Volume 13
Issue 2 *Volume 13, Issue 2*

Article 6

2023

Why the U.S. Supreme Court is More Politicized than its U.K. Counterpart

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Cover Page Footnote

Graduate of Notre Dame Law School, 2023. The author would like to thank Professors Stephen Tierney and Penny Darbyshire of the Notre Dame London Law Programme and Professor Samuel Bray of Notre Dame Law School for their inspiration and insights into British constitutional law and American constitutional law, respectively. Gratitude is also expressed to Professor Michael Addo, Director of the Notre Dame London Law Programme, and Notre Dame Law School Dean G. Marcus Cole for respectively leading and investing in the program where much of the inspiration for this Note was garnered.

WHY THE U.S. SUPREME COURT IS MORE POLITICIZED THAN ITS U.K. COUNTERPART

MIKE KOWALSKI*

INTRODUCTION

President Joe Biden's nomination of then-Judge Ketanji Brown Jackson to the United States Supreme Court (the "Court") conjured up all too fresh memories of just how politicized the Court, and the candidate selection process, has become. Not long before now-Justice Jackson's nomination, the recent nomination and confirmation of Justice Amy Coney Barrett to the Court received significant media attention, both within the United States (U.S.) and internationally.[1] On the same day of her swearing-in ceremony, the BBC, a public news organization headquartered in the United Kingdom (U.K.), found it relevant to publish an article describing seemingly mundane features of Justice Barrett's life.[2] For example, BBC journalist Vicky Baker noted that "Judge Barrett lives in South Bend, Indiana, with her husband, Jesse, a former federal prosecutor who is now with a private firm. The couple have seven children, including two adopted from Haiti. She is the oldest of seven children herself."[3] Moreover, that February, American essayist Margaret Talbot published an article in *The New Yorker* in which she claims Justice Barrett "isn't just another conservative—she's the product of a

* Graduate of Notre Dame Law School, 2023. The author would like to thank Professors Stephen Tierney and Penny Darbyshire of the Notre Dame London Law Programme and Professor Samuel Bray of Notre Dame Law School for their inspiration and insights into British constitutional law and American constitutional law, respectively. Gratitude is also expressed to Professor Michael Addo, Director of the Notre Dame London Law Programme, and Notre Dame Law School Dean G. Marcus Cole for respectively leading and investing in the program where much of the inspiration for this Note was garnered.

[1] Ed Pilkington & David Smith, *Amy Coney Barrett confirmed to supreme court in major victory for US conservatives*, GUARDIAN (Oct. 27, 2020), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-confirmed-supreme-court-justice-vote ("The US Senate has confirmed Amy Coney Barrett to the supreme court, delivering Donald Trump a huge but partisan victory just eight days before the election and locking in rightwing domination of the nation's highest court for years to come."); Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html ("It was the first time in 151 years that a justice was confirmed without the support of a single member of the minority party, a sign of how bitter Washington's war over judicial nominations has become."); Li Zhou, *Amy Coney Barrett has officially been confirmed as a Supreme Court* justice, VOX (Oct. 26, 2020), https://www.vox.com/2020/10/26/21529619/amy-coney-barrett-confirmed-supreme-court ("Barrett has the potential to roll back the Affordable Care Act, undo *Roe v. Wade*, and expand the interpretation of the Second Amendment as a member of the court."); Sahil Kapur, Julie Tsirkin, & Rebecca Shabad, *Senate confirms Amy Coney Barrett, heralding new conservative era for Supreme* Court, NBC NEWS (Oct. 26, 2020), https://www.nbcnews.com/politics/congress/amy-coney-barrett-set-be-confirmed-supreme-court-monday-n1244748 ("The addition of Barrett could solidify the right's advantages on issues like campaign finance and gun rights while threatening progressive issues like abortion rights, voting rights and health care regulations.").

[2] Vicky Baker, *Amy Coney Barrett: Who is Trump's Supreme Court pick?*, BBC (Oct. 27, 2020), https://www.bbc.co.uk/news/election-us-2020-54303848.

[3] *Id.*

Christian legal movement that is intent on remaking America."[4] Notwithstanding the specifics of Ms. Baker and Ms. Talbot's commentary on Justice Barrett, it is clear that the news media saw nearly everything about her life as relevant and that they were keen on predicting the impact she may have on American politics.

This acute interest in the lives of U.S. Supreme Court justices and fear of their power was not unique to Justice Barrett. In 2017, there was similar fanfare surrounding Justice Neil Gorsuch's nomination and confirmation to the Court.[5] NBC News correspondent Leigh Ann Caldwell described the time between Justice Gorsuch's nomination and his confirmation as "weeks of brutal political fighting which deepened congressional divides and changed the nature of high court appointments in the future."[6] Further, few Court nominations received as much media attention and scrutiny as Justice Brett Kavanaugh's nomination. Mired in a sexual assault allegation,[7] Justice Kavanaugh's nomination and confirmation hearing were covered with acute interest by media outlets.[8] Even Saturday Night Live, a popular late-night television show, covered the events with a comedic portrayal by actor Matt Damon.[9] Justices like the late Justice Antonin Scalia, whose vacancy Justice Neil Gorsuch filled in the Court, and the late Justice Ruth Bader Ginsberg, have even attained celebrity status in American popular culture.[10] Clearly,

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[4] Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game.

[5] Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html ("President Trump ...nominated Judge Neil M. Gorsuch to the Supreme Court, elevating a conservative in the mold of Justice Antonin Scalia to succeed the late jurist and touching off a brutal, partisan showdown at the start of his presidency over the ideological bent of the nation's highest court."); *Trump picks Neil Gorsuch as nominee for Supreme Court*, BBC (Feb. 1, 2017), https://www.bbc.co.uk/news/world-us-canada-38813137 (speculating on, at the time, Judge Gorsuch's positions on divisive issues in American politics and whether Democrats could successfully prevent him from becoming a justice on the Court).

[6] Leigh Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option'*, NBC NEWS (Apr. 7, 2017), https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766.

[7] Ronan Farrow & Jane Mayer, *A Sexual-Misconduct Allegation Against The Supreme Court Nominee Brett Kavanaugh Stirs Tension Among Democrats in Congress*, NEW YORKER (Sept. 14, 2018), https://www.newyorker.com/news/news-desk/a-sexual-misconduct-allegation-against-the-supreme-court-nominee-brett-kavanaugh-stirs-tension-among-democrats-in-congress ("Senate Democrats disclosed that they had referred a complaint regarding President Trump's Supreme Court nominee, Judge Brett Kavanaugh, to the F.B.I. for investigation. The complaint came from a woman who accused Kavanaugh of sexual misconduct when they were both in high school, more than thirty years ago.").

[8] Demetri Sevastopulo & Kadhim Shubber, *Brett Kavanaugh hearings: key moments*, FIN. TIMES (Sept. 28, 2018), https://www.ft.com/content/b3b4f3ae-c24d-11e8-8d55-54197280d3f7 (describing dramatic moments in, at the time, Judge Kavanaugh's confirmation hearing, including his retorts to the sexual assault allegation).

[9] Saturday Night Live, *Kavanaugh Hearing Cold Open – SNL*, YOUTUBE (Sept. 30, 2018), https://www.youtube.com/watch?v=VRJecfRxbr8.

[10] Tyler Aquilina, *The Notorious R.B.G.: How Ruth Bader Ginsburg became an unlikely pop culture icon*, ENT. WKLY. (Sept. 19, 2020), https://ew.com/celebrity/ruth-bader-ginsburg-pop-culture-icon-notorious-rbg/ ("Ginsburg's iconic status was truly galvanized by Donald Trump's election in 2016. As the oldest justice on the bench and the de facto leader of the Court's left-leaning faction, Ginsburg became a champion for liberals who dreaded Trump's potential to shape the future of the Court. She was no longer merely a judicial hero; she was a symbolic barrier against a decades-long conservative Supreme Court majority. Her workout routine to stay fit and healthy soon became another part of the

there is significant interest in, and sometimes adoration of, U.S. Supreme Court justices.

Compare this situation with that in the U.K. Before 2009, there was not even a distinct Supreme Court there with its own building in London.[11] Instead, the U.K.'s court of highest appeal in all civil and criminal matters outside of Scotland was shrouded in the Palace of Westminster in the House of Lords[12] as the mere Appellate Committee.[13] It was not until the Constitutional Reform Act of 2005 that the Supreme Court of the U.K. found its own place nestled within the other institutions that form the state.[14] While even the British seem to be keenly interested in the U.S. Supreme Court, there is comparatively little such interest in the political nature of the newly-created Supreme Court of the U.K. Although some may suggest that the U.S. Supreme Court garnering such attention and being more political than the Supreme

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R.B.G. mythos. For her part, Ginsburg—typically soft-spoken and reserved in public, despite her fiery dissents—usually spoke of her newfound status with demure amusement. 'I haven't seen anything that isn't either pleasing or funny on the website,' she told Katie Couric of the "Notorious" Tumblr in 2014. 'I think she has created a wonderful thing with Notorious R.B.G. I will admit I had to be told by my law clerks, what's this Notorious, and they explained that to me, but the website is something I enjoy, all of my family do.' That same year, the justice said she had 'quite a large supply' of 'Notorious R.B.G.' T-shirts, and that she gave them out as gifts.");
Sara Aridi, *How Ruth Bader Ginsburg Lives on In Popular Culture*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html?
(describing that Justice Ruth Bader Ginsburg's life and career have been popularized in books, such as *Notorious RBG: The Life and Times of Ruth Bader Ginsburg*, *I Dissent: Ruth Bader Ginsburg Makes Her Mark*, and *The RBG Workout: How She Stays Strong ... and You Can Too*; in television shows, like "The Late Show With Stephen Colbert" and "Saturday Night Live;" and in films, including *RBG* and *On the Basis of Sex*); *see Ruth Bader Ginsburg I Dissent Socks Funny Socks Crazy Socks Meme Socks Dress Socks*, Etsy, https://www.etsy.com/uk/listing/987329405/ruth-bader-ginsburg-i-dessent-
socks?gpla=1&gao=1&&utm_source=google&utm_medium=cpc&utm_campaign=shopping_uk_en_gb_-
clothing&utm_custom1=_k_Cj0KCQiAmeKQBhDvARIsAHJ7mF7AwJt7EGltubk9k5ohBMISDNvokSiH4OzgTBaXboLXMLvnYGW4jVwaAvKFEALw_wcB_k_&utm_content=go_14821442085_125173007262_549119977881_pla-
360912201277_c__987329405engb_486539498&utm_custom2=14821442085&gclid=Cj0KCQiAmeKQBhDvARIsAHJ7mF7AwJt7EGltubk9k5ohBMISDNvokSiH4OzgTBaXboLXMLvnYGW4jVwaAvKFEALw_wcB (last visited Feb. 25, 2022) (showing an example of socks with Justice Ruth Bader Ginsburg's likeness being sold online as a testament to her larger-than-life status in American popular culture); *see also* Bonnie Faller, *Antonin Scalia*, HOLLYWOOD LIFE, https://hollywoodlife.com/celeb/antonin-scalia/ (last visited Feb. 25, 2022) (listing Justice Antonin Scalia as a celebrity and thus placing his public image in the same category as Hollywood actors).

[11] PENNY DARBYSHIRE, DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM 116 (Thomson Reuters ed., 13th ed. 2020).

[12] *Id*. ("The problem with the law lords, [the colloquial term for Lords of Appeal in the Appellate Committee of the House of Lords] apart from their being led by the Lord Chancellor, a government minister, was their location in the legislature and consequent perceived danger that they could be involved in debates on Bills which they might later have to interpret and apply in court. Further, despite the constitutional convention that law lords should not take part in political debates in the House of Lords chamber, some law lords had done so, albeit very rarely. In 2003, the Government was persuaded by the reform campaigners, the radical and outspoken intellectuals, law lords Bingham and Steyn. Lord Steyn invoked the words of the famous constitutionalist Walter Bagehot, that the 'the Supreme Court of the English people … ought not to be *hidden beneath the robes* of a legislative assembly.'" He was alarmed at the *confusion of functions in the eyes of the public and foreign observers*." (emphasis added)).

[13] *Id.*

[14] Constitutional Reform Act 2005 c.4 (U.K.) (detailing that there should be a Supreme Court of the U.K. with no more than 12 full-time judges).

Court of the U.K. boils down to the difference in appointment processes or the outwardly political opinions of the U.S. Court's members, the real reason lies with the underlying constitutional differences upholding each court.[15] While the U.S. Supreme Court is granted power to interpret the U.S. Constitution in a way that directly impacts individuals and thus makes political decisions for the entire U.S., the doctrine of parliamentary sovereignty prevents the Supreme Court of the U.K. from making any such determinations. In this way, regardless of how justices or judges are appointed to each court and despite their political leanings, the U.S. Supreme Court is bound to be more political than its U.K. counterpart solely because of this constitutional difference.

I. U.K. SUPREME COURT: HINDERED BY PARLIAMENTARY SOVEREIGNTY

The U.K. is unique in that it is one of the only countries with an uncodified constitution.[16] Rather than laying out the entire confines of its constitution in a single, coherent document, the U.K.'s institutions are guided by various principles, unwritten traditions, and scattered collections of parliamentary acts.[17] Among the most important of these principles and traditions is parliamentary sovereignty, or parliamentary supremacy.

The birth of Parliament, in the sense of officially using that term to describe the meetings of representatives from around England, is said to begin with King John signing the Magna Carta in 1215.[18] However, the tradition of

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[15] Richard Hodder-Williams identifies six notions of "political" when discussing the U.S. Supreme Court. Richard Hodder-Williams, *Six Notions of 'Political' and the United States Supreme Court*, BRITISH J. POL. SCI., Jan. 1992, at 1, 2 uses his first notion: "The first notion is essentially definitional. Although there is no universal agreement over what constitutes the essence of politics, there is a general acceptance that politics in the state is the process through which competing choices over public policy are made and which legitimates the exercise of state power to enforce those choices."

[16] Other countries with uncodified constitutions include Israel, New Zealand, Saudi Arabia, and Sweden. Jo Eric Khushal Murkens, *A Written Constitution: A Case Not Made*, 41 OXFORD J. L. STUD. 965, 965 (2021).

[17] HOUSE OF COMMONS, THE UK CONSTITUTION: A SUMMARY, WITH OPTIONS FOR REFORM 5 (2015). ("The United Kingdom constitution is composed of the laws and rules that create the institutions of the state, regulate relationships between those institutions, or regulate the relationship between the state and the individual. These laws and rules are not codified in a single, written document. Constitutional laws and rules have no special legal status.").

[18] *Magna Carta (1215) to Henry IV (1399)*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/keydates/1215to1399/ (last visited Mar. 30, 2022) (outlining a timeline of key dates concerning Parliament); In part, Magna Carta sets out the following:

> "To all free men of our kingdom we have…granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:
>
> …
>
> For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood.
>
> …
>
> In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.
>
> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor

a national council occasionally meeting to aid the king in administering the country goes back even further to the beginning of the 10th century.[19] Evolving over several centuries in response to practicality and tangible demands rather than an ideologically-driven plan, Parliament came to be the sole legislative power in England and Wales, and later in Scotland and Ireland. This power dynamic came about following the Glorious Revolution of 1688-89 (the "Glorious Revolution" or "Revolution").[20] Prior to the Revolution, England and Wales were ruled by a monarchy with significant power over their lives, notwithstanding the liberties granted by Magna Carta. However, during the Glorious Revolution, during which there was a planned change of the reigning monarch, the new co-monarchs acceded to their position only on the express condition that they have certain limitations to their power. These limitations were expressed in the Declaration of Rights, now referred to as the English Bill of Rights, which the new co-monarchs both signed. [21]

In relevant part, the English Bill of Rights provides:

> will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
> To no one will we sell, to no one deny or delay right or justice.
> …
> To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgment of his equals, we will at once restore these.
> …
> Since we have granted all these things for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:
> The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.
> If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us – or in our absence from the kingdom to the chief justice – to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us."

English translation of Magna Carta, BRITISH LIBRARY (July 28, 2014) https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[19] John Maddicott, *Parliament of England to 1307: Origins and Beginnings to 1215 in* A SHORT HISTORY OF PARLIAMENT: ENGLAND, GREAT BRITAIN, THE UNITED KINGDOM, IRELAND & SCOTLAND 3, 3 (Clyve Jones, ed. 2009).

[20] *See* J.D. van der Vyver, *Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights*, 99 S. AFR. L.J. 557, 560, 563 (1982); *see* Dr. Edward Vallance, *The Glorious Revolution*, BBC https://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml (last visited Mar. 30, 2022) (explaining that the Glorious Revolution comprised England inviting William of Orange and his wife Mary to depose James II and replace him as co-monarchs with limited powers).

[21] van der Vyver, *supra* note 21, at 560.

> That the pretended power of suspending the laws or execution of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal; … That election of members of Parliament ought to be free; [and] [t]hat the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court of place out of Parliament.[22]

Following this new power arrangement, the Earl of Shaftesbury declared in 1689 that "[t]he Parliament of England is that supreme and absolute power, which gives life and motion to the English Government."[23]

By the late Victorian era, the doctrine of parliamentary sovereignty came to be defined by renowned English constitutional scholar A.V. Dicey in absolutist terms. Comprised of the House of Lords[24] and the House of Commons,[25] Parliament can pass any law on anything physically possible without legal restraint.[26] Although technically bills require royal assent by the reigning monarch to become Acts of Parliament, the last time royal assent was refused was in 1708.[27] However, although royal assent is merely a formal requirement, it is a requirement nonetheless, and Parliament is consequently construed to mean the Crown in Parliament.[28] In other words, when discussing

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[22] *English Bill of Rights 1689: An Act Declaring the Rights and liberties of the Subject and Settling the Succession of the Crown*, YALE LAW SCHOOL: THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/england.asp (last visited Mar. 30, 2022).

[23] *See* Andrew Mansfield, *The First Earl of Shaftesbury's Resolute Conscience and Aristocratic Constitutionalism*, HIST. J., 2021, at 969, 981.

[24] DONALD SHELL, THE HOUSE OF LORDS 85 (Manchester Univ. Press. Ed., 2007) ("The House of Lords makes a substantial contribution to the work of the British parliament. Though unquestionably the junior chamber, and not since the 1909-11 constitutional crisis showing any serious sign of forgetting that fact, it is nevertheless constitutionally part of parliament, and must therefore approve all legislation. Though its powers are constrained both by the Parliament Acts and by convention, it shares in the responsibility of parliament to scrutinise all draft legislation. In practice the House is responsible for a great many of the changes made as legislation wends its way through parliament, much of this the result of persuasion rather than through the exercise of power. The House also takes part in the classic scrutiny functions exercised by parliament, through affording opportunities for government spokesmen to be questioned and for debate to take place. Through select committee inquiries too the House contributes to the parliamentary function of holding the executive to account.")

[25] Comprised of 650 elected Members of Parliament (MPs), the House of Commons is responsible for considering and proposing new laws and scrutinizing government policies. *Parliamentary business: House of Commons*, UK PARLIAMENT, https://www.parliament.uk/business/commons/ (last visited Mar. 30, 2022); *see* UK Parliament, *Prime Minister's Questions (PMQs) – 23 February 2022*, YOUTUBE (Feb. 23, 2022), https://www.youtube.com/watch?v=jfHJpMuyJxg for an example of the House of Commons scrutinizing government policies during Prime Minister's Questions, a weekly event during which the Prime Minister must answer questions MPs put forth and thus hold himself accountable to the people of the United Kingdom.

[26] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 3 (Macmillan ed., 8th ed. 1915).

[27] *Key dates of the Glorious Revolution: 1689-1714*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/keydates/keydates1689-1714/ (last visited Dec. 1, 2021) ("1708: Queen Anne refused to assent to the Scottish Militia Bill, the last time the royal veto was used.").

[28] DICEY, *supra* note 27, at 3.

parliamentary sovereignty, scholars like Dicey assume that Parliament will be granted royal assent.[29]

To this end, Dicey provides that:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. A law may, for our present purpose, be defined as "any rule which will be enforced by the Courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, *will be obeyed by the Courts*. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament[.][30]

It follows that the constitutional limitations, in terms of which laws may be passed, are whatever Parliament defines them to be. Not even a current Parliament can bind a future one.[31] Importantly, under this arrangement, there is no room for courts in the U.K. to stop Parliament from doing whatever it likes. As Dicey stated, Acts of Parliament must "be *obeyed* by the Courts."[32]

Put in these explicit terms, parliamentary sovereignty may seem a bit frightening to an American jurist, or even the casual reader. In the U.S., sovereignty is largely understood to rest with the people. The same arrangement holds true in the U.K., and Dicey defines this as *political* sovereignty.[33] Parliament, on the other hand, retains *legal* sovereignty.[34] In other words, the people of the U.K. have the political sovereignty to elect, or not elect, whomever they would like and to ultimately hold Parliament accountable. In this way, Parliament cannot pass *any* law it likes. Rather, it may only pass those laws palatable to a large swath of British society. The institution still faces political checks, even if there are no legal ones to speak of. Thus, "Parliament has the theoretical power to [even] legislate in a way

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[29] If the monarch did not grant such assent today, a constitutional crisis would likely ensue in which the requirement for royal assent is revoked.
[30] DICEY, *supra* note 27, at 3-4 (emphasis added).
[31] *Id.* at 21-23.
[32] *Id.* at 4 (emphasis added).
[33] *Id.* at 27-32.
[34] *Id*; Stephen Tierney characterizes this distinction as one between legislative *supremacy*, what this paper refers to as legal sovereignty, and a holistic conception of sovereignty that situates Parliament's ability to legislate in light of political and constitutional constraints. Stephen Tierney, *Parliament and the Brexit Process: The Battle for Constitutional Supremacy in the United Kingdom*, 12 NOTRE DAME J. INT'L & COMP. LAW 1, 2-4.

that infringes … fundamental rights,"[35] but the people of the U.K. still stand as a vanguard against them doing so.

However, some doubt whether the seemingly Victorian era relic of parliamentary sovereignty, even in a purely legal sense, holds true today. One of parliamentary sovereignty'spurpoted chinks in its armor lies with an event that occurred more than 300 years ago: the very creation of the U.K. itself. Following a failed attempt of creating a colony in modern day Panama, Scotland's economy nearly went bankrupt.[36] Partially as a result of this financial disaster, Scotland decided to enter into a political union with England and Wales through the Treaty of Union 1707.[37] Although it is settled that parliamentary sovereignty existed in England beforehand, some contend that this doctrine was nonexistent in Scotland.[38] Scottish nationalist politician Sir Neil MacCormick contends that Scotland was dominated by the idea of sovereignty resting with the people.[39] However, as Dicey explained, Parliament has *legal* sovereignty, not political sovereignty.[40] Thus, political sovereignty still resides with the people of the U.K., just as it arguably did with the people of Scotland before 1707. Notwithstanding the sovereignty argument, others may say that Parliament is bound by the provisions found in the Acts of Union 1707, since, as the pieces of legislation that brought the Treaty of Union 1707 into force, that is seemingly the source of Parliament's legal authority.[41] Yet Parliament "can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections."[42]

Another attack often levied against parliamentary sovereignty is that Parliament did not retain its sovereignty whilst the U.K. was a member of the European Union.[43] Most notably, the *Factortame* case confirmed that

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[35] TOM BINGHAM, THE RULE OF LAW 168 (Penguin Books Ltd. ed., 2011).
[36] Allan Little, *The Caribbean colony that brought down Scotland*, BBC (May 18, 2014), https://www.bbc.co.uk/news/magazine-27405350.
[37] *Id.*
[38] In *obiter dicta*, Lord President Cooper of the Court of Session stated: The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. … Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done." *See* MacCormick v. Lord Advocate (1953) SC 396, 411 (Scot.).
[39] Dan Sharp, *Parliamentary Sovereignty: A Scottish Perspective*, 6 CAMBRIDGE STUDENT L. REV. 135, 138-39.
[40] DICEY, *supra* note 27, at 27-32; *but see* Dan Sharp, *Parliamentary Sovereignty: A Scottish Perspective*, 6 CAMBRIDGE STUDENT L. REV. 139 (2010) ("[I]t seems perverse to argue that popular sovereignty was the norm in pre-Union Scotland, given that Scotland … was also pre-democratic—or at the very least an aristocratic polity with a limited franchise, within which any conception of 'the people' as collective political agent would perhaps have been largely rhetorical.").
[41] *See* Union with England Act 1707 c. 7 ("That the United Kingdom of Great Britain be Represented by one and the same Parliament to be stiled the Parliament of Great Britain.").
[42] DICEY, *supra* note 27, at 5.
[43] The U.K. officially joined the European Union through the European Communities Act 1972 c. 68 (repealed).

European Union law would take precedence over U.K. laws that it conflicted with, and that courts in member states must adhere to this hierarchy.[44] However, "whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely *voluntary*."[45] In other words, U.K. courts would only accept that European Union law was superior to U.K. law "because Parliament, exercising its legislative authority … told them to. If Parliament, exercising the same authority, told them not to do so, they would obey that injunction also."[46] Further, when Parliament was no longer content with this arrangement,[47] it simply ended it.[48] In this way, Parliament retained its sovereignty throughout the entire time the U.K. was a member of the European Union. Parliament always held on to the option to leave the European Union and was completely within its legal right to exercise such an option.

An even weaker argument against the modern validity of parliamentary sovereignty derives from the devolved parliaments in Scotland, Wales, and Northern Ireland. Following referendums in the late 20th century, Parliament granted certain devolved powers to each of these respective nations within the U.K.[49] Within each of these arrangements, these nations are able to legislate on certain matters, like COVID restrictions, while the U.K. Parliament reserves the power to legislate on other matters, like defense spending.[50] However, Parliament retains the legal right to legislate on any devolved powers.[51] It simply chooses not to. In fact, the devolved parliaments derive their powers solely from Acts of Parliament, which Parliament could legally revoke at any time.[52] In this way, the devolved parliaments are properly understood as "any other statutory body … [that] must work within the scope of … [their] powers."[53]

Yet another criticism of the legal validity of parliamentary sovereignty is more recent, and it rests with the Human Rights Act 1998. Related to this Act of Parliament, the European Convention on Human Rights came into force in 1953.[54] Following the governmental abuses preceding and during the Second

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[44] R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] I A.C. 603.
[45] R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] I A.C. 603 (emphasis added).
[46] BINGHAM, *supra* note 36, at 164.
[47] To be more precise, the people of the U.K., acting through a referendum, no longer wished to be part of the European Union. Parliament chose to abide by the results of the referendum, but it had no legal obligation to do so.
[48] *See* European Union (Withdrawal Agreement) Act 2020 c. 1.
[49] *Devolved Parliaments and Assemblies*, UK PARLIAMENT, https://www.parliament.uk/about/how/role/relations-with-other-institutions/devolved/ (last visited Mar. 31, 2022).
[50] *See id.*
[51] *Id.*
[52] Scotland Act 1998 c. 46; Northern Ireland Act 1998 c. 47; Government of Wales Act 2006 c. 32 (since amended by the Wales Act 2014 c. 29 & Wales Act 2017 c.4); BINGHAM, *supra* note 36, at 164.
[53] Whaley v. Lord Watson (2000) SC 340, 348 (Scot.).
[54] *European Convention on Human Rights,* EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/pages/home.aspx?p=basictexts#:~:text=of%20the%20Court-,European%20Convention%20on%20Human%20Rights,force%20on%203%20September%201953. (last visited Mar. 31, 2022).

World War, in addition to the growing threat of Stalinism,[55] the European Convention on Human Rights was drafted to include a litany of rights, including freedom of thought (Article 8), right to a fair trial (Article 6), and right to marriage (Article 12).[56] Starting in 1965, the European Court of Human Rights in Strasbourg could hear individual complaints from U.K. citizens.[57] The Human Rights Act 1998, however, allowed individuals in the U.K. to lodge complaints stemming from the European Convention on Human Rights in *domestic* courts.[58] Under the Human Rights Act 1998 (HRA), government ministers have a duty to inform Parliament whether legislation under review will violate the rights found in the European Convention on Human Rights.[59] However, Parliament remains within its right to pass the legislation in question regardless of what the ministerial report says. More germane to the discussion at hand:

> If judges determine that legislation is inconsistent with Convention rights, judicial censure can take an interpretive form under section 3 of the HRA, by altering the scope or effects of legislation through a judicial interpretation that strives to render legislation compatible with Convention rights, or it can take a more explicit form by declaring that the legislation is not compatible with Convention rights under section 4 of the HRA.[60]

Yet even when a court makes a declaration of incompatibility, Parliament does not, legally, have to alter the legislation whatsoever.[61] Parliament could even repeal the Human Rights Act entirely.[62]

Perhaps the best case made against parliamentary sovereignty seems to have come from the Supreme Court of the U.K. itself, although this criticism misses the nuances of the issue. In 2017, the Supreme Court of the U.K. issued a decision on *R (Miller) v. Secretary of State for Exiting the European Union* ("Miller I").[63] Shortly afterwards, they decided *R (Miller) v. The Prime Minister and Cherry Advocate General for Scotland* ("Miller II").[64] Miller I,

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[55] *See* ROBIN C. A. WHITE & CLARE OVEY, JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1-3 (Oxford Univ. Press ed., 7th ed. 2021); *see also* European Convention on Human Rights.
[56] European Convention on Human Rights.
[57] Vaughne Miller, *Parliamentary Sovereignty and the European Convention on Human Rights* (Nov. 6, 2014), https://commonslibrary.parliament.uk/parliamentary-sovereignty-and-the-european-convention-on-human-rights/#:~:text=The%20UK%20at%20the%20European,in%20relation%20to%20individual%20complaints.
[58] Human Rights Act 1998 c. 42.
[59] Janet L. Hiebert, *Human Rights Act: Ambiguity about Parliamentary Sovereignty*, 14 GERMAN L.J. 2253, 2254 (2013).
[60] *Id.*
[61] *Id.*
[62] *See Press release: Plan to reform Human Rights Act*, MINISTRY OF JUSTICE (Dec. 14, 2021), https://www.gov.uk/government/news/plan-to-reform-human-rights-act (briefly explaining current plans by the Conservative Government in power to reform the Human Rights Act).
[63] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5.
[64] R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland [2019] UKSC 41.

as its long-form name suggests, concerned the U.K. government attempting to unilaterally withdraw from the European Union without parliamentary approval.[65] Because leaving the European Union concerned domestic, individual rights of U.K. citizens, the Supreme Court of the U.K. held that an Act of Parliament was required for the U.K. to legally withdraw.[66] In this way, the Supreme Court of the U.K. directed the *Government* as to what it could and could not do, not *Parliament*. In this way, the U.K. Supreme Court reinforced parliamentary sovereignty.

In Miller II, the Supreme Court of the U.K. was considering the legality of the Government proroguing Parliament in the midst of the withdrawal from the European Union.[67] In light of parliamentary sovereignty, the Supreme Court of the U.K. stated:

> For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[68]

In this case, no such reasonable justification existed, and therefore the prorogation was void.[69] Once again, the Supreme Court of the U.K. limited the power of the Government, but not of Parliament. The two institutions are intertwined in that the Prime Minister is also a Member of Parliament, but the two bodies are legally, distinctly separate.

Having shown that parliamentary sovereignty remains alive and well, it naturally follows that this doctrine precludes the Supreme Court of the U.K. from making any political decisions that Parliament could not make itself. Further to this point, although the Supreme Court of the U.K. can sometimes adjudicate disputes between the other branches of government, such as in Miller II, it is not called upon to decide relations between the government and individuals in the U.K., like defining their individual rights. For example, the Supreme Court of the U.K. will not make policy decisions that cannot be overruled by Parliament, such as by proclaiming whether individuals have a right to an abortion. In the U.S., on the other hand, as will be seen shortly, the U.S. Supreme Court may make such determinations. If a certain law is unconstitutional, then Congress simply cannot pass another law to that effect

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[65] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5.
[66] *Id.*
[67] R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland [2019] UKSC 41.
[68] *Id.* at para. 50.
[69] *Id.* at para. 70.

without amending the U.S. Constitution itself. In this way, the Supreme Court of the U.K. is inherently not political in the policy-oriented sense that this paper uses.[70]

Nonetheless, some may contend that the apolitical nature of the appointment procedure of the Supreme Court of the U.K. maintains that court's relative neutrality in the political arena. The appointment procedure for judges of the Supreme Court of the U.K. is governed by the Constitutional Reform Act 2005, the same legislation that created the court itself.[71] The Constitutional Reform Act outlines certain professional criteria judges must possess, ensuring a certain degree of quality for candidates.[72] If an individual meets these criteria, then she may be recommended for the position by the Prime Minister.[73] However, unlike the procedure in the U.S., the Prime Minister may only recommend individuals chosen by an independent selection commission, which is convened by the Lord Chancellor whenever a vacancy on the court arises.[74] The members of this independent selection commission will include the President of the Supreme Court, a non-Supreme Court senior judge, and at least one non-lawyer.[75] The independent selection commission will then go through a number of rounds of consultations with senior politicians and various U.K. judges.[76] If the candidate makes it through this rigorous, largely apolitical process, and the selection commission recommends her, then the Lord Chancellor may send this recommendation to the Prime Minister.[77] Once the reigning monarch provides her formal approval, the individual becomes a member of the Supreme Court of the U.K.[78]

While this appointment procedure is well and fine, it is not determinative in making the Supreme Court of the U.K. a relatively apolitical body. A different procedure would not make the Supreme Court of the U.K. any more political than it already is in terms of its constitutional power to make political decisions for the country. Consider the following hypothetical scenario. Instead of the appointment procedure outlined by the Constitutional Reform Act 2005, the Prime Minister nominates a candidate who is then approved or rejected by a simple majority vote in the House of Commons.[79] By the nature

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[70] *See* Hodder-Williams, *supra* note 16, at 2.
[71] Constitutional Reform Act 2005 c. 4.
[72] Constitutional Reform Act 2005 c. 4, pt. 3, s 25 ("(1) A person is not qualified to be appointed a judge of the Supreme Court unless he has (at any time)— (a) held high judicial office for a period of at least 2 years, (b) satisfied the judicial-appointment eligibility condition on a 15-year basis, or been a qualifying practitioner for a period of at least 15 years.)".
[73] *Id.*, s. 25.
[74] *Id.*; *Appointments of Justices*, THE SUPREME COURT, https://www.supremecourt.uk/about/appointments-of-justices.html (last visited Mar. 31, 2022).
[75] *Appointments of Justices*, *supra* note 75.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] In fact, such a procedure has indeed been called for in the U.K. In response, Lady Hale, an extremely well-respected justice previously on the Supreme Court of the U.K., urged the government not to appoint judges based on their personal political, as is done in the U.S. Owen Bowcott, *Lady Hale warns UK not to select judges on basis of political views*, GUARDIAN (Dec. 18, 2019, 5:47 PM),

of how prime ministers are selected,[80] this majority in the House of Commons will likely approve of the Prime Minister's selection because the candidate will align with the members ideologically. This reformed process would be strikingly similar to the appointment process for U.S. Supreme Court justices, as will be further explained in more detail later on. These justices in the U.K. may further be outwardly political, and their personal views well known. Yet any interpretation of a given law could in every single case could be "overturned" by Parliament, simply passing a new law that is in better accordance with its wishes. There is no constitutional "backstop" for the Supreme Court of the U.K. to fall back on to then tell Parliament that it cannot pass a certain type of law. The doctrine of parliamentary sovereignty, which is alive and well today, prohibits such behavior by the courts.

In this way, all political decisions regarding passing new Acts of Parliament or repealing existing legislation, all debates concerning the constitution of the U.K., the general structure of government, and the forum for potentially extinguishing rights are in Parliament. Thus, the U.K. public need not place any pressure nor care very much whether their Supreme Court justices have personal views on an issue like individual rights. The public will always have a means of redressing any injustices by the Supreme Court of the U.K. by having their representatives in Parliament resolve the issue. In any chain of events, the logical progression leads to Parliament, and not the courts, making political decisions. In contrast, the only body that can overturn a decision handed down by the U.S. Supreme Court is the Court itself. That dynamic is what makes the Court in the U.S. inherently more political than not only the Supreme Court of the U.K., but any other conceivable court of highest appeal in the U.K. — barring an alteration of the doctrine of parliamentary sovereignty.[81] The exceptionally polite nature of the U.K. Supreme Court justices and their commendable adherence to not discussing personal political views with colleagues and the public alike,[82] while admirable and welcomed, is ultimately not what is stopping them from

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https://www.theguardian.com/law/2019/dec/18/lady-hale-warns-uk-not-to-select-top-judges-on-basis-of-political-views.

[80] *General elections*, UK PARLIAMENT, https://www.parliament.uk/about/how/elections-and-voting/general/ (last visited Mar. 30, 2022) ("The Prime Minister is appointed by the monarch. The monarch's appointment of the Prime Minister is guided by constitutional conventions. The political party that wins the most seats in the House of Commons at a general election usually forms the new government. Its leader becomes Prime Minister.").

[81] Lady Hale disagrees, fearing the Supreme Court of the U.K. could become as politicized as its U.S. counterpart, but her remarks about the politicization of the court are merely surface level concerns and do not touch constitutional issues nor matters of policy:

> Judges have not been appointed for party political reasons in this country since at least the second world war. We do not want to turn into the supreme court of the United States – whether in powers or in process of appointment. On the other hand, we do have an idea of one another's approach to judging and to the law. But we are often surprised. Everyone is persuadable.

Bowcott, *supra* note 80.

[82] *Id.* (Lady Hale was also quoted as stating that "[t]hey are so open-minded and so unpredictable. We go into our post hearing deliberations not knowing what the others are going to say. Well sometimes. We do not know one another's political opinions – although occasionally we may have a good guess – and long may that remain so").

becoming involved in a political theater as is seen in the U.S. surrounding its own Supreme Court justices.

II. U.S. SUPREME COURT: A COURT OF FINAL APPEAL ON CONSTITUTIONAL MATTERS

The U.S. shares significant legal and constitutional traditions with the U.K.[83] However, an obvious point of departure lies with the U.S. Constitution providing for a legislature with only enumerated powers. Originally setting out only to amend the Articles of Confederation, which governed the U.S. between independence from the U.K. and the adoption of the U.S. Constitution, the Framers produced a written constitution in 1789 out of both ingenuity and necessity. Operating within a still new country that had just broken away from the U.K., the U.S. could not merely adopt all the unwritten constitutional conventions and principles as their own. Instead, they explicitly defined the contours of the newly devised federal government in a single document.

This federal government was created to have three separate branches that were meant to check and balance one another. The U.K. Constitution also has three branches of government,[84] but their power dynamic is drastically different from branches of the U.S. federal government. Article I of the U.S. Constitution details the first branch of the federal government, or the legislature. Unlike the legislature of the U.K., Parliament, the American legislature, known as Congress, does not have legislative supremacy. Rather, Congress is severely limited in its legislative powers in Section 8 of Article I by being confined to an explicit list of enumerated powers.[85] In this way,

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[83] Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 U. PA. L. REV. . 553, 553 (1882) ("The most casual student of the jurisprudence of the several states comprising the Federal Union will observe that our whole system is predicated upon a body of laws not found in any books published on this side of the Atlantic").

[84] These three branches include: (1) the executive, comprised of the Crown and Government; (2) the legislature, *i.e.*, Parliament; and, (2) the judiciary, operating through the court system.

[85] Explicit enumerated powers granted by art. I, § 8 provide:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the Untied States;
> To borrow Money on the credit of the United States;
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
> To establish Post Offices and post Roads;
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
> To constitute Tribunals inferior to the supreme Court;
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Congress can only pass legislation in connection to one of these enumerated powers—a position reinforced by the Tenth Amendment of the U.S. Constitution, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[86]

Having established Congress's limited powers in Article I, the Framers then define the role of the judiciary of the federal government in Article III. Rather vaguely, Section 1 of Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[87] Article III goes on to define the jurisdiction of this mentioned "judicial [p]ower" in Section II,[88] but does not offer a description of what power the judiciary was to have in relation to Congress.

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

[86] U.S. CONST. amend. X.

[87] U.S. CONST. art. III, § 1.

[88] This section provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been

During the ratification process of the U.S. Constitution debates raged over various topics concerning the newly developed document, including arguments over the proper role of the judiciary. In Brutus XI, an anti-Federalist, using "Brutus" as a pen name, espoused his fear over the vast power the U.S. Supreme Court would have:

> They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorized by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them.[89]

In this way, Brutus envisioned the judiciary as some sort of tyrannical ruler that could ultimately establish whatever laws it would like for the U.S.. Opposed to the Parliament of the U.K., it would be the Supreme Court of the U.S. that would be the most powerful branch of government.

Yet, avid Federalist and defender of the U.S. Constitution Alexander Hamilton attempted to assuage Brutus's fears in Federalist Paper No. 78. Hamilton saw the judiciary as the *least* dangerous of all the branches, in part because it would rely on another branch, the executive, to enforce any of its judgements.[90] Moreover, Hamilton argued that a court such as the U.S. Supreme Court was not only valuable, but essential in a political and legal system governed by what he refers to as a "limited constitution," or a constitution in which the legislature is limited in its lawmaking capacities.[91] If Congress shall be limited in what laws it can implement in accordance with the confines established by the U.S. Constitution, then there must be an independent body to interpret whether Congress is abiding by those confines.[92] In fulfilling this role, Hamilton frames the U.S. Supreme Court not as the dangerous usurper of power from the legislature, but as the defender of the people of the U.S. and their expressed will, found within the U.S.

> committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2.

[89] Unknown, *Brutus Essay XI,* (Jan. 31, 1788) https://www.consource.org/document/brutus-xi-1789-6-16/ (last visited Feb. 22, 2023).

[90] Hamilton, *The Federalist Papers: No.* 78, YALE LAW SCHOOL: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited Feb. 22, 2023).

[91] *Id.*

[92] *Id.*

Constitution.[93] In this way, the judiciary is not superior to the legislature, but rather the people are superior to both.[94] "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[95]

However, neither Brutus's nor Hamilton's view was solidified by the judiciary itself until the landmark 1803 U.S. Supreme Court case *Marbury v. Madison*. In *Marbury*, the U.S. Supreme Court held that not only could it decide which law would prevail in the event of a conflict of laws, but also that the Court could strike down legislation as unconstitutional.[96] In this way, the judiciary affirmed for itself that it could limit Congress's power—a drastically different situation than that found between Parliament and the Supreme Court of the U.K.. Moreover, the Court did so not by relying on a purely textual argument, but by emphasizing the mere fact that the U.S. Constitution is a written one with enumerated legislative powers.[97]

This view of judicial supremacy did not go unchallenged. In the 1858 Lincoln−Douglas presidential debates, the two candidates argued extensively over whether the *Dred Scott v. Sanford* decision, which sought to settle the slavery debate by declaring that no black person could ever be a citizen of the United States, was binding in perpetuity on the nation. While Douglas advocated the view that the U.S. Supreme Court's decisions are final,[98] Lincoln argued that the Court's decision may bind Dred Scott in that particular case, but not Congress, the President, or the other branches of the federal government, in their future actions.[99]

The view associated with Lincoln's argument has become known as "departmentalism," and was further advocated by states in the American South following the decision in *Brown v. Board of Education* in 1954 that held racial segregation in public schools as unconstitutional under the 14th Amendment.[100] The Court responded to the southern states' resistance, however, by reaffirming its stance from *Marbury* in yet another decision, *Cooper v. Aaron*. In *Cooper*, Chief Justice Marshall, with the support of a unanimous Court, proclaimed that "[i]f legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."[101] Yet, although the courts have settled the question of

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Marbury v. Madison*, 5 U.S. 137, 180 (1803).
[97] *Id.* ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument").
[98] Stephen Douglas, *Speech at the Third Lincoln-Douglas Debate* (1858).
[99] Abraham Lincoln, *Speech at the Sixth Lincoln-Douglas Debate* (1858).
[100] *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).
[101] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

departmentalism and judicial supremacy in favor of the latter, the debate continues to live on in academic literature.[102]

Nonetheless, this debate predominantly exists only in academic circles, and a majority of justices of the U.S. Supreme Court have not espoused a position in favor of "departmentalism" since the debate was settled, for the judiciary at least, in *Marbury*. In this way, the U.S. Supreme Court remains, functionally, a court of last resort and of highest appeal for constitutional issues. The Court offers binding decisions that proliferate throughout the U.S. via precedent. Thus, the U.S. Supreme Court makes political decisions that affect the entire country.

> It just does not make sense, therefore, for anybody to claim that the Court should not be political, should not disturb the current distribution of power and rights. In a centralized, party-dominated state, such as in China or the Soviet Union in years past, or in some Third World autocracy, the courts may indeed be expected to forgo the 'prerogative of choice' by towing the government line. But that is not possible in the United States. Legitimate authority is so widely diffused, between the individual states and the federal government and between the several parts of the federal government itself, that it is impossible for justices merely to 'take the government line' and act as nothing more than a formal agency of legitimation. Even the Court's harshest critics do not imagine that the Court can properly become a political eunuch in this way.[103]

Barring an adoption of "departmentalism," which, if done, would raise questions as to how Congress's powers would be checked to stay within the confines estabslihed by the U.S. Constitution, the U.S. Supreme Court will remain inherently more political than its U.K. counterpart. Even changing the appointment procedure to the U.S. Supreme Court would not alter this dynamic. Currently, as required by the U.S. Constitution, the President nominates candidates who are then either approved or rejected by the U.S. Senate.[104] Taking this power away from the President and giving it to, say, an independent judicial commission, would not change the fact that U.S. Supreme Court justices would still make major political decisions once on the Court. In this way, the U.S. Supreme Court being more political than the Supreme Court of the U.K. boils down to the former deriving its power from a written constitution providing for a legislature with only enumerated powers, while the latter is severely limited by parliamentary sovereignty. The fact that recent nominations to the U.S. Supreme Court have become

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[102] *See* Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 THE WM. & MARY L. REV. 1713, 1715-749 (2017) (offering an argument in support of departmentalism over judicial supremacy).
[103] Hodder-Williams, *supra* note 15, at 3.
[104] U.S. CONST. art. II, § 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the Supreme Court").

increasingly contentious in the Senate is likely because congressmen have fully realized the political capacity of the Court and value the achievement of certain policy goals over a sense of unity in the U.S. If anything, the Senate has changed, not the Court. Thus, notwithstanding a drastic alteration to the U.S. Constitution, U.S. citizens should seek a path forward that accepts and better manages the inherently political nature of the Court, rather than simply criticizing the institution on those grounds.

CONCLUSION

Commentators frequently remark that the U.S. Supreme Court is more political than its counterpart in the U.K. However, notwithstanding the personal politics of justices in the U.S. or the appointment procedure they must endure to obtain their current positions, the enumerated legislative powers in the U.S. Constitution are to blame—if blame can be an accurate characterization at all for the politicization of the U.S. Supreme Court as contrasted to the Supreme Court of the U.K. The enumerated powers place a duty on the U.S. Supreme Court to interpret the U.S. Constitution against any potential transgressions against it by Congress. If there was not a referee to demarcate these boundaries, then there would be little point in having them whatsoever. Congress could simply do whatever it likes, irrespective of the power limitations set on it by the U.S. Constitution. Thus, the U.S. Supreme Court *must* make inherently political decisions about the U.S. federal government in relation to both the states and the people of the U.S.

In the U.K., the political machinery could not be more different in this arena. The legislative branch of Parliament is legally sovereign in absolutist terms; it knows no legal bounds. In this way, the Supreme Court of the U.K. is in no constitutional position to make political decisions for the country they serve— this task is simply left to Parliament. Thus, even though an independent appointment procedure or the apolitical culture of justices in the U.K. may create a more congenial work environment, these aspects of the Supreme Court of the U.K. do nothing in the way of preventing it from becoming politicized like the U.S. Supreme Court. Only a constitutional amendment could accomplish this task. Therefore, it behooves us to realize that, to a point, comparisons drawn between the U.S. Supreme Court and the Supreme Court of the U.K. are a relatively fruitless task unless the people of one or both of these countries are considering a dramatic alteration of their system of governance. Perhaps that is a desired outcome, but it is beyond the scope of this paper to determine with convincing finality.