.theguardian.com/politics/2016/nov/08/scottish-parliament-nicola-sturgeon-article-50-case>.

147. Dickson, *supra* note 140, at 276.

148. Gavin Little, *Scotland and Parliamentary Sovereignty*, 24 LEGAL STUD. 540, 543–44 (2004).

149. David Cameron et al., *The Vow*, DAILY REC., Sep. 16, 2014, at 1.

150. Libby Brooks, *SNP Dissatisfied with Devolution of Powers Outlined in the Queen’s Speech*, GUARDIAN (May 27, 2015, 12:09 EDT), <http://www.theguardian.com/politics/2015/may/27/snp-dissatisfied-with-devolution-of-powers-outlined-in-queens-speech>.

government in Brexit negotiations to fully take into account the Scottish majority vote to stay in the EU, may lead to revolutionary constitutional reform “from above,” which could contain a British bill of rights.

In conclusion, comprehensive constitutional reform in the UK, including an entrenched British Bill of Rights, could be engineered as a process of multicultural nation-building. Even though the UK has been ruled as a unitary state, it is undeniable that it is in fact a union state, especially after the devolution legislation of 1998. A strengthening of the Union between England, Wales, Scotland, and Northern Ireland could be achieved through fundamental and systematic reform of the UK state structure via the implementation of an entrenched bill of rights, with which all the home nations can identify.

C. *Multilevel Governance and Political Expediency*

A British bill of rights could also be introduced as a result of political expediency in handling multilevel governance, without necessarily the element of multicultural nation-building. The U.S. Bill of Rights was proposed by Anti-Federalists as a means to secure state rights.¹⁵¹ As evidenced by their switch in position after Madison decided to actually introduce a federal bill of rights at the first Congress, as well as Madison’s own unlikely transition from a detractor to a supporter of the idea, a bill of rights can come into being out of political expediency.¹⁵² For the UK, a similar case of political expediency as a result of crisis in multilevel governance may be imaginable in the EU context. Despite obvious differences, a similar logic may apply.

The British EU referendum on June 23, 2016, yielded a UK majority to leave the EU. Despite this result, there remains, at the time of writing, a possibility that Brexit may not actually happen. For example, while in office, Sir Ivan Rogers, the UK’s former ambassador to the EU who resigned on January 4, 2017,¹⁵³ had warned that due to the complexity of the issues at stake and the need for ratification of the eventual agreement by each EU member state, a trade deal between the UK and the EU could take up to ten years and still fail.¹⁵⁴ Since an effective Brexit ultimately involves settling on a future trade relationship between the UK and the EU, completing Brexit itself may thus become problematic. This would be especially the case if a general election is held in the near future. According to Jonathan Morgan, “if some combination of Labour, Liberal and Scots/Welsh Nationalists won a snap poll, on a platform of remaining in the EU, their mandate could properly be seen to supersede

151. Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL’Y 111, 115 (1993).

152. See *supra* Part III.A.

153. *Sir Ivan Rogers’ Letter to Staff in Full*, BBC (Jan 4, 2017), <http://www.bbc.com/news/uk-politics-38503504>.

154. *Brexit Trade Deal Could Take 10 Years, Says UK’s Ambassador*, BBC (Dec 15, 2016), <http://www.bbc.com/news/uk-politics-38324146>.

the referendum.”¹⁵⁵ Thus, if Brexit does not come to fruition, the introduction of a British bill of rights alongside comprehensive constitutional reform may yet become one strategy to preserve British constitutional identity in the face of European integration. The principle of EU legal supremacy fundamentally clashes with UK parliamentary sovereignty,¹⁵⁶ and a solution has to be found if the UK does remain in the EU.

A process of constitutionalization of EU law has transformed the EU into an entity *sui generis*. The doctrine of EU-law supremacy, as developed by the European Court of Justice, effectively means that in the event of inconsistencies between EU law and national law, the former has to prevail.¹⁵⁷ As long as the UK remains a member of the EU and continues to insist on an orthodox Diceyan understanding of parliamentary sovereignty, friction between London and Brussels is to be expected. The uncertainty for the UK will always be around the question of to what extent the UK has transferred parts of its sovereignty to the EU institutions. This uncertainty can be observed in case law, legislation, as well as commentaries by politicians ever since the UK joined the EU in 1973. For example, the Factortame cases have led to the unprecedented legal innovation of “disapplying” acts of Parliament.¹⁵⁸ With such innovations in multilevel governance, the Conservative government has found it necessary to repeatedly assert that the UK Parliament remains sovereign, despite EU membership. In passing the European Union Act 2011, emphasis was placed on a so-called “sovereignty clause.” Yet, commentators have argued that this clause states nothing new about the UK-EU relationship.¹⁵⁹ It is therefore unsurprising that despite having passed the European Union Act in 2011, in the build-up to the 2016 EU referendum, senior Conservative politicians continued to debate the issue of introducing new sovereignty legislation.¹⁶⁰

From recent comments made by Lord Neuberger and former Justice Minister Michael Gove,¹⁶¹ one can deduce that key reasons for this difficult relationship from a constitutional perspective include the lack of a codified constitution and the lack of a strong constitutional or supreme court, which can defend British constitutional identity. Conversely, in-

155. Jonathan Morgan, *A Brexit General Election?*, UK CONSTITUTIONAL LAW ASS'N BLOG (July 9, 2016), <https://ukconstitutionallaw.org/2016/07/09/jonathan-morgan-a-brexit-general-election>.

156. GORDON, *supra* note 136, at 152.

157. BOGDANOR, *supra* note 7, at 27.

158. Mark Elliott, *The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective*, in *THE CHANGING CONSTITUTION* 47 (Jeffrey Jowell et al., eds., 8th ed. 2015).

159. See Jo Eric Khushf Murkens, *The European Union Act 2011: A Failed Statute* (LSE Law, Society, and Economy Working Papers No. 3, 2013), http://eprints.lse.ac.uk/48991/1/WPS2013-03_Murkens.pdf.

160. George Parker & Kate Allen, *Johnson Presses Cameron on Sovereignty Law as Part of EU Deal*, FIN. TIMES (Feb 17, 2016, 1:48 PM), <http://www.ft.com/intl/cms/s/0/32583002-d572-11e5-829b-8564e7528e54.html>.

161. Owen Bowcott, *Plans to Scrap Human Rights Act Delayed Again*, GUARDIAN (Dec. 2, 2015, 10:56 EST), <http://www.theguardian.com/law/2015/dec/02/plan-to-scrap-human-rights-act-delayed-again>.

roducing a codified constitution and a concentrated form of constitutional review attacks, rather than defends, current British constitutional identity. Yet, without such institutions it is unsurprising that the open and flexible nature of the UK constitution is at a disadvantage in the process of European integration, compared, for example, with the German constitution. The German Federal Constitutional Court (“FCC”) has been a strong guardian of German constitutional identity in the process of European integration. In cases concerning European integration, the FCC has ruled that the German Basic Law contains constitutional limits. Any transfer of power to the EU must take into account three aspects. First, EU institutions must not act *ultra vires*—they do not possess “Kompetenz-Kompetenz,”¹⁶² meaning they cannot expand their own competencies without explicit authorization from the member states. Second, German constitutional identity must not be infringed.¹⁶³ Third, the decision-making role of the German Parliament in any transfer of powers to the EU must be adequately respected.¹⁶⁴ It is the apparent lack of a controlled transfer of powers via clear amendments to a codified constitution and a strong senior court to enforce limits to this transfer, which make the UK seemingly constitutionally vulnerable to European integration.

Thus, if Brexit negotiations prove impossible to secure a UK withdrawal from the EU in the near future, it may be the case that for political expediency, constitutional reform will be introduced that includes a British bill of rights that is enforced by a strong UK Supreme Court in order to guard British constitutional identity. According to the UK Ministry of Justice, the introduction of a British bill of rights may entail the introduction of a constitutional court based on the German model. Due to the timing of this informal policy suggestion and the low feasibility of a direct institutional transplant due to fundamentally different legal cultures, however, it is questionable whether such a move is more about securing UK sovereignty in the process of European integration and less about systematically improving human-rights protection in the UK. Academic commentators such as Jeff King have recently warned against rushing to introduce a UK constitutional court as a perceived solution to the EU problem.¹⁶⁵ Nevertheless, this is another stark reminder that, as was the case with the U.S. Bill of Rights, the introduction of a national bill of rights and related enforcement mechanisms may very well be based on motives beyond the desire to constitutionally entrench the rights of the individual.

162. JUSTIN COLLINGS, *DEMOCRACY’S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT* 279 (2015).

163. Jo Eric Khushal Murkens, *Identity Trumps Integration: The Lisbon Treaty in the German Federal Constitutional Court*, 48 *DER STAAT* 517, 519 (2009) (Ger.).

164. *Id.* at 518.

165. Jeff King, *On the Proposal for a UK Constitutional Court*, UCL EUR. INSTIT. (Feb 16, 2016), <https://www.ucl.ac.uk/european-institute/highlights/2015-16/uk-constitutional-court>.

If the referendum result of the June 23, 2016 is successfully implemented and the UK leaves the EU, then a process of post-EU-membership nation-building may be triggered. On the one hand such policy may be the result of an attempt to heal any serious rifts caused by the way Brexit negotiations have been conducted, for example if Scotland feels its interests have been ignored and thus pushes for a second independence referendum. On the other hand, comprehensive constitutional reform may come about as a result of Prime Minister Theresa May's aims for a "second Brexit," namely that of exiting the ECHR.¹⁶⁶ Serious concerns and fractious experiences over one or the other issue by the individual nations which make up the UK will likely engender actions based on political expediency, which in turn may be based on issues discussed in Section IV.B of this Article.

V. CONCLUSION

The case studies have demonstrated various ways in which entrenched bills of rights may emerge. They include short-term political expediency, devastating historical events, and carefully engineered nation-building. The key question is whether, in the twenty-first century, the UK can move from a system of parliamentary sovereignty to a system where fundamental rights are sovereign. Much may depend on how the outcome of the EU referendum is implemented in the coming years. If the Brexit negotiations fail, while simultaneously, a future general election yields a new democratic mandate to stay within the EU, the development of an entrenched British bill of rights and a stronger UK Supreme Court may be desirable in order to manage the UK's position within the process of European integration. If the UK successfully implements the Brexit vote of June 2016 and leaves the EU, nationalist forces in Scotland and Northern Ireland may force the UK to undertake comprehensive constitutional reform and establish a bill of rights as a strategy of multicultural nation-building. Ultimately, the long-lasting dispute between political and legal constitutionalists in the UK may only be resolved by hard facts of the distant future and not by any conscious effort to break the chains of seventeenth-century British constitutional history. Yet, the value of learning from history must not be forgotten. Particular knowledge of the history of others can be extremely useful too, especially if they have been experiences of a cataclysmic kind. It would be wise to prevent such history to repeat itself.

166. Hope, *supra* note 46.

