

The Constitutional Codification Debate in the United Kingdom

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- Brian Christopher Jones, [Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness](#) (2020).
- W. Elliot Bulmer, [Westminster and the World: Commonwealth and Comparative Insights for Constitutional Reform](#) (2020).

The Brexit referendum result in June 2016 brought to the boil a cauldron of constitutional politics that had been simmering since the piecemeal New Labour reforms of the 1990s. Those reforms were undertaken as a programme of constitutional modernisation in improving the legal protection of individual rights and in establishing asymmetric devolved institutions at the peripheries of the Union. Despite some radical rhetoric at the time, it was, in both style and substance, a very British kind of reform – incremental, pragmatic, careful to preserve a cherished narrative of historical continuity, and dismissive of theoretical grand designs. They were meant to be practical solutions to practical problems, which would enable the constitution to change sufficiently in order to carry on as successfully as ever before.

Except that this was not how it turned out. The changes to the regime of rights protection turned out to be, for some at least, a cultural revolution through the judicialisation of politics. The institutionalisation of democratically elected loci of popular sovereignty at the sub-state level turned out to be difficult to reconcile with the principle of the legislative supremacy of the Crown-in-Parliament upon which the rest of the unwritten constitution still rested. The judicialisation of rights protection and multilevel governance were both reforms that presumed UK membership in the European Union in perpetuity. When Leave won the Brexit referendum largely through English votes and against majorities for Remain in Scotland and Northern Ireland, these debates and especially the question of the UK's continued territorial integrity have become engulfed in flames of passionate rhetoric and deep divisions. All of a sudden, the UK constitutional settlement finds itself in a very un-British place.

Even in the somewhat more rarefied atmosphere of academic discussions of the constitution, the sense that something is seriously wrong and that something must be done is never far away. It is in this context that the old debate about whether or not there is now a need to codify the constitution, in whole or in part, has assumed new relevance. Two new rigorously researched and persuasively argued books make important contributions to this debate from opposing perspectives. Admirably, both make their interventions into the UK debate in the context of comparative constitutional law, or more precisely, the way the field has developed in the post-World War II and post-Cold War waves of democratic constitution-making. In this sense both books make valuable general contributions beyond the immediate concern of the writtleness of the UK constitution.

The subtitle of Brian Christopher Jones' [Constitutional Idolatry and Democracy](#) makes clear the author's aim: "Challenging the Infatuation with Writtenness". Jones defines 'constitutional idolatry' as "drastically or persistently over-selling the importance and effects of written constitutions." The consequences of constitutional idolatry are threefold: it devalues politics and the democratic process; it is paternalistic; and it stifles constitutional maintenance. The first objection is based on the well-known '[political constitutionalist](#)' perspective on the UK constitution. An idolised written constitution raises law and judges above politics and legislators and guts the vitality of politics and democracy, all based on the fallacy that constitutional norms have an independent and superior existence above the political. Secondly, constitutional idolatry is paternalistic because it assumes that the framers of the supreme text, and the judges who authoritatively interpret it, know what is best for the polity better than any other citizen. This paternalism also has the consequence of giving rise to the false expectation that the written constitution, necessarily an historically and spatially contingent thing, provides all the answers to every constitutional problem for all time coming. Thirdly,

written texts ossify constitutions when what is needed is 'constitutional maintenance', i.e., the flexible, continuous, and undramatic change that keeps the constitution broadly in step with changes in society, culture, and technology.

In challenging the infatuation with writtenness, Jones systematically asks the sceptical questions that must be asked in any serious conversation about constitutional codification. Even if it is accepted that the traditional self-understanding of the British constitution is under terminal challenge today, he is right to ask how and if an attempt at introducing a written constitution would serve as a plausible solution. If the problems arise from a deep unsettling of a traditional consensus, what are the prospects of a new consensus being forged, codified, and moreover, (justiciably) entrenched? Why, indeed, is '[constitutional unsettlement](#)' not itself the more plausible response in the face of politically salient divisions over Europe, human rights, juristocracy, and most of all, the institutional, territorial, and demotic pluralism of a [plurinational union-state](#)?

But is writtenness always the same thing as idolatry? Does writtenness always cause idolatry? A persistent question about the entire framing of Jones's critique is whether he fixates too much on the American tradition. The American trait of constitutional veneration, after all, has not been followed in very many other places. As Ginsburg, Elkins and Melton famously [showed](#), the mean lifespans of written constitutions are remarkably short at 17 years. In the liberal democracies, at least, this frequency of constitutional replacement surely points, not to constitutional idolatry, but perhaps to written constitutions being used more as instruments of a deeper political constitutionalism of the type that Jones approves.

For an answer to this question that looks to a written but proceduralist model of constitution and constitutionalism that was once (but no longer) familiar in mainstream UK public law scholarship, we can look to W. Elliot Bulmer's [Westminster and the World](#). This book is an elegant restatement of many of the arguments in favour of a written UK constitution from the heyday of that movement in the 1980s and early 1990s. These arguments would also be familiar to those engaged in constitution-making as part of effecting transitions from authoritarianism-to-democracy or conflict-to-peace in the Global South. However, there are at least two ways in which the contribution is original.

The first is the attempt to convince Burkean constitutional conservatives that a written constitution is not inconsistent with the organic and the incrementalist view of the British constitution. Bulmer's 'neo-Burkean' argument goes as follows. Edmund Burke's starting premise was that the constitution of the state is an inter-generational compact between the living, the dead, and the unborn. Such a constitution, preserving ancient liberties and evolved institutions, is better protected from the tyranny of transient parliamentary majorities by a written and entrenched document. Such a written constitution is not about the pursuit of abstract rationalist ideals in the Continental style, but an expression of the common inheritance of values and institutions derived from long and concrete experience. Moreover, as Burke recognised that limited and prudential reform was essential to the preservation of the inherited order, a written constitution may not merely express the *status quo*, but also effect those necessary changes. In developing this point, Bulmer has not become a Burkean conservative or abandoned his clear preference for the constitutional thought of Burke's great radical detractor, Tom Paine. He is merely showing that the conservatism of one and the radicalism of the other are not as fundamentally irreconcilable as generally assumed.

Bulmer's second, and perhaps the really serious, contribution of the book, is the theorisation he offers of 'The Westminster Model as a Constitutional Archetype'. Somewhat ironically, perhaps, this aspect of the discussion may well be independently and more widely accepted among Bulmer's readership than his main thesis about a written constitution for the UK. This model is the concrete instantiation of the marriage between the Burkean and Paineian traditions of constitutional thought. Recently there have been scholarly [denials](#) that the 'Westminster Model' is any longer a thing, if it ever was. Bulmer offers a robust response to such ahistorical political science. His multi-layered model encompasses the legal and the political, the normative and the descriptive, and the historical, institutional, and cultural dimensions that must all be accounted for in a proper theory of a model of constitutional state. The explanatory taxonomy of Westminster model states he builds towards the end of this discussion is the visual proof of his success in theoretical completeness. Using this as the basis to argue for the codification of the UK constitution will constitute a powerful appeal, including by answering some although by no means all of Jones's concerns. But it is far from clear

whether the disparate bodies of public opinion in the UK today, pushing and pulling in different and often opposed directions, are any readier to accept this historic ideal of British constitutional achievement than they have been in the past.

Neither Jones nor Bulmer, despite the sustained intellectual efforts represented in their very well-written recent books, are likely to fully convince their strongest detractors. That is testament to the scale of the division, or more likely, the indifference, of public opinion, rather than their abilities. But their efforts will be extremely well regarded by everyone looking for illumination and inspiration in the tortuous days that lie ahead in British constitutional discourse.

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