THINGS BETTER LEFT UNWRITTEN?: CONSTITUTIONAL TEXT AND THE RULE OF LAW

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The written nature of America's Constitution has been traditionally regarded as a constitutional virtue, and more recently dismissed as an irrelevancy of form. However, the concept of "writtenness" itself, in the constitutional context, remains vague and undefined. Through a comparison of the United States and United Kingdom constitutions, this Note identifies the essential characteristics of a written constitution and examines how such writtenness affects the achievement of the rule of law in a society. The Note argues that an unwritten constitution may prove as conducive to important rule-of-law values as a written constitution, if not more so, and challenges the general perception of writtenness as an unequivocally desirable aspect of our Constitution.

INTRODUCTION
THE PHENOMENON OF CONSTITUTION WORSHIP

The pride, respect, and reverence that Americans have for our Constitution resonate across different levels of our society[1] and

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[1] Constitution worship is more than an analytical curiosity among academics and a rhetorical tool of politicians. *See* Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1304 (1937) (describing how "the process of building the Constitutional legend" involved participation of diverse groups and institutions—legal community, immigrant communities, schools, and popular media). In 1997, the National Constitution Center conducted a nationwide telephone survey on constitutional knowledge. National Constitution Center, Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml (last visited July 20, 2008).

Out of one thousand respondents, National Constitution Center, Highlights of Survey, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/HighlightsofthePoll.shtml (last visited July 20, 2008), ninety-one percent agreed that "The US Constitution is important to me," eighty-nine percent agreed that "I am proud of the US Constitution," and seventy-seven percent disagreed that "The Constitution doesn't matter much in my daily life." National Constitution Center, NCC Constitution Poll Statistics, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/TheAnswers.shtml (last visited July 20, 2008).

arguably date back to the very moment of the Constitution's ratification.[2] This phenomenon of what might be called "Constitution worship" appears partially due to the written nature of the U.S. Constitution.[3] On a pragmatic level, a discrete document that Americans can definitively regard as "the Constitution" provides a focal point of worship.[4] Delving more deeply, there is a sense that the very "writtenness" of the Constitution is a cause for veneration.[5]

Despite a common understanding of the U.S. Constitution as a "written constitution," the key questions of how to define writtenness beyond the presence of a formal text and what consequences flow from a constitution's writtenness remain underanalyzed. Legal scholars have tended to take one of two positions. The traditional position focuses upon writtenness as a desirable trait that helps to uphold the rule of law within a society.[6] However, its advocates do so without fully exploring what makes a constitution written in the first

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[2] *See* Lerner, *supra* note 1, at 1295–96 ("The rhetoric of national unity marked the beginning of Constitution worship. The people rejoiced that the disunity of the Confederation had been turned into the unity of the Constitution.").

[3] *See* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 639 (2006) ("[I]t is evident from even a cursory awareness of American culture that we have a tradition in the United States of venerating the written Constitution."); Lerner, *supra* note 1, at 1298–99 ("The American was the first written national Constitution. . . . The very definiteness with which the design for a government was set down in words on parchment was enough to command admiration and then reverence."); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation*,*'* 58 S. CAL. L. REV. 551, 557 (1985) (noting "[t]he importance attached, not merely in judicial practice but in American political-legal culture generally, to the 'writtenness' of the Constitution: the text is accorded authoritative status").

[4] *See* Lerner, *supra* note 1, at 1299 ("What was wanted was a visible symbol of the things that men hold dear."); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 123–24 (referring to Constitution as "the sacred document" of America's "civil religion").

[5] *See* Perry, *supra* note 3, at 564 ("For the American polity, the constitutional text is not (simply) a book of answers to particular questions . . . . It is, rather, a principal symbol of, perhaps *the* principal symbol of, the aspirations of the tradition.").

[6] Alexander Hamilton alluded to the written nature of the proposed Constitution in those terms when he was urging his countrymen to ratify it. *See* THE FEDERALIST No. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that Americans had opportunity to be first nation to "establish[ ] good government from reflection and choice, [instead of being] forever destined to depend for their political constitutions on accident and force"). During the Founding Era, the Supreme Court adopted a similar attitude toward writtenness. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (noting that written constitutions "have [been] deemed the greatest improvement on political institutions" and "have been viewed with so much reverence"). Generations of Justices since *Marbury* have linked writtenness to assorted constitutional functions. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 (2000) (limiting government authority); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) (plurality opinion) (embodying enduring societal values); United States v. Salerno, 481 U.S. 739, 761 (1987) (Marshall, J., dissenting) (protecting individual rights); Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting) (ensuring certainty and stability of law). *But cf.* Perez v. Brownell,

place.[7] In the absence of analytically defensible criteria for determining writtenness, their claims about the differences between written and unwritten constitutions are difficult to evaluate.[8] More recent literature eschews the written/unwritten distinction altogether, pointing out that *all* constitutions, regardless of how they are categorized, consist of written and unwritten elements. These scholars contend that thinking of constitutions in terms of writtenness is therefore conceptually unsound and/or inconsequential in practice.[9]

This Note argues that both perspectives are insufficient and presents a third position on the relevance of the written/unwritten distinction to the rule of law. Part I draws upon existing understandings and concepts of written and unwritten constitutions to develop a "conceptual ideal"[10] of a written constitution. Part II identifies an overlooked relationship between two sets of constitutional distinctions: Whether a constitution is written or unwritten may help determine

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356 U.S. 44, 79 (1958) (Douglas, J., dissenting) (accepting writtenness as important positive aspect of Constitution without passing normative judgment).

[7] *See, e.g.*, Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 586 (2003) (cursorily defining "a constitution's 'written-ness'" as "its unique character as a written document"); Martin Edelman, *Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 586 & n.4 (2005) ("Only five member states of the United Nations [Bhutan, Israel, San Marino, Saudi Arabia, and the United Kingdom] have never promulgated a formal, integrated written constitution."). As I explain in Part I, this approach is too superficial to be considered an adequate definition of writtenness.

[8] For example, Paul Roth asserts that New Zealand lacks a written constitution because it has no law that is entrenched and "to which all other statute law is inferior." His failure to justify why entrenchment is characteristic of a written constitution in the first place renders suspect his subsequent arguments on the differences between written and unwritten constitutions. Paul Roth, *Captive Audience Speech Under New Zealand Law*, 29 COMP. LAB. L. & POL'Y J. 147, 157 & n.28 (2008).

[9] Such arguments have been made by scholars on both sides of the Atlantic. In his recent book on English public law, Adam Tomkins contends that the written/unwritten distinction is purely formalistic and thus irrelevant. *See* ADAM TOMKINS, PUBLIC LAW 9 (2003) ("The distinction between written and unwritten constitutions is one of form, not of substance. . . . No substantive consequences flow from the fact that the constitution is unwritten."). Tomkins also argues that the distinction is inaccurate, since all so-called written constitutions contain certain unwritten elements and vice versa. *Id.* Rivka Weill makes the same critique, by reference to the "living constitution" model. *See* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429, 462 (2006) ("To remain a living document, every written constitution must evolve over time. Thus, even written constitutions are usually supplemented with unwritten ones."). Finally, David Strauss points to the similarities between the actual functioning of the U.S. written constitution and the U.K. unwritten constitution to argue that the distinction does not matter, at least among mature constitutional regimes with strong constitutional traditions. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 924 (1996).

[10] I use the term "conceptual ideal" to refer to a definition of writtenness that addresses the strengths and weaknesses of both positions in the extant literature. *See infra* Part I.A.

whether constitutional rights and principles are conclusively enforced in the legal or the political arena, with proximate consequences for the rule of law. Thus, this Note refutes the revisionist position's contention that the written/unwritten distinction does not matter. At the same time, it disagrees with the traditional position as to why this distinction matters. Part III argues that writtenness may not only be less effective than has been assumed in furthering formal principles of legality, but may also even undercut substantive rule-of-law values.

To set the parameters of this Note, I would like to make two points about the scope of my analysis. First, it primarily applies to the constitutions of common law societies. By removing from consideration the variable of the type of legal system (common law versus civil), any distinctions between written and unwritten constitutions can be more clearly traced to the difference in form. Furthermore, the conceptual starting point for an unwritten constitution—the lack of a single, authoritative text—is in important ways rooted in the common law.[11] Second, my analysis is most pertinent to liberal democracies,[12] which possess a political framework that recognizes the value of the rule of law. It would be pointless to talk about how a constitution's form may further the rule of law in the context of a political system, such as a dictatorship, that does not recognize such concepts.[13]

In sum, this Note makes a twofold case. First, we should think more critically about the written form of our Constitution, especially in terms of the possible pitfalls posed by writtenness for achieving the rule of law. Second, any such assessment would benefit from an understanding of the unwritten constitution and its relation to the rule of law. The Note concludes that writtenness, far from being an unequivocally positive attribute of a constitution, risks undermining the rule of law by granting excessive authority to the judiciary. In contrast, an unwritten constitution provides ultimate recourse to political institutions and mechanisms, an approach that contains its own dangers yet remains a viable alternative for upholding the rule of law.

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[11] *See infra* note 53 and accompanying text. Indeed, the three national constitutions today widely recognized as being unwritten all belong to common law countries. *See infra* note 17.

[12] Of course, "liberal democracy" itself is not an easy term to define. Frank Cunningham, *The Socialist Retrieval of Liberal Democracy*, 11 INT'L POL. SCI. REV. 99, 100 (1990). Still, "headway can be made by attending to the values by reference to which actual [liberal-democratic] activities and institutions . . . are justified. These values include . . . freedom, equality, and democracy, plus a stance on their relative weights." *Id.*

[13] Eric Barendt distinguishes between liberal constitutions and what he calls "nominal constitutions," which are "simply maps of political power, *describing* the powers of particular persons and institutions." ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 6 (1998).

I
THE MEANING OF WRITTENNESS

A meaningful analysis of the significance of constitutional form for the rule of law must be founded upon a workable definition of writtenness. In turn, the question of what writtenness means may be posed on two levels: On a literal level, whether something is "written" is determined by the dictionary sense of the word;[14] on a representative level, "written" becomes a term of art that varies according to context.[15]

This Part addresses the issue of writtenness in the constitutional context. It proceeds from the basic understanding of a written constitution as one embodied in a single text of constitutional status.[16] This definition of writtenness falls short, however, in two respects. First, it fails to account for constitutional development that occurs after the text is adopted but does not result in amendments to the text. Second, it does not address the status of the text within a given society's legal hierarchy. Thus, this Part aims to provide a more comprehensive definition of writtenness, framed in terms of two overarching criteria that together form the conceptual ideal of a written constitution.

A. The Complete Codification of Constitutional Principles

The first condition of a written constitution is that all constitutional principles be codified as such. The accepted characterization of the United Kingdom's constitution as "unwritten" suggests as much: Although the bulk of the constitution is composed of acts of Parliament and judicial decisions, it does not take the form of a distinct document stating the rules and principles that establish a legal order.[17] Rather, what counts as constitutional law in the United Kingdom is what ultimately emerges from practice—that is, the rules

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[14] *See, e.g.*, THE OXFORD ENGLISH DICTIONARY 639 (2d ed. 1989) (defining "written" as "to form (letters, words, etc.) by hand on paper").

[15] *See* TOMKINS, *supra* note 9, at 7 n.4 ("[T]he phrases ['written' and 'unwritten constitutions'] are terms of art and are not to be construed literally.").

[16] Of course, the issue of determining what law is "constitutional" is not always clear-cut. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 256 (1999) ("Often the decisions which determine the shape of a society's constitution are entangled with or woven into the fabric of ordinary political life. . . . Even in the United States where there is a full written constitution and an established tradition of interpreting it, an event which has fundamental significance for the basis on which political life is conducted may not advertise itself as 'constitutional.'"). This Note views constitutional law as constitutive law—that is, legal provisions that create, organize, direct, and limit government power. *Id.* at 275.

[17] While no definitive categorization of constitutions exists, the three countries most widely recognized today as having unwritten constitutions are Israel, New Zealand, and the United Kingdom. *E.g.*, Maria Dakolias, *Are We There Yet?: Measuring Success of Constitutional Reform*, 39 VAND. J. TRANSNAT'L L. 1117, 1118 (2006).

that the different branches of government actually follow in exercising their powers, carrying out their duties, and interacting with one another.[18]

The example of the United Kingdom demonstrates that both context and extent of codification are relevant when distinguishing a written constitution from an unwritten one. The context in which codification takes place matters because the mere fact that principles of constitutional status have been codified does not render a constitution written.[19] Rather, constitutional codification occurs when a society comes together and knowingly and deliberately confers constitutional status on a group of principles.[20]

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[18] *See* RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT 3 (3d ed. 1999) ("[T]he whole system of British central government is based on practice, not law[, and] requires a detailed consideration of 'rules' [such as] the powers of the Sovereign, the existence of and relationships between the Prime Minister and the Cabinet . . . and the appointment and disciplining of the judiciary."); MICHAEL FOLEY, THE POLITICS OF THE BRITISH CONSTITUTION 1 (1999) (describing conventional view of British constitutionalism as "a summation of political experience expressed through forms, processes, traditions and developments, and substantiated by longevity, continuity, assimilation and adaptation"); Anthony Bradley, *The Sovereignty of Parliament—Form or Substance?*, *in* THE CHANGING CONSTITUTION 26, 32 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004) (quoting Sir John Salmond's comment that in United Kingdom "[t]he constitution as a matter of fact is logically prior to the constitution as a matter of law," meaning that "constitutional practice is logically prior to constitutional law").

Constitutional practice as constitutional law is reflected in the centrality of constitutional conventions to the U.K. constitution. Broadly speaking, constitutional conventions are nonlegal rules that impose obligations and confer rights upon constitutional actors. GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 7 (1984). They are not judicially enforceable, although courts may take notice of them to help clarify what the existing law is. *Id.* at 15. Since conventions are identified as rules that "*are* generally obeyed and generally thought to be obligatory," *id.* at 6, they are a prime example of how U.K. constitutional law is determined by how political actors conduct themselves in practice.

[19] For example, the structure of the U.K. constitution, in terms of the legal relationship between the different branches of government, is secured by the statutory Bill of Rights and Act of Settlement. TOMKINS, *supra* note 9, at 45. Similarly, New Zealand's constitution includes a Constitution Act that establishes a framework of government and a Bill of Rights Act to guard against the infringement of rights. Geoffrey Palmer, *The New Zealand Constitution and the Power of Courts*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 551, 558, 567 (2006).

[20] *See* BLACK'S LAW DICTIONARY 273–74, 275 (8th ed. 2004) (defining "codification" as "[t]he process of compiling, arranging, and systematizing . . . a discrete branch of the law, into an ordered code," and defining "code" as "[a] complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations"); *see also* Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *in* MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 181, 190 (Mark A. Graber & Michael Perhac eds., 2002) (pointing out that importance of writtenness of Constitution for Chief Justice Marshall in *Marbury v. Madison* was not "just a matter of the people having kept a written record of how they proposed to govern themselves," but of "their having chosen a mode of exercise of popular sovereignty that is deliberately law-like in form").

The extent of constitutional codification is also important, but a more nuanced approach to the requirement of completeness must be taken in light of a constitution's specific role and purposes in a legal and political system. While the concept of codification generally implies that the end product of the process be complete unto itself,[21] a constitution cannot be strictly analogized to an ordinary code.[22] Civil and criminal codes presuppose a political and legal framework within which laws operate and interact with other laws, whereas a constitution establishes such a framework for its society in the first instance.[23] Furthermore, given that no constitution could contain all the rules required to solve every constitutional issue that might ever arise, some process of informal amendment or interpretation of constitutional principles is necessary.[24] Thus, it is important to bear in mind the unique nature of a constitutional document when we think about the extent of codification that should be required before a constitution may be meaningfully labeled as a written one.

Taking such considerations into account, I argue that codification is "complete" for constitutional purposes when three conditions are fulfilled: All core constitutional principles are codified, all subsidiary constitutional principles are based upon core principles,[25] and an ongoing process of codification ensures that such subsidiary principles

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[21] *See* BLACK'S LAW DICTIONARY, *supra* note 20, at 273–74 (defining "code" as "[a] *complete* system of positive law" (emphasis added)).

[22] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."). *But see* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 126 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION] (calling U.S. Constitution "the most fundamental American statute of them all").

[23] *See, e.g.*, CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 6 (2001) ("[T]he central goal of a constitution is to create the preconditions for a well-functioning democratic order . . . .").

[24] *See* TOMKINS, *supra* note 9, at 9 ("Constitutional questions, which change over time, are too varied and too unpredictable for any single legal instrument to be capable of answering them all. Even countries with written or codified constitutions need to supplement those codes with unwritten, or more likely uncodified, rules.").

[25] *See McCulloch*, 17 U.S. (4 Wheat.) at 407 (stating that nature of Constitution "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves"). The distinction I see between core and subsidiary constitutional principles draws upon H.L.A. Hart's concept of the rule of recognition: A principle is subsidiary if it relies for its authority upon an antecedent constitutional principle. *See* H.L.A. HART, THE CONCEPT OF LAW 102–04 (1975) (arguing that every legal system contains ultimate rule of recognition at its foundation which provides criteria by which validity of other rules of system can be assessed). For example, the Miranda warnings that must be given to a defendant prior to any custodial interrogation are a subsidiary constitutional principle, formulated by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436

will eventually become an official part of the codified constitution.[26] This formulation resolves the challenges posed by those scholars who argue against the very notion of a "written constitution." On one hand, it recognizes that a written constitution, such as that of the United States, includes more than the explicit constitutional text; on the other hand, by imposing the requirement that constitutional principles drawn from but not specifically included in the text be codified in due course, it ensures that describing a constitution founded upon a text as written does not become a mere semantic exercise.

Thinking about writtenness in these terms reveals the falsity of a dichotomy between the written and unwritten constitutions that we are familiar with. In practice, countries without formal written constitutions possess codified laws of constitutional import, and countries with written constitutions rely upon uncodified constitutional principles.[27] It would be more accurate to view writtenness as a spectrum along which countries are arranged by the completeness of their constitutional codification.

B. Constitutional Principles as Supreme Law

The second condition of a written constitution is that constitutional principles become "supreme law" as a result of their codifica-

(1966), that is drawn from the core constitutional principle prohibiting unreasonable searches and seizures codified in the Fourth Amendment, U.S. CONST. amend. IV.

[26] A useful analogy would be to the Uniform Commercial Code (U.C.C.) in American law, which was promulgated to "provide a stable and predictable [legal] framework for the business community," and which has since "been enacted in whole or in part in all fifty states, as well as in the District of Columbia, the Virgin Islands, and Puerto Rico." Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 520–21 (2000). The U.C.C. is a collection of common law principles of commercial law, presented in the form of a code, that is accepted as legally binding by the jurisdictions that have adopted it. Whereas scholars debate whether or not the U.C.C. qualifies as a codification, *id.* at 521–22, any process of collecting and codifying subsidiary constitutional principles such that they form part of a society's written constitution would have to be sanctioned in some societally agreed-upon manner, for instance through the approval of a country's constitutional court or through popular referendum, such that they are binding upon the government and the society at large. Thanks to Professor Jeremy Waldron for the analogy.

[27] The United States appears to be no exception. Scholars have argued that the United States does in fact have an unwritten constitution in the form of "unwritten texts (of precedent, social ideals, and the like) [that] supplement [or even] supplant the written document as the exclusive object of constitutional interpretation." Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 115 (1989) (emphasis omitted). Tom Grey's seminal piece on the unwritten U.S. Constitution argues that many of our most fundamental contemporary constitutional principles, such as the right to privacy (which includes the right to an abortion) or the prohibition against racial segregation, cannot be justified through a strict textual interpretation of the Constitution. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 708–09, 711–13 (1975).

tion in "the constitution."[28] Two aspects of supremacy are at play: First, constitutional law is final, trumping all other sources of law in the society, and, second, constitutional law is entrenched, being more resistant to change than other sources of law.[29] A society's process for amending its constitution reflects both of these elements: Finality dictates that an amendment procedure is legitimate only if it is specified in the constitution,[30] while entrenchment demands that this procedure be stricter than the processes for passing or repealing ordinary legislation.[31]

In *Marbury v. Madison*, Chief Justice Marshall provided three insights into why "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."[32] The first insight has to do with legitimacy. A valid written constitution is established by an authority that the society recognizes as "supreme" at the time of such establishment.[33] By contrast,

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[28] *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 556 (1984) (Stevens, J., dissenting) (noting that written constitution "enshrine[s] as principles of fundamental law beyond the reach of governmental officials or legislative majorities").

[29] James Madison highlighted the distinction between the U.S. and U.K. constitutions in this respect:

> The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. . . . Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable as well with regard to the Constitution as the ordinary objects of legislative provision.

THE FEDERALIST No. 53, at 331 (James Madison) (Clinton Rossiter ed., 1961).

[30] Beyond concerns of finality, it is inherent in the nature of a constitution to provide for its own amendment, at least insofar as the process of amending a society's constitution is regarded as constitutive of that society's political and legal system. *See* WALDRON, *supra* note 16, at 260–61 (arguing that constitutional provisions may be viewed as constitutive procedural rules that establish framework within which society acts).

[31] If this is not the case in a given constitution, the constitution would merely be "an initiating statute that is thoroughly 'inside' the ordinary political order," as opposed to a constitution that "in some ways [is] supposed to stand 'above' and in some sense even 'outside' the everyday system of ordinary political decisionmaking." Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 107–08 (1996).

[32] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[33] The authority that establishes the constitution of a society can be accepted by that society as "supreme" on any number of grounds. In the United States, the Constitution was founded upon the theory of popular sovereignty. *See id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."). Thus, the Constitution was only established when it was ratified by the people. *See* THE FEDERALIST No. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of govern-

unwritten constitutions draw from diverse sources of authority,[34] making conceptually problematic the argument that these sources are all equally "supreme" and that the end product must be treated as supreme.

Marshall's second insight is pragmatic: The process of drafting and adopting a written constitution is a "great exertion" that a society should not, and probably cannot, seek to repeat on any level of frequency.[35] This gives rise to two reasons that a society would want to regard its constitutional principles as supreme. First, in practical terms, meaningful change is rarely viable.[36] Second, on a conceptual level, the effort that has gone into creating the constitutional document would seem to suggest that the principles it enshrines were "*designed* to be permanent."[37]

The third and final insight deals with the question of purpose. Marshall argued that a written constitution enabled the people to limit the powers of government, a purpose rendered obsolete if future governments were free to alter constitutional provisions as they saw fit.[38] But this insight is complicated by the countermajoritarian difficulty,[39] which suggests that a democratically elected government can legiti-

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ment hold their power, is derived . . . ."). For Commonwealth countries such as Canada and Australia, the supreme authority was the British Parliament legislating from across the ocean. LESLIE ZINES, CONSTITUTIONAL CHANGE IN THE COMMONWEALTH 3 (1991).

[34] For example, New Zealand considers its unwritten constitution to be composed of legislation, judicial decisions, treaties, royal prerogative powers, and constitutional conventions. Kenneth Keith, *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, *in* CABINET MANUAL (Cabinet Office, Dep't of the Prime Minister and Cabinet ed., 2008), *available at* http://www.dpmc.govt.nz/cabinet/manual/intro.html.

[35] *Marbury*, 5 U.S. (1 Cranch) at 176.

[36] Change would become more viable if the constitutional amendment process were no different from the ordinary legislative process. However, given that a constitution originally derives its legitimacy from the particular process by which it was enacted, it can be argued that any legitimate constitutional change must at the very least keep with the spirit of the enactment process, which presumably involved greater societal consensus than the laws passed regularly by the legislature. Furthermore, the foundational nature of constitutional law itself counsels against subjecting constitutional principles to speedy and/or frequent change. *See* Mark Tushnet, *The Whole Thing*, 12 CONST. COMMENT. 223, 225 (1995) ("Perhaps some degree of institutional stability is required for a system to warrant the name *constitutional*, which suggests that it should not be too easy to amend all of a constitution's provisions, or perhaps any of its basic institutional prescriptions.").

[37] *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added).

[38] *Id.*

[39] This term—coined by Alexander Bickel—encapsulates the problem posed in a democratic society when unelected judges overturn decisions made by the representative branches of government. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962); *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586–90 (1993) (discussing how legal scholarship has defined problem of countermajoritarian difficulty).

mately seek to overturn written constitutional provisions on behalf of the people, if/when the courts, by upholding the words of an ancient document, foist upon today's society the will of people long dead and gone—or even the will of the courts themselves. Given this response to Marshall's argument, another way of understanding written constitutions by reference to their purposes—which may better express Marshall's point about how writtenness establishes desirable boundaries within a legal and political system—is to treat such constitutions as precommitment strategies.[40] A written constitution allows a society to impose constraints upon itself: The conflict is not between what the *government* wants versus what the *people* want, but between what the *people now* want versus what the *people then* wanted. The precommitment view resolves this conflict in favor of the written constitution. It regards written constitutional constraints as rational and deliberative steps that a society takes at a time when it is "sober" so as to protect itself from what it might subsequently do when it is "drunk."[41] From this perspective, entrenchment becomes responsible self-government.[42]

As Part I has shown, the term "written" has been used somewhat carelessly, to refer to constitutions in a codified text without justifying either the constitutional principles and doctrines that exist beyond the text or the general assumption that constitutional writtenness creates "fundamental and paramount"[43] law. The two conditions of writtenness identified in Part I—complete codification and constitutional supremacy—seek to provide a fuller understanding of what it means to call a constitution "written," thereby providing a better foundation upon which to assess the implications of writtenness for the rule of law.

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[40] For an overview of the academic literature on precommitment in constitutional law, see generally John A. Robertson, *"Paying the Alligator": Precommitment in Law, Bioethics and Constitutions*, 81 TEX. L. REV. 1729 (2003).

[41] Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195–96 (Jon Elster & Rune Slagstad eds., 1988); *see also* SUNSTEIN, *supra* note 23, at 241 ("[D]emocratic constitutions [are] 'precommitment strategies[ ]' in which nations, aware of problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do.").

[42] WALDRON, *supra* note 16, at 260. *But see id.* at 262–71 (criticizing facile invocation of precommitment argument as support for judicial review).

[43] *Marbury*, 5 U.S. (1 Cranch) at 177.

II
Writtenness and the Distinction Between Legal and Political Constitutions

This Part ties the written/unwritten distinction, discussed in Part I, to a distinction between constitutions that are more legal or more political in nature. Here, I argue that the written or unwritten form of a constitution affects whether it is ultimately vindicated in the legal or the political arena. Part III then explores the relevance of the legal/political distinction in the context of the rule of law.

Adam Tomkins has emphasized the importance of distinguishing between constitutions according to whether the accountability mechanisms they rely upon are legal or political.[44] In a legal constitution, the "principal means, and the principal institution, through which the government is held to account is the law and the court-room," whereas a political constitution holds the government "to constitutional account through political means, and through political institutions."[45] What Tomkins fails to realize is the relevance of constitutional form to the legal/political distinction: Writtenness helps to legalize the operation of a constitution by empowering the judiciary on constitutional issues at the expense of the political branches of government. In the first place, the judiciary appears best positioned to act as the arbiter of a written constitution. The existence of a legal text allows for violations of its provisions to be enforced legally, which the judiciary as a profession has the responsibility and the expertise to do.[46] Furthermore, as argued above, a written constitution's commands are supreme and must be upheld against conflicting laws.[47] Thus, a written constitution allows the courts to cast themselves as the guardians of its codified provisions,[48] effectively acting as a shield

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[44] *See* Tomkins, *supra* note 9, at 18 ("A constitutional distinction which is of rather more significance than the [written/unwritten] distinction . . . is that between political and legal constitutions.").

[45] *Id.* at 18–19.

[46] *Marbury*, 5 U.S. (1 Cranch) at 177 (holding that it is judiciary's responsibility to "say what the law is").

[47] *See supra* Part I.B.

[48] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant . . . ."). Such a characterization of the courts was welcomed by James Madison when he introduced the Bill of Rights in Congress. *See* 1 Annals of Cong. 439 (1789) ("If [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive . . . ."); *see also* Lerner, *supra* note 1, at 1308 ("From

against the political realities of power.[49] In other words, by rooting their decisions in what the constitution requires and in their role as enforcers of the constitution,[50] judges force the political branches of government to either give in to their constitutional decisions or deny the ultimate legitimacy of the judiciary and/or the constitution. Where a judiciary has successfully impressed upon society that its pronouncements are to be treated as those of the constitution's,[51] a situation of narrow judicial supremacy arises within the realm of issues implicated by constitutional considerations.[52]

A lack of writtenness, on the other hand, may well politicize the constitution. An unwritten constitution is in one sense a common law constitution, since courts develop constitutional rules and principles over time.[53] For example, the United Kingdom's foundational principle of parliamentary sovereignty is regarded as a common law doctrine.[54] This historical fact might make U.K. courts appear at least as powerful as those in the United States—if they are responsible for

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Marshall through Taney, and increasingly after the Civil War, the Supreme Court offered to guard exclusively the charter of fundamental liberties.").

[49] *See* Lerner, *supra* note 1, at 1309 ("[J]udges have been associated in our minds with the function of protection rather than with the struggle for power. This has been of enormous importance. It has conscripted to the service of the judicial symbol all the accumulated Anglo-Saxon tradition of the 'rule of law.'").

[50] *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 579 (1972) ("[I]t is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.").

[51] *See, e.g.*, Lerner, *supra* note 1, at 1293 ("Since the Supreme Court is popularly considered as exercising a guardianship over the Constitution, the result has been to invest the judges of the Court with all the panoply of sanctity with which the Constitution has itself been invested.").

[52] The 2000 U.S. presidential election provides perhaps the most striking example of the fact and implications of constitutional judicial supremacy in America. The race was widely contested and the electoral votes that Florida held tipped the balance. After the Florida Elections Canvassing Commission declared Republican candidate George W. Bush to be the winner by less than one-half of one percent of the votes cast, Democratic candidate Al Gore contested the certification in court. Bush v. Gore, 531 U.S. 98, 101 (2000) (per curiam). Gore requested a manual recount of 9000 votes in Miami-Dade County on which the voting machines had failed to detect a vote for President ("undervotes"). *Id.* at 102. The Supreme Court struck down such manual recounts as unconstitutional, *id.* at 110, in effect declaring Bush the President. Gore acceded to the Court's conclusion on the ground that "the Rule of Law precluded any criticism of the justices." Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 137–38 (2002). There were certainly objections from other quarters, and even outrage. *See id.* at 138 ("[M]any others thought that the best they could do for the Rule of Law was to condemn the decision in *Bush v. Gore* . . . ."). Significantly, the word of the Court stood and Bush went on to serve as President for two terms.

[53] *See* BARENDT, *supra* note 13, at 33 (drawing connection between U.K. constitution's being uncodified and its description as common law constitution).

[54] TOMKINS, *supra* note 9, at 103.

parliamentary supremacy, why not simply declare *themselves* supreme?

In fact, the U.K. constitution's unwritten nature prevents this. The lack of an authoritative text for judges to interpret means that whatever the courts say on constitutional issues is merely common law decisionmaking and may be openly overruled by the legislature.[55] Pragmatically speaking, "underpinning the strictly legal doctrine of legislative supremacy is the courts' recognition of a political reality"[56]—the power of Parliament—against which they are relatively defenseless without a written constitution.

The evolution of the U.K.'s constitution provides an example of how the legal or political nature of the constitution can be tied to its writtenness, or lack thereof. According to Tomkins, the traditional Diceyean view of parliamentary supremacy as the lynchpin of English constitutionalism created a strong tradition of political constitutionalism in the United Kingdom.[57] However, since the 1970s, and especially since 1990, the United Kingdom has moved toward legal constitutionalism as the judiciary has come to play a greater constitutional role.[58] In parallel to this movement toward legalism, the U.K. constitution has undergone increasing codification, beginning with the country's entry into the European Union in 1973, which created a need for it to harmonize its domestic legislation with the European Convention on Human Rights as well as with other aspects of E.U. law.[59] This codification process accelerated beginning in 1997, when the Labour Party and Prime Minister Tony Blair came into power,

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[55] *See* BARENDT, *supra* note 13, at 33 (noting that common law constitutional principles may be "reformulated by statutes"). Any objection that this sounds, in the analogous American legal context, as if political branches are disregarding constitutional rules laid down by the courts fails to recognize that an unwritten constitution *is* politics, in the sense that the content of the constitution is determined by ongoing political practices and developments. *See supra* note 18 and accompanying text. Thus, in effect, what the legislature does in such situations is announce a new constitutional rule that is controlling until amended or repealed. Of course, legislative constitutional change may also be stymied by politics, for instance where public disapproval of proposed reforms causes the government to back down. *See infra* note 60.

[56] TOMKINS, *supra* note 9, at 104.

[57] *Id.* at 21–23.

[58] *Id.* at 21, 23–24.

[59] *See* Dakolias, *supra* note 17, at 1164 ("[The United Kingdom's] entry into the European Union . . . required [it] to comply with [European Directives] and harmonize its legislation and required the judiciary to determine compliance of such legislation."); Constantine Theophilopoulos, *The Influence of American and English Law on the Interpretation of the South African Right to Silence and the Privilege Against Self-Incrimination*, 19 TEMP. INT'L & COMP. L.J. 387, 396 (2005) ("England, with its proud heritage of an unwritten constitution, has introduced the Human Rights Act of 1998, which incorporates the principles of the European Convention into domestic English law.").

with a strong commitment to constitutional change and an apparent mandate to engage in reform through constitutional codification.[60] The movement toward codification appears likely to continue under current Prime Minister Gordon Brown.[61]

In conclusion, Tomkins is too quick to reject the role that constitutional form plays in determining the operation and the enforcement of the constitution. In fact, whether a constitution is written—that is, codified as a unified whole and treated as supreme law—has important implications for the means, legal or political, through which the government will be held accountable.

III
CONSTITUTIONAL WRITTENNESS AND THE RULE OF LAW

Part III proceeds from the connection between constitutional form and legal/political constitutionalism, drawn in Part II, to reexamine the relationship between writtenness and the rule of law. Part III.A introduces the rule of law as a concept that involves formal requirements of legality as well as substantive values. Utilizing this theoretical framework, Part III.B argues that a written constitution, which tends to favor legal accountability mechanisms, permits and

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[60] FOLEY, *supra* note 18, at 250–51. The U.K. Chief Justice, Lord Woolf, has described the constitutional changes undertaken by the administration under Prime Minister Tony Blair as a "torrent," which included "the removal of the hereditary peers from the House of Lords, devolution, the incorporation into domestic law of the European Convention on Human Rights and the creation of a unified courts administration." Lord Woolf, The Lord Chief Justice of England & Wales, Squire Centenary Lecture: The Rule of Law and a Change in the Constitution (Mar. 3, 2004), *available at* http://www.law.cam.ac.uk/docs/view.php?doc=1415 [hereinafter Squire Centenary Lecture].

While there is general popular support for constitutional reform, FOLEY, *supra* note 18, at 256–57, not all of the Blair administration's plans for codification met with approval or acceptance. For example, its attempt in 2003 to unilaterally abolish the longstanding post of Lord Chancellor and create a Supreme Court of the United Kingdom was fiercely criticized on various grounds—the sudden and apparently arbitrary nature of the decision; the failure to consult other branches of government, especially the judiciary; and the disregard for constitutional history and precedent. *See* Lord Woolf, *Constitutional Developments in a Common-Law Jurisdiction*, 37 ISR. L. REV. 5, 9, 10–11 (2003). Strong opposition from the judiciary and the House of Lords, combined with media scrutiny, forced the government to back down. *Id.* The bill that narrowly passed Parliament in March 2005 reformed the office of Lord Chancellor instead of removing it altogether, made formal guarantees about the rule of law and continued judicial independence, and gave the senior judiciary the right to select its own members to the supreme court. *See* Constitutional Reform Act, 2005, c. 4, §§ 14–15, scheds. 3–4 (U.K.) (providing for transfer of functions to and from Lord Chancellor); *id.* §§ 1, 3–4 (guaranteeing rule of law and judicial independence); *id.* § 26, sched. 8 (laying out process for selection of supreme court justices).

[61] In March 2008, Brown announced a draft Constitution Renewal Bill containing proposals to, *inter alia*, strengthen Parliament and restrict the role of the attorney general. *Easy Does It*, ECONOMIST, Mar. 29, 2008, at 42 (noting Brown's "long-standing enthusiasm" for reform while suggesting that his proposals appeared "timid").

even encourages judicial departure from formal and substantive aspects of the rule of law. Correspondingly, Part III.C proposes that an unwritten constitution, which relies more heavily on political enforcement, may promote the rule of law as effectively as would a written constitution, if not more so, by placing significant pressures upon the government to conform to rule-of-law values.

A. The Concept of the Rule of Law

While the contours of the rule of law as a positive and normative concept remain deeply contested,[62] in its barest sense it must refer to a society—the government as well as its people—that is ruled by the law.[63] Thus, the rule of law is associated with certain substantive political values stemming from the basic idea that "the law must be capable of guiding the behaviour of its subjects."[64] These "rule-of-law values" are an absence of arbitrary government power,[65] protection of personal freedom,[66] and respect for human dignity.[67]

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[62] *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (analyzing competing ideals of rule of law used in constitutional discourse).

[63] *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 212 (1979) ("Taken in its broadest sense [the rule of law] means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read [as saying] that the government shall be ruled by the law and subject to it.").

[64] *Id.* at 214.

[65] *Id.*; *see also* Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central . . . to the idea of the rule of law . . . is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

[66] F.A. Hayek is perhaps the best known proponent of the argument that the rule of law promotes freedom because "when we obey laws . . . we are not subject to another man's will and are therefore free." F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153 (1960). Joseph Raz clarifies that Hayek uses "freedom" to mean "an effective ability to choose between as many options as possible," as opposed to what Raz calls "political freedom." RAZ, *supra* note 63, at 220.

[67] *See* RAZ, *supra* note 63, at 221 (arguing that rule of law respects human dignity by "treating humans as persons capable of planning and plotting their future"). My list of rule-of-law values, which is adopted from Joseph Raz's discussion in *The Authority of Law*, *id.* at 219–22, is not intended to be exhaustive. Raz points out that the values underlying the rule of law are in a sense negative because they all run to countering the evils of law—for example, the very existence of law as an institution creates the danger of infringement upon individual freedom because it allows for the government to regulate what people may or may not do, and so we require the rule of law as a safeguard against such a danger occurring. *Id.* at 212. From this perspective, it would theoretically be possible to identify additional rule-of-law values corresponding to various conceivable dangers arising from law itself. However, given space constraints, I focus upon the rule-of-law values responding to those recurring, fundamental concerns that have been expressed regarding the law and its reach. *See, e.g.*, Jeremy Bentham, *Principles of the Civil Code*, *in* THE THEORY OF LEGISLATION 88, 109, 111 (C.K. Ogden ed., 1931) (1802) (arguing that "principal object of law" is "the care of security," which gives individuals "the power of forming a general plan of conduct" for their lives); William Blackstone, 1 COMMENTARIES *44–45

Arguments that written constitutions promote the rule of law have tended to focus on how formal writtenness, or the existence of a constitutional text, promotes certain qualities, such as clarity and stability.[68] These qualities, best expounded by Lon Fuller as "principles of legality," provide a useful framework within which to analyze how the written or unwritten nature of a nation's constitution might further substantive rule-of-law values.[69]

According to Fuller, a system of rules can only be regarded as a system of laws if its rules meet eight requirements: generality (laws are phrased in general terms), publicity (laws are well publicized), prospectivity (laws do not apply retroactively), clarity (laws are not overly vague), consistency (laws are not contradictory), practicability (laws are capable of being obeyed), constancy (laws are stable), and congruency (the actions of government officials match the laws as stated).[70] Fuller's primary concern was with developing principles that would provide the practical and moral ground for the citizen's duty to observe the rules laid down by his government.[71] He noted, however, that the government's superior position vis-à-vis the citizen was gained only by subjecting itself to rules of a constitutional nature,

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(noting "permanent, uniform, and universal" nature of law, which includes requirement that law must "be notified to the people who are to obey it").

[68] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 277 (1970) (Black, J., dissenting) ("A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content."); Muller v. Oregon, 208 U.S. 412, 420 (1908) ("[I]t is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.").

[69] See *infra* notes 73–75 and accompanying text for the distinction between principles of legality and substantive rule-of-law values. That Fuller's principles of legality provide a useful framework is not to say that they are definitive of the rule of law; rather, they are but one example of the rule-of-law "laundry lists" that scholars have come up with. *See, e.g.*, RAZ, *supra* note 63, at 214–18 (combining several of Fuller's principles with, inter alia, guarantee of independent judiciary and observance of "principles of natural justice"). I rely on Fuller's list for two reasons. First, proponents of the written constitution tend to argue in the same terms that Fuller does. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting) (arguing that written constitution is important because it provides "certainty and security"). Second, Fuller's principles are generally accepted as being *necessary* for the rule of law, even if critics go on to complain that Fuller draws the wrong conclusions from them. *See, e.g.*, H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1285–88 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)) (accepting importance of principles of legality listed by Fuller but criticizing Fuller's classification of such principles as "morality").

[70] LON L. FULLER, THE MORALITY OF LAW 39 (2d ed. 1969). The principle of congruency is a special case that straddles both the formal and the substantive aspects of the rule of law—in effect, it requires that the government follow the rules and that it not behave arbitrarily.

[71] *Id.*

which determined what the government's powers were and when it could exercise such powers.[72]

Fuller's "principles of legality" concern formal elements of the rule of law, whereas rule-of-law values run to its substantive purposes.[73] One way to understand the relationship between both sets of criteria is to view principles of legality as means and rule-of-law values as ends.[74] By observing formal principles, a legal system attains substantive values. Thus, any inquiry into how a written constitution promotes principles of legality must be paired with an analysis of how rule-of-law values are upheld as a consequence.[75]

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[72] Fuller argued that "[t]his body of laws [would be] subject to all the kinds of shipwreck that can visit any other legal system" if it failed to meet the principles of legality. *Id.* at 115.

[73] I use "principles of legality" as well as the complementary term "rule-of-law values" as terms of art. Principles of legality are specific formal requirements that laws must meet. *Cf.* U.S. CONST. art I, § 9, cl. 3 (enshrining principle of prospectivity by forbidding passage of ex post facto laws); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (recognizing principle of clarity by declaring that it is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"). Rule-of-law values refer to broader substantive objectives that a system of laws must accomplish, such as restraining the government from abusing its powers or providing a reliable basis for individual planning, in order for it to conform to the rule of law.

[74] This becomes clear when we ask *why* we object to laws that are unclear or retroactive. It is not for the sake of clarity or prospectivity itself, but because a vague law or a law that applies retroactively violates rule-of-law values. Such a law not only contains the risk of arbitrary government action but also, by rendering it difficult if not impossible for individuals to plan their affairs, curtails personal freedom and disregards human dignity. *See Grayned*, 408 U.S. at 108–09 (noting that vague laws "offend several important values" because they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and allow for "arbitrary and discriminatory application"); FULLER, *supra* note 70, at 59 (arguing that criminal retroactivity is "so universally condemned . . . [because] the criminal law is most obviously and directly concerned with shaping and controlling human conduct").

[75] Of course, like much else in the rule-of-law literature, this particular conception of the rule of law is open to challenge. One could take a strict formal approach and argue—as Fuller does—that adherence to the principles of legality *is* the rule of law. *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 645 (1957) (arguing that principles of legality constitute "morality of order [that] must be respected" before enactment can properly be called law). Three points are worth making in response. The first concerns Hart's criticism of Fuller's portrayal of the principles of legality as "morality." Viewed in and of themselves, such principles are merely "principles of good craftmanship[,] . . . [and] are independent of the law's substantive aims just as the principles of carpentry are independent of whether the carpenter is making hospital beds or torturers' racks." Hart, *supra* note 69, at 1284. Second, my characterization of the rule of law may in fact be viewed as being conceptually consistent with Fuller's. Fuller distinguishes between the "internal" morality of law, constituted by the principles of legality, and the law's "external" morality, a substantive concept that encompasses rule-of-law values such as those I have identified. *See* Fuller, *supra*, at 644 (describing external morality of law as "law that corresponds to the demands of justice, or morality, or men's notions of what ought to be"). Indeed, his description of the relationship between the internal and external moralities of law as one of "reciprocal[ ] influence," where "a deteri-

B. Enforcing the Rule of Law in a Legal Constitution

As Part II discussed, a written constitution tends to invest ultimate responsibility to enforce the rule of law in the courts, which interpret the constitutional text.[76] However, while writtenness may set up the judiciary as the final arbiter of what the constitution requires, it runs the risk of undermining the judiciary's adherence to the rule of law in two respects: It weakens judicial commitment to precedent in the area of constitutional law, and it insulates constitutional decisions from challenge.[77]

1. Writtenness and Stare Decisis

The doctrine of stare decisis enables the rule of law in a number of ways. Broadly speaking, precedential decisionmaking—the idea that it matters more for the law to be settled than for it to be right[78]—

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oration of the one will almost inevitably produce a deterioration in the other," is similar to the connections I have drawn between principles of legality and rule-of-law values. *Id.* at 645. If this is the case, the dispute becomes largely semantic, since it is nothing more than a question of which of these concepts one chooses to classify under "rule of law," as opposed to some other heading. Finally, accepting that the rule of law is a purely formal concept would still not affect the viability of my arguments, since Parts III.A and III.B.1 make the point that a written constitution does a relatively poor job of meeting the requirements of formal legality as compared to an unwritten constitution. However, I think the argument that writtenness matters—for better or for worse—is strengthened by showing how it influences not only the formal characteristics of a society's constitution but also the political values that the society strives toward. Thus, my analysis draws the link between these two aspects of the rule of law.

[76] The U.S. Supreme Court, for instance, has explicitly linked the written nature of the U.S. Constitution to the Court's final power of review over constitutional issues. *See* United States v. Morrison, 529 U.S. 598, 616 & n.7 (2000) ("Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace. . . . No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury*, this Court has remained the ultimate expositor of the constitutional text.").

[77] There is also a threshold argument to be made that writtenness is simply ineffective—that judges are not constrained by the text when they make constitutional decisions. *See* Strauss, *supra* note 9, at 883 ("Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to 'doctrine'—an elaborate structure of precedents built up over time by the courts—and to considerations of morality and public policy.").

[78] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled in part by* Helvering v. Bankline Oil Co., 303 U.S. 362, 369 (1938) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."); Nat'l Bank v. Whitney, 103 U.S. 99, 102 (1880) ("Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends . . . upon the stability of the rules by which its transactions are governed."); *see also* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1–9 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (discussing importance of "institutional settlement" in organized society).

reflects the substantive purposes of the rule of law.[79] If courts were not bound by precedent, they could subject the parties before them to arbitrary and inconsistent legal interpretations. Furthermore, individuals would be unable to structure their lives within the framework of the law.[80] More narrowly, stare decisis promotes principles of legality: prospectivity, by discouraging courts from inventing new rules and applying them retroactively to the parties at hand;[81] clarity, by compelling a court that overrules its precedents to provide a thorough analysis of its reasons for doing so;[82] consistency, by requiring courts to rule in accordance with prior decisions;[83] and constancy, by setting a high benchmark for change.[84]

A written constitution weakens the judicial commitment to stare decisis in constitutional cases because it allows courts to invoke writtenness as a generically valid reason to depart from constitutional precedent. This is due to the combination of the two characteristics of a

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[79] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072, *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 372–73 (2004) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"); *see also* Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 478–79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

[80] *See* Randall v. Sorrell, 548 U.S. 230, 244 (2006) ("*Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm."); Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (describing stare decisis as "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion[, because it] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

[81] *See Nat'l Bank*, 103 U.S. at 102 ("If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.").

[82] *See* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification.").

[83] This is not to deny the possibility of either conflicting precedents or hairsplitting distinctions that in effect amount to contradictions. Of course, stare decisis would still encourage consistency overall: First, it bars openly contradictory opinions from being issued; second, higher courts are able to use stare decisis as a rationale to strike down lower court opinions that incorrectly interpret precedent.

[84] Since stare decisis by definition requires a court to adhere to precedent because of its status as precedent, the doctrine sets a standard for change that demands more than mere inaccuracy of decision. For instance, the U.S. Supreme Court has set out four factors for a court to consider in deciding whether or not to overrule a prior decision: whether the rule is "intolerable simply in defying practical workability," the nature and extent of any reliance on the rule, any "related principles of law [that] have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and whether changes in facts or perception of facts have "robbed the old rule of significant application or justification." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (plurality opinion).

written constitution:[85] the presence of an authoritative text and the constitution's status as supreme law. The former characteristic implies definitive answers to constitutional questions, expressed in the words of the constitutional document—that is, it implies that a "true" meaning of the constitution exists.[86] The latter characteristic then makes it important to discern what this constitutional meaning is as a methodological matter, because this is the document underpinning the society's legal and political framework, and as a pragmatic matter, because—unlike other areas of the law where the court mistakes the meaning of a statute—no external authoritative body can correct the court.[87] Thus, it matters less that a constitutional rule has been interpreted in a certain way for years because if a subsequent judiciary determines that this interpretation is wrong, it must give way to what the constitution "really" says.[88]

2. Writtenness as Judicial Insulation

As discussed in Part II, writtenness creates the political and legal conditions for the judiciary to assert its power over the other branches of government.[89] In so doing, writtenness also has the effect of insulating constitutional judgments from criticism, since judges may insist that they are merely executing the dictates of the canonical text.[90]

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[85] *See supra* Part I.

[86] *See* Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 486 (1996) ("Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.").

[87] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy . . . even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

[88] Indeed, the U.S. Supreme Court has consistently recognized that the doctrine of stare decisis holds less weight in constitutional cases. *See, e.g.*, *Casey*, 505 U.S. at 854 ("[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case . . . ."); Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) ("[T]his Court's considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases.").

[89] *See* Dickerson v. United States, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting) (objecting to Court "writ[ing] a prophylactic, extraconstitutional Constitution, binding on Congress and the States").

[90] Applying a functional approach, one might deny altogether the utility of pure legal concepts such as "due process" or "equal protection," and argue that explaining legal decisions in legal terms merely masks the actual motivations of courts in reaching their decisions. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812–14 (1935).

Such judicial insulation enables and even encourages courts to behave arbitrarily.[91] Judges may lapse into moral disingenuousness[92] or intellectual sloppiness,[93] or they may seize the opportunity to pursue private political agendas.[94]

C. Enforcing the Rule of Law in a Political Constitution

On the other side of the equation, the unwritten constitution operates through political means and institutions to constrain a government's behavior in accordance with the rule of law. Part III.C.1 discusses how the uncodified elements of the unwritten constitution exhibit characteristics conducive to the political realization of the rule of law.[95] Part III.C.2 applies this analysis of the unwritten constitution to the question of how constitutional form relates to principles of

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[91] Justice Hugo Black authored many a dissent accusing the Supreme Court of doing just that. *See, e.g.*, Rogers v. Bellei, 401 U.S. 815, 837 (1971) (Black, J., dissenting) ("The Court today holds that Congress can . . . rob a citizen of his [Fourteenth Amendment] citizenship just so long as [a majority] can satisfy [itself] that the congressional action was not 'unreasonable [or] arbitrary,' 'misplaced or arbitrary,' or 'irrational or arbitrary or unfair,' . . . . [N]ot one of these 'tests' appears in the Constitution." (internal citations omitted)); Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., dissenting) ("[The Framers] decided that the value of a jury trial far outweighed its costs for 'all crimes' and '(i)n all criminal prosecutions.' . . . I cannot agree that this Court can . . . substitute its own judgment [that jury trial right is limited to "serious" crimes] for that embodied in the Constitution."). Black's argument in such opinions was that the Court acted arbitrarily *in spite of* the written Constitution; in contrast, I argue that the very presence of a constitutional text was what *enabled* the Court's behavior, because it necessarily created a need for judicial interpretation while rendering such interpretation unreviewable.

[92] *See* Cohen, *supra* note 90, at 840 ("It is the great disservice of the classical conception of law that it hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy.").

[93] *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 264 (1999) ("The positivist judge is apt not to question his premises . . . [nor] to recognize that he may be wrong and to seek through investigation to determine whether he is wrong.").

[94] This appears to be Justice Antonin Scalia's outraged appraisal of recent Fourteenth Amendment decisions by the Supreme Court. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . ."); Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting) ("Today's opinion has no foundation in American constitutional law, and barely pretends to. . . . Striking [down Colorado's Amendment 2, which prohibited any governmental action designed to protect gays and lesbians as a class,] is an act, not of judicial judgment, but of political will."). Like Justice Black, however, Scalia fails to appreciate that it is the Court's reliance on a written constitutional text that empowers it to issue with finality the kinds of decisions that Scalia finds so deplorable.

[95] This is not to imply that a written constitution contains no uncodified rules—as I have acknowledged, every real-world constitution relies upon uncodified rules to a certain extent. *See supra* note 27 and accompanying text. However, such rules are of greater import in an unwritten constitution, where they are not treated as merely "supplement[ing]" the codified constitutional text. *Cf.* TOMKINS, *supra* note 9, at 9 ("Even coun-

legality, finding that the asserted superiority of the written constitution in upholding the rule of law may in fact be contingent upon faulty assumptions.

This Note does not deny the validity of criticisms that have been leveled against the political constitution. One obvious objection is that a political constitution surrenders the constitutional framework of a society to majoritarian whims.[96] This has especial resonance in situations involving individual liberties, where constitutional provisions such as those in the written U.S. Bill of Rights are designed to protect minorities from oppression by the majority.[97] Indeed, some commentators have argued that the United Kingdom needs a codified bill of rights similar to that which exists in the U.S. Constitution in order to properly safeguard fundamental rights.[98] Concerns have also been raised regarding the effectiveness of political constraints upon the government, given the malleability of conventions as well as the limitations of using public opinion as a check.[99] Far from suggesting that

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tries with written or codified constitutions need to supplement those codes with unwritten, or more likely uncodified, rules.").

[96] *See* FOLEY, *supra* note 18, at 2 ("[T]he [British] constitution is vulnerable to the charge of being driven by the exigencies and practicalities of contemporary politics. . . . [It] can be seen as being reducible to the needs of prevailing political forces.").

[97] As *Carolene Products*'s famous Footnote Four has come to be understood, the Fourteenth Amendment is designed to protect "discrete and insular minorities" from government action motivated by majority prejudice, "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); *see also* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1800 (2007) ("A century ago, [commentators] looked abroad to compare the triumph of organic development in Britain with the tragic failure of Reconstruction in America. But today, the whole world seems to be designing constitutional machines to check and balance power in the name of human rights."). Of course, this conception of the Fourteenth Amendment is a judicial gloss on the bare words of the constitutional provision and is subject to the criticism of judicial insulation made in Part III.B.2.

[98] *See* Lord Lester of Herne Hill, QC & Lydia Clapinska, *Human Rights and the British Constitution*, *in* THE CHANGING CONSTITUTION, *supra* note 18, at 62, 86 ("[U]nless and until we have a modern British Bill of Rights . . . the [European Convention on Human Rights] provides the best available text to accustom our lawmakers, our judges, and our administrators to the constitutional landscape."). *But see* WALDRON, *supra* note 16, at 213 ("[I]f people disagree about basic rights . . . while nevertheless needing . . . a common framework, an adequate theory of authority in this area can neither include nor be qualified by any simple conception of rights as 'trumps' over majoritarian forms of decision-making.").

[99] *See* FOLEY, *supra* note 18, at 2 ("[I]t is alleged that . . . [w]hat restraint exists [in the British constitution] comes more from the mutual convenience, collective interest or political prudence of the political participants—rather than from the effect of any autonomous and authoritative dimension of constitutional principle."); *cf.* TOMKINS, *supra* note 9, at 24 (suggesting that United Kingdom's "political constitution has come to be widely seen as having broken down [because] Ministers, it is felt, are rarely held to account by Parliament").

political constitutionalism is per se superior to legal constitutionalism—and correspondingly that an unwritten constitution is preferable to a written one—my focus in comparing the different approaches taken is to enable a more critical analysis of how writtenness may advance or impair the rule of law.

1. Tradition and Change in an Unwritten Constitution

An unwritten constitution reconciles two characteristics that, at first blush, appear contradictory: On one hand, its rules tend to have the weight of long-established acceptance behind them;[100] on the other hand, those rules are continually changing in response to social developments. This combination of characteristics results in an inherently evolutionary constitutional framework that, as shown in Part III.C.2, is compatible with fundamental rule-of-law values.[101]

Core parts of the unwritten constitution are rooted in custom, tradition, and precedent.[102] Conventions, which have a much more significant role to play in an unwritten constitution,[103] are predicated upon obedience and obligation—qualities that only become apparent over time and with consistent application of the convention in question.[104] Custom and precedent also exert a greater influence upon the common law aspects of an unwritten constitution because judges do not make their constitutional decisions under the shadow of an

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100 Adam Tomkins has pointed to this contradiction in support of his arguments that the written/unwritten distinction is of little consequence. *See* TOMKINS, *supra* note 9, at 9–14 (arguing that unwritten constitutions are no more flexible than written constitutions because conventions are traditions—"a force for conservatism, for doing the same thing as was done in the past, not a force for change"). My response to Tomkins's point is two-fold: First, I argue that such a contradiction is merely apparent, not real, because conventions are in fact continually responding to social change at a highly gradual and informal level; second, I show how other elements of the unwritten constitution lend themselves to greater flexibility than is found in a written constitution. *See infra* notes 107–13 and accompanying text.

101 *See* FOLEY, *supra* note 18, at 3 ("[The British constitution's] defining condition and chief virtue is one of evolutionary change.").

102 *See* Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights?*, 58 ADMIN. L. REV. 177, 203 (2006) ("We refer to the rules of our constitutional traditions to guide us in the development of [the United Kingdom's] unwritten constitution.").

103 *See* THE BRITISH POLITICAL PROCESS: AN INTRODUCTION 47 (Tony Wright ed., 2000) [hereinafter THE BRITISH POLITICAL PROCESS] ("The 'unwritten' nature of the UK constitution, where there are no constitutional 'higher laws' and no universally agreed set of constitutional enactments, inevitably provides significant scope for the operation of conventions."). According to the paradigm of the written constitution that I have laid out, *see supra* Part I.A, there would be little to no room for conventional constitutional law, since only those principles codified and integrated into the constitution would be treated as constitutionally binding.

104 See *supra* note 18 for a discussion of the role of constitutional conventions in the U.K. constitution.

authoritative text with a "right" meaning,[105] but instead hew to their traditional role of drawing forth general rules "from the precedents which guide [them to] be applied to new cases."[106]

At the same time, constitutional conventions and judicial decisions are by their nature uniquely responsive to changes in the society around them. They arise as a reflection of the conditions of society as it stands[107] and are subsequently able to develop free of the confines of codified boundaries. The new political circumstances to which conventions are being applied help to shape and refine those conventions.[108] Similarly, constitutional precedents evolve through the cases that invoke, seek to distinguish, or challenge them; as well as through the legislative acts that, as a last resort, can override them. This is entirely consistent with the perception of uncodified constitutional rules as time-honored, because the pace of informal change is continuous and gradual enough to accommodate both sets of seemingly divergent qualities.[109]

The same responsiveness holds true, in compressed fashion, for the statutory aspects of an unwritten constitution. Where political developments necessitate rapid change, the contemporary legislature can act to pass, amend, or revoke statutes.[110] Codified and uncodified elements pass between the upper tier of formal legislative change and the lower tier of organic change. The legislature may adopt in statute a conventional or common law constitutional rule, turning it into a statutory rule;[111] however, legislation once passed will be subject to the mediation of the courts[112] and to political conventions.[113]

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105 See *supra* Part III.B.1 for the argument that the presence of an authoritative constitutional text weakens judicial commitment to stare decisis.

106 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 86 (1983).

107 *See id.* at 87 ("What must guide [the judge's] decision is . . . solely what is demanded by general principles on which the going order of society is based."); THE BRITISH POLITICAL PROCESS, *supra* note 103, at 47 ("[Conventions] describe, at any point in time, the practical workings of the political and governmental system, and the actual, rather than the theoretical, distribution of power among the various organs of the state.").

108 MARSHALL, *supra* note 18, at 217.

109 *See* Squire Centenary Lecture, *supra* note 60 ("A virtue of . . . our [U.K.] constitution [is that it] has always been capable of evolving as the needs of society change. The evolution can be incremental in a way which would be difficult if we had a written constitution.").

110 *See* WALDRON, *supra* note 16, at 220 ("[L]egislative text[, unlike constitutional text,] can readily be amended to meet our evolving sense of how best to get at the important issues at stake.").

111 *See* MARSHALL, *supra* note 18, at 13 (noting that Britain's Parliament Act of 1911 "formalized relations between the two Houses of Parliament that had formerly been matters of convention").

112 *See* TOMKINS, *supra* note 9, at 185–87 (discussing U.K. cases which recognize "[c]onstitutional rights . . . that executive action may not interfere with, *even where that*

2. *Writtenness and the Principles of Legality*

This subsection addresses the three principles of legality that are most significantly related to the form, written or unwritten, of the constitution: publicity, clarity, and constancy.[114] These principles do not exist in isolation but rather relate to one another, such that when one principle is affected, others may be as well.[115] Thus, where one principle is not met, the negative repercussions on other principles must be taken into account.

I begin in each case by presenting the argument in favor of constitutional writtenness. I then offer an alternate approach to the question of how principles of legality should be regarded in the constitutional context, utilizing the paradigm of the unwritten constitution to challenge two key assumptions relied upon by the written constitution: first, that writtenness best promotes the principle in question, and, second, that the particular principle indeed furthers substantive objectives of the rule of law.

a. The Principle of Publicity

As enumerated provisions in a single document, a written constitution appears more accessible than an unwritten one, which consists of scattered statutes, judicial decisions, and unrecorded conventions. The link between a well publicized constitution and rule-of-law values, such as a lack of governmental arbitrariness, inheres in the idea that the public must be familiar with what the constitution says before it can scrutinize government action according to such standards.[116] In societies where continued government efficacy is sufficiently depen-

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executive action is apparently authorized by statute, unless the statute expressly states otherwise" (emphasis added)).

113 *See* THE BRITISH POLITICAL PROCESS, *supra* note 103, at 47 ("Conventions . . . relate the formal theory of the constitution to the practical realities of the day, perhaps by modifying the strict law, or by expanding it.").

114 These are the principles most often raised in arguments connecting writtenness with the rule of law. *See supra* note 68 and accompanying text. In contrast, the remaining principles are not based on form and thus have relatively little to do with the presence or absence of a written constitution—whether constitutional rules are framed in general terms, apply prospectively, are non-contradictory, and are within the abilities of their addressees to follow are determined by the content of those rules. This is not to say that writtenness has no repercussions whatsoever upon the content of constitutional rules, and this Note does reference principles other than those of publicity, clarity, and constancy; however, due to space constraints, my focus lies on a more narrow set of values. Finally, for reasons explained in note 70, *supra*, the requirement of congruency is not a part of this inquiry.

115 *See* FULLER, *supra* note 70, at 80, 82 (providing examples of how different principles are linked).

116 *See id.* at 51 ("[I]f the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.").

dent upon popular support, this provides a political check on what the government can get away with.[117]

I argue that an unwritten constitution may well prove equally familiar to both the government which must abide by it and to the people. The need for relevant actors to be formally educated about the constitution in the first instance depends "upon how far the requirements of law depart from generally shared views of right and wrong."[118] Where the law's demands match up to "conceptions . . . generally held in the society of the time,"[119] parties are able and expected to follow what the law says even if an official text of the rules is not made available to them.[120] Under an unwritten constitution, many of the fundamental rules regulating government conduct have developed over time based upon the principles, precedents, and actual practices of a society[121]—thus they are embedded in the understandings of the people as well as in the actual workings of the government. For example, no written provision enshrines the U.K. constitution's core principle of parliamentary sovereignty; instead, this constitutional rule derives from the common law and has developed in response to events in British history.[122]

Even if a society with a written constitution may be said to contain constitutional rules and principles which have flourished in a sim-

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117 Lon Fuller takes this point one step further to suggest that, even if the government were not answerable to the people, it would still act more responsibly if it had to justify its actions with reference to known constitutional standards. *See id.* at 159 ("Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts.").

118 *Id.* at 50.

119 *Id.*

120 *See* HAYEK, *supra* note 106, at 87 ("The task of the [common law] judge [is to tell parties in dispute] what ought to have guided their expectations, not because anyone had told them before that this was the rule, but because this was the established custom which they ought to have known.").

121 *See* THE BRITISH POLITICAL PROCESS, *supra* note 103, at 34 ("The monarchy, Parliament, the courts, ministers and Prime Minister and the rest were not originally established by statute or other formal device, but have developed by custom, practice and convention, and then by recognition in common and statute law."); *See also supra* notes 107–13 and accompanying text (describing evolutionary nature of constitutional rules in unwritten constitution).

122 *See* TOMKINS, *supra* note 9, at 103–04 ("The doctrine of legislative supremacy is a doctrine of the common law. . . . Parliament's victory in the Civil War, reaffirmed forty years later in the Bill of Rights . . . meant that it had conclusively asserted itself, and had thereby acquired for itself greater power and authority than it had . . . enjoy[ed] beforehand . . . ."); Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233, 254 (2004) ("Judicial deference . . . [to Parliament] is the product of case law, history, and the judiciary's own conception of the proper role of the courts.").

ilar manner—American judicial review comes to mind[123]—these remain distinct because they must, in the first and final instance, draw their authority from the canonical constitutional text.[124] Thus, where there is a disconnect between text and practice, the two must be reconciled at the expense of familiarity, clarity, or even logic.[125]

b. The Principle of Clarity

According to proponents of writtenness, codifying constitutional constraints makes explicit the limits on government action.[126] In terms of the role of the judiciary, the courts working under a written constitution appear confined to interpreting an existing authoritative text,[127] whereas an unwritten constitution may be described as a common law constitution that is created, elaborated upon, and changed by successive judicial decisions.[128]

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123 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty* (pt. 1)*: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 342 (1998) (describing "the Supreme Court's authority to determine constitutional meaning for the entire country" as "[a] gradual evolution"). As explained in Parts II and III.B, *supra*, however, the evolution of judicial review in the U.S. was made possible in the first place by the written nature of the country's constitution.

124 *See, e.g.*, Mackey v. United States, 401 U.S. 667, 678–79 (1971) (Harlan, J., concurring and dissenting) ("We [the Supreme Court] announce new constitutional rules . . . only as a [corollary] of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules.").

125 This has been one criticism of the doctrine of substantive due process, where substantive limits upon government action are defended by reference to the Due Process Clauses in the U.S. Constitution, which by their own terms refer only to procedural limitations. U.S. CONST. amends. V, XIV; *see also* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 736 (2000) ("The [Supreme] Court's present policy of relying exclusively on the Due Process Clause to protect substantive Bill of Rights freedoms confounds the ordinary meaning of the term 'due process.' Indeed, through the years, various [Justices] have explicitly acknowledged the textual difficulties inherent in substantive due process . . . ."); *id.* at 737 (summarizing arguments of various legal scholars against conceptual validity of substantive due process).

126 *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 160 (1996) (Souter, J., dissenting) ("Whereas a constitution [was] seen in the colonial period as a body of vague and unidentifiable precedents and principles of common law origin . . . after independence it [was seen] as a written charter by which the people delegated powers to various institutions of government and imposed limitations on . . . those powers. . . ." (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 90 (1975)).

127 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 579 (1972) ("[I]t is a written Constitution that we apply. Our role is confined to interpretation of that Constitution."); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972) ("[J]udicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text . . . .").

128 *See supra* note 53 and accompanying text.

I question the causal links that are commonly drawn between clarity and the rule of law on the one hand, and between writtenness and clarity on the other. Part III.B showed how, in fact, a written constitution allows the judiciary, a politically unaccountable body, to have the final say on constitutional issues, which gives it greater leeway to behave arbitrarily. Thus, in this sense, formal clarity—knowing what the words of the constitution are—might still fail to aid rule-of-law values. Furthermore, the assumption that writtenness enables meaningful clarity is not only untrue but dangerous as well.

In the constitutional context, certain classes of substantive rules—such as those formulated in normative terms—are inherently unclear.[129] In a written constitution, provisions enshrining individual rights may be clear in a formal sense—we know that something called "equality" or "liberty" is being protected—even though the political concepts as expressed by the terms of such provisions remain deeply contested.[130] It could be argued that a written constitution at least tells us what substantive values should be safeguarded, even if the contours of these values are unclear. However, this argument fails to appreciate the role that judicial decisions and political conventions play in articulating such values under an unwritten constitution.[131] Indeed, judicial decisions and political conventions may be more effective at protecting substantive values than provisions codified ex ante, since judgments and conventions are not abstract declarations of a society's moral and political commitments but constitute its actual practices.[132]

Thus, the view that a written constitution necessarily imparts clarity is misguided. Writtenness may present superficial clarity through its use of specific terms to allude to broad principles. However, this accomplishes only the illusion of genuine clarity and creates problems for the rule of law. First, it exacerbates concerns addressed in Part III.B about judicial usurpation under a written constitution:

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[129] Indeed, on a conceptual level, it is debatable whether clarity of rules is ever possible. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 800 (1989) (using Wittgensteinian concepts of inherent ambiguity of language to argue that we only know there are rules when "disputes don't break out" (internal quotation marks omitted)).

[130] Such principles are often referred to as "'essentially' contested concepts"—that is, concepts that are intrinsically and desirably contestable. Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 529–31 (1994).

[131] *See* HAYEK, *supra* note 106, at 118–20 (portraying role of judge as "maintaining and improving a going order of action" by articulating rules based upon society's "general sense of justice").

[132] *See id.* at 116 ("[J]udicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from . . . the written law.").

By presenting contested normative concepts as clear and thus indisputable, the written constitution further adds to the aura of legitimacy around judges' opinions of what those concepts are. Second, this illusion of clarity has negative repercussions for any ongoing societal debate over the content and scope of individual rights. Not only may it restrict the parameters of discussion,[133] it may discourage debate altogether, removing a valuable political counterweight to the judiciary in the area of fundamental rights.[134]

An unwritten constitution avoids these problems by openly acknowledging that the fundamental rights recognized by a society should be shaped in accordance with that society's evolving sense of morality.[135] Rather than rely upon "some canonical form of words in which [each right is] enunciated,"[136] the constitution entrusts the expression of fundamental rights to assorted political and legal actors: the legislature, through civil rights laws; the courts, through the development of common law principles; and the political community as a whole, through the observance of or departure from conventions.[137]

c. The Principle of Constancy

Unlike an unwritten constitution, the provisions of a written constitution are—assuming entrenchment—fixed for all time. However, since constitutional change is recognized as being both inevitable and desirable, most if not all written constitutions provide for the possi-

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133 *See* WALDRON, *supra* note 16, at 220 ("One lesson of American constitutional experience is that the words of each provision in the Bill of Rights tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question.").

134 The classic counterargument to this is that it is precisely the judiciary's role to protect constitutional rights from being trampled upon by political majorities. *See, e.g.*, Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 910 (2007) (describing role of judiciary as "enforc[ing] the rights of a minority against a majoritarian vote of a legislature that may have forgotten (or chosen to ignore) the dictates of our Constitution"). However, this fails to address the questions of how or why the judiciary should determine in the final instance the content of those rights, as opposed to merely upholding them.

135 A.V. Dicey believed that fundamental rights were part of the U.K. constitution *because* they were secured by judicial decisions—in other words, that constitutional principles were "inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (8th ed. 1915) (1885).

136 WALDRON, *supra* note 16, at 220.

137 Jeremy Waldron contrasts the uniquely determinate phraseology of a codified Bill of Rights with legislative text, which "can readily be amended to meet our evolving sense of how best to get at the important issues at stake." *Id.* "[T]his process of evolving phraseology is even easier if we are talking about legal recognition in the form of common law principles and precedents, and easier still if rights take the form of 'conventional' understandings subscribed to in the political community at large . . . ." *Id.* at 221.

bility of change through a formal amendment process.[138] Proponents of writtenness would argue that this does not detract from the relative stability of a written constitution. First, such amendment processes tend to be more demanding than the procedures required for passage or amendment of ordinary legislation.[139] Second, constitutions can and do exclude certain provisions from amendment altogether.[140] Finally, the very existence of this formal process promotes stability by assuring that any constitutional modifications are predictable, orderly, strictly regulated, and highly supported.

Constitutional constancy may be viewed as aiding assorted rule-of-law values. It discourages the arbitrary exercise of government power—when rules are stable, the government is at once better able and more widely expected to adhere to them. Furthermore, stability imbues such rules with greater normative force, since the longevity of a rule not only creates a presumption of its soundness but also provides an independent reason for adhering to it.[141] Constancy also aids the values of individual freedom and human dignity by enabling a legal framework within which long-term planning is possible.

However, the arguments for how writtenness promotes constancy fail to adequately account for the need for constitutional change. The very reasons offered to support a codified amendment process reveal how a written constitution, rather than deserving praise for its sta-

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[138] *See* THE FEDERALIST NO. 43, at 246 (James Madison) (Clinton Rossiter ed., 1999) ("That useful alterations [to the Constitution] will be suggested by experience could not but be foreseen. . . . [Article V's amendment process] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.").

[139] The American constitutional amendment process appears designed to ensure that societal consensus is reached before any codified constitutional change can occur. *See* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1958 (2003) (arguing that Article V "'implements' a certain model of constitutional deliberation" that involves "a high level of public mobilization and engagement supported by a sense of urgency and . . . seriousness of purpose" as well as "a generality of perspective"). It could be argued that the existence of the twenty-seven amendments shows how constitutional codification can indeed occur repeatedly over time. This argument, however, can just as easily be turned on its head—the fact that only twenty-seven amendments have been ratified since 1787 is a testament to the extraordinary difficulty of amending the Constitution. *See id.* at 1954 (noting "standard critique" that "Article V sets the bar too high: Its provisions were intended to make the Constitution obdurate to change, and in practice it has been extravagantly so"); Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 117 (1996) (noting failure of proposed Equal Rights Amendment "in spite of the fact that over 60% of the states, containing an ample majority of the population, had given it their assent").

[140] For example, the German constitution contains a few provisions which are "wholly unamendable." BARENDT, *supra* note 13, at 8.

[141] See *supra* notes 79–84 and accompanying text for a discussion of stare decisis and its significance for the rule of law.

bility, might instead suffer from rigidity. Where the amendment process erects too high a bar for change, constitutional changes that would be beneficial to the society may be thwarted by factionalism[142] or by the sheer political difficulty of amassing the requisite degree of support in the manner specified by the constitution and at a particular moment in time.[143] A possible rejoinder is that the written constitution does encompass uncodified channels of change: ongoing judicial interpretation and application of the constitution,[144] "critical elections" which serve as a popular mandate for change,[145] or "superstatutes" which articulate constitutional rules and principles.[146] However, this response is insufficient in two ways. As a threshold matter, the existence of informal amendment processes alongside a formal amendment procedure would weaken any claim that writtenness affirmatively aids stability, since that claim rests upon the assumption that a written constitution may only be changed through a public and official process. Furthermore, instability in the form of conflict and confusion would ensue if reforms were enacted through such unofficial processes. Beyond disputes over the legitimacy of such reforms,[147] difficulties in identifying precisely what the content of the

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142 *See* David Gringer, Note, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 186–87 & n.30 (2008) (suggesting that repeated failures to reform electoral college despite "strong public support for eliminating [it] for at least the last fifty years" might be due at least partly to fact that electoral college is biased toward smaller states).

143 *See supra* note 139 and accompanying text (noting difficulty of amending U.S. Constitution through Article V process).

144 *See, e.g.*, Rochin v. California, 342 U.S. 165, 170 (1952) ("[T]he gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.").

145 *See generally* BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS (1998) (laying out theory of constitutional dualism, which distinguishes between ordinary lawmaking and moments of heightened democratic mobilization).

146 William N. Eskridge, Jr., *America's Statutory "Constitution*," 41 U.C. DAVIS L. REV. 1, 6 (2007).

147 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 22, at 3, 38 (describing "Great Divide" in constitutional interpretation between original meaning and current meaning and criticizing "Living Constitution" as "the common law returned, but infinitely more powerful . . . for now it trumps even the statutes of democratic legislatures"); *see also* William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 403 (2006) (rejecting idea underlying "living Constitution" that "nonelected members of the federal judiciary" who are "responsible to no constituency whatever" have authority to "address themselves to a social problem simply because other branches of government have failed or refused to do so").

reforms are and how they relate to the codified constitution would render their scope and application uncertain.[148]

In contrast, an unwritten constitution strikes a better balance between stability and the need for change through its uncodified elements, which respond to the policies and concerns of a society in an organic, diffuse manner without any compromise of stability. It could be argued that an unwritten constitution allows for sudden, destabilizing changes to be made through legislative action. Any such fear is greatly exaggerated for two reasons relating to what has already been discussed about the nature of constitutional rules in an unwritten constitution. First, statutory changes of constitutional magnitude will be tempered through subsequent judicial interpretation and application of conventions. Second, because the expectation underlying an unwritten constitution is of evolutionary change, any action by the government to the contrary will be all the more suspect and thus subject to political scrutiny.[149]

Part III has employed the structural dichotomy of legal and political constitutionalism to explore the consequences of constitutional writtenness upon the rule of law. On a formal level, I have argued that the apparent rule-of-law virtues of having a written constitution—publicity, clarity, and constancy—are in fact overstated, since these qualities may be just as well served, or even better served, by an unwritten constitution. On a structural level, writtenness may entail an allocation of considerable authority to the courts without providing an adequate check to prevent them from undermining the rule of law.

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[148] *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413–14, 455 (2007) (noting that theories of "extracanonical mechanisms of constitutional change" are "on a collision course with Article V" and run into problems of "identify[ing] both which norms have achieved [constitutional] status and what their precise content is"). These problems would in turn negatively affect other principles of legality such as clarity and practicability.

[149] For example, part of the outrage over the Blair administration's proposals for judicial reform in 2003, *see supra* note 60, stemmed from the methods employed by the government to enact the changes it wanted—the sudden and unexpected announcement, and the attempt to pass off far-reaching reforms as part of a routine Cabinet reshuffle that could be unilaterally accomplished—which were felt to undermine constitutional principles such as judicial independence and the separation of powers. *See* Woolf, *supra* note 60, at 9 (stating that way in which government announced its plans for judicial reform caused author to have concerns about independence of U.K. judiciary); *Blair's Coup d'Etat*, DAILY TELEGRAPH, June 13, 2003, at 27 (labeling Blair's announcements "a coup d'etat by stealth" and objecting that his reforms were "a shockingly casual way to interfere with the peculiarly informal separation of powers that is one of the glories of British governance").

CONCLUSION
WHAT CAN WE LEARN FROM THE UNWRITTEN CONSTITUTION?

In 1997, a national survey of Americans' constitutional attitudes and knowledge[150] presented a picture of sharp contrasts: Despite the positive sentiments that respondents overwhelmingly expressed toward the Constitution—pride and a belief in the Constitution's importance and continued relevance—their lack of knowledge about the actual contents of the document remained substantial.[151] This example reveals the darker side of constitution worship—blind faith in the constitution. Ironically enough, a written constitution might contribute to the ignorance of what we are worshipping by providing an obvious symbol for us to fixate upon at the expense of comprehending more deeply what the Constitution actually means.

Ultimately, this Note suggests that we rethink the notion, largely taken for granted in our society, of writtenness as a reason to worship our Constitution. In the same way that the written nature of the Constitution initially seems to enhance our awareness of what the Constitution is while in fact obscuring it, a written constitution may detract from a society's commitment to the rule of law despite appearing conducive to formal principles of legality. Rather than focus solely upon the writtenness of our own Constitution, we should also examine the paradigm of the unwritten constitution to help us better appreciate the effects of a canonical text upon procedural and substantive elements of the rule of law. This analysis would lead to a fuller and more critical understanding of how, for better or for worse, our written Constitution works.

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150 The National Constitution Center conducted a telephone poll of one thousand U.S. citizens across the country. National Constitution Center, Highlights of Survey, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/HighlightsofthePoll.shtml (last visited July 20, 2008).

151 For instance, only nineteen percent of respondents knew that there are twenty-seven amendments to the Constitution. National Constitution Center, NCC Constitution Poll Statistics, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/TheAnswers.shtml (last visited July 20, 2008). Eighty-four percent thought that the Constitution states that all men are created equal. National Constitution Center, Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll, http://72.32.50.200/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml (last visited July 20, 2008).