McGill Law Journal
Revue de droit de McGill

Common Law Constitutionalism Through Methodology

Se-shauna Wheatle

Volume 65, numéro 2, december 2019

Unwritten Constitutional Norms and Principles: Contemporary Perspectives

URI : https://id.erudit.org/iderudit/1075519ar
DOI : https://doi.org/10.7202/1075519ar

Aller au sommaire du numéro

Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)
1920-6356 (numérique)

Découvrir la revue

Citer cet article

Wheatle, S.-s. (2019). Common Law Constitutionalism Through Methodology. *McGill Law Journal / Revue de droit de McGill*, *65*(2), 341–377. https://doi.org/10.7202/1075519ar

Résumé de l'article

Cet article avance que la méthodologie est une pierre angulaire dans le développement du constitutionnalisme de common law, tant au sein des juridictions particulières qu'au niveau transnational. Les méthodes de la common law, incluant les présomptions interprétatives et le raisonnement par principes non écrits, sont essentielles pour comprendre le développement du constitutionnalisme de common law. De plus, les pratiques méthodologiques constituent une base plus féconde pour un constitutionnalisme de common law durable à plusieurs égards. Premièrement, ces méthodes ont le potentiel de survivre aux vents de changement législatifs. La dépendance du cheminement (dans le sens que les décisions et les résultats juridiques sont façonnés par la séquence historique des développements juridiques) illustre la sauvegarde des techniques à travers la pratique judiciaire intégrée. Deuxièmement, les méthodes traversent aisément les frontières et permettent donc de plus amples développements de la dimension transnationale du constitutionnalisme de common law. Les méthodes de common law sont capables d'adaptation au-delà des frontières; elles sont moins vulnérables aux barrières érigées par des revendications d'identité nationale ou constitutionnelle. Face à ce contexte, nous soutenons que les débats sur les bénéfices et les impacts du constitutionnalisme de common law doivent inclure et interagir avec les composantes des méthodes appliquées dans le raisonnement constitutionnaliste de common law.

McGill Law Journal — Revue de droit de McGill

Common Law Constitutionalism Through Methodology

*Se-shauna Wheatle**

This paper makes the case that methodology is a cornerstone of the advance of common law constitutionalism both within jurisdictions and transnationally. Common law methods, including interpretive presumptions and reasoning by unwritten principles, are central to an appreciation of the development of common law constitutionalism. Moreover, methodological practices present a more fruitful basis for lasting common law constitutionalism in several respects. Firstly, methods have the potential to survive legislative winds of change. Path dependence (in the sense that legal decisions and outcomes are shaped by the historical sequence of legal developments) points to the retention of techniques through embedded judicial practice. Secondly, methods also travel well across borders and thereby enable further development of the transnational dimension of common law constitutionalism. Common law methods are capable of adaptation across borders; they are less susceptible to barriers erected by claims of national or constitutional identity. Against this background, I argue that debates about the merits and impact of common law constitutionalism must contain and respond to accounts of the methods engaged in common law constitutionalist reasoning.

Cet article avance que la méthodologie est une pierre angulaire dans le développement du constitutionnalisme de common law, tant au sein des juridictions particulières qu'au niveau transnational. Les méthodes de la common law, incluant les présomptions interprétatives et le raisonnement par principes non écrits, sont essentielles pour comprendre le développement du constitutionnalisme de common law. De plus, les pratiques méthodologiques constituent une base plus féconde pour un constitutionnalisme de common law durable à plusieurs égards. Premièrement, ces méthodes ont le potentiel de survivre aux vents de changement législatifs. La dépendance du cheminement (dans le sens que les décisions et les résultats juridiques sont façonnés par la séquence historique des développements juridiques) illustre la sauvegarde des techniques à travers la pratique judiciaire intégrée. Deuxièmement, les méthodes traversent aisément les frontières et permettent donc de plus amples développements de la dimension transnationale du constitutionnalisme de common law. Les méthodes de common law sont capables d'adaptation au-delà des frontières; elles sont moins vulnérables aux barrières érigées par des revendications d'identité nationale ou constitutionnelle. Face à ce contexte, nous soutenons que les débats sur les bénéfices et les impacts du constitutionnalisme de common law doivent inclure et interagir avec les composantes des méthodes appliquées dans le raisonnement constitutionnaliste de common law.

* Associate Professor, Durham Law School. I am grateful to Hayley Hooper, Vanessa MacDonnell, Roger Masterman, the anonymous reviewers and journal editors for their comments on earlier drafts of this article. Thanks also to Ruth Houghton for her general advice on the article.

Citation: (2019) 65:2 McGill LJ 341 — Référence : (2019) 65:2 RD McGill 341

Introduction

Methods are a cornerstone of the advance of common law constitutionalism, both within jurisdictions and in the transnational sphere. Common law methods, including interpretive presumptions and reasoning by unwritten or implied principles, are central to an appreciation of the development of common law constitutionalist thought. Common law constitutionalism has attracted renewed attention as a result of the resurgence of common law constitutional rights in United Kingdom jurisprudence, alongside the continued invocation of unwritten constitutional principles in other common law jurisdictions. Commentary on common law constitutionalism has at times discounted the increased reference to unwritten norms by stressing the limitations on their substantive content. This claim suggests that only a limited number of rules and principles are referenced and that they possess limited normative force, particularly over legislation.[1] Yet, common law constitutionalism remains a prominent feature of constitutional law in anglophone countries. This article argues that common law methodology is an integral feature of the continuing relevance of common law constitutionalism. Accordingly, regardless of the limitations of substantive common law norms, the methods employed in common law constitutionalism are crucial in appreciating the endurance and influence of common law constitutionalism.

Methodological practices provide a fruitful basis for lasting common law constitutionalism in several respects. First, methods have the potential to survive legislative winds of change. Path dependence (in the sense that legal decisions and outcomes are shaped by historical legal developments) points to the retention of techniques through embedded judicial practice. Second, methodologies travel well across borders and thereby enable the growth of the transnational dimension of common law constitutionalism. Common law methods are capable of transferral and adaptation across jurisdictions. While methods may be contested, they often do not carry the baggage of substantive norms and are less susceptible to barriers erected by claims of national or constitutional identity. Both characteristics speak to resilience or endurance—the ability to persist beyond barriers, whether temporal or jurisdictional. In short, methodological techniques are generally better able than substantive norms to move across temporal and spatial boundaries. Against this background, I argue that debates about the merits and impact of common law constitutionalism must include and respond to accounts of the methodologies of common law constitutionalist reasoning.

---

1 See e.g. Richard Clayton, "The Empire Strikes Back: Common Law Rights and the Human Rights Act" [2015] 1 Public L 3 at 7–12; Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 Current Leg Probs 85 at 88–90.

To explore these ideas, this paper proceeds along the following path. Part I sets out the scope of the article, outlining what is meant by methodology and explaining the value of a transnational perspective on the methods of common law constitutionalism. Part II then provides a brief account of common law constitutionalism. Here I note the systemic, historical, and geographical dimensions of the common law, as well as the core characteristics of common law constitutionalism. Part III then addresses the factors that facilitate the endurance of common law constitutionalist practices by discussing the unifying threads between common law and statute and the influence of path dependence in preserving the impact of common law methods. The transnational relevance of common law constitutionalist reasoning and discourse is then discussed in Part IV, with particular attention to the use of the principle of legality and the implication of unwritten constitutional principles in a range of constitutional settings. I suggest that these two interpretive techniques work to sustain a close constitutional relationship across common law jurisdictions, reducing the impact of differences occasioned by written and unwritten constitutionalism. Methodological practices are accordingly at least as pivotal as substantive principles in sustaining the endurance and transnational reach of common law constitutionalism. Part V then explores the impact of these methodological practices on the coherence of the common law. This section questions whether the advance and influence of the techniques employed by courts in common law constitutionalist reasoning disturb the coherent relationship between substance and method within the common law. I suggest that transnational engagement on common law constitutionalism may assist in ensuring coherence within the common law constitution.

I. The Scope of the Article: The Methods of Common Law Constitutionalism in Transnational Perspective

The article is primarily prompted by renewed attention to common law constitutionalism—particularly common law rights—in the UK, and some of the trends that have emerged in the academic discourse on this resurgence.[2] The UK Supreme Court has, in recent years, placed increased reliance on constitutional rights developed at common law, asserting the ability of the common law to protect fundamental rights alongside the *European Convention on Human Rights* as applied through the *Human Rights Act 1998* (HRA).[3] Yet, significant doubts have been expressed in the UK literature regarding the content and scope of the rights available under the

---

2 See e.g. *Kennedy v Information Commissioner*, [2014] UKSC 20 at para 46 [*Kennedy*]; *R (Osborn) v Parole Board*, [2013] UKSC 61 [*Osborn*]. On the resurgence of common law rights, see Roger Masterman & Se-shauna Wheatle "A Common Law Resurgence in Rights Protection?" [2015] 1 Eur HRL Rev 57.

3 See e.g. *Osborn*, *supra* note 2; *Kennedy*, *supra* note 2; *R (UNISON) v Lord Chancellor*, [2017] UKSC 51 [*UNISON*].

common law constitution.[4] Mark Elliott, for instance, voices the concern that common law rights lack sufficient precision and scope to effectively replace a written bill of rights in the form of the *European Convention on Human Rights*. Elliott therefore maintains that judicially recognized common law rights "occupy a terrain substantially narrower than that occupied by the Convention rights."[5] The unwritten nature of common law rights has also elicited the caution that "[e]ven where common law rights have been established for many years, the absence of express words means that these rights are less certain in scope, their underlying justification often unclear."[6] Even in the wake of the resurgence of common law rights in UK courts, enthusiasm for this reawakening has been tempered by the caution that common law rights have a "traditional limited status" in UK law[7] and that the recent cases relate to a narrow area of law regarding issues of open justice and fairness.[8]

This skeptical view prompts a consideration of whether we ought to reflect on the potential of common law constitutionalism beyond the substantive norms—including rights and general principles—that have been articulated in the courts. Arguably, much of the value of common law constitutionalist adjudication lies in the methods employed by judges in such cases.[9] Methods speak to the process of developing a norm and applying it to the facts, rather than the substance of the norm applied or the resulting decision.[10] Methodology therefore encompasses the techniques for determining the meaning of norms, the application of norms, and their relationship to each other. Within common law constitutional adjudication, such techniques include the vaunted principle of legality, which has played a prominent role in common law constitutionalism in Australia and the UK, and the implication of constitutional principles, which has been influential in a range of common law countries including Canada and the jurisdictions of the Commonwealth Caribbean.

---

4 See discussion in Thomas Fairclough, "The Reach of Common Law Rights" in Mark Elliott & Kirsty Hughes, eds, *Common Law Constitutional Rights* (Oxford: Hart, 2020) 295.

5 Elliott, *supra* note 1 at 88.

6 Paul Bowen, "Does the Renaissance of Common Law Rights Mean that the Human Rights Act 1998 Is Now Unnecessary?" [2016] 4 Eur HRL Rev 361 at 366.

7 Clayton, *supra* note 1 at 4.

8 See *ibid* at 10.

9 Thomas Fairclough also questions the approach adopted by these authors—which he describes as "empirical"—and proposes a "normative" approach based on the principles underlying common law rights: see *supra* note 4.

10 For a similar understanding of methodology, see Sir Philip Sales, "The Common Law: Context and Method" (2019) 135:1 Law Q Rev 47 [Sales, "Context and Method"]; Vivian Grosswald Curran, "Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union" (2001) 7:1 Colum J Eur L 63 at 77–79.

With a turn toward methods, this article therefore seeks to develop on commentary that goes beyond the content and reach of common law rights and principles. Much of that commentary can be found in common law jurisdictions such as Australia and Canada, though there are also significant recent examples in the UK. There is a wealth of Canadian debate on the legitimacy and foundation of the use of unwritten constitutional principles in interpreting the Constitution.[11] In the Australian context, there is extensive literature on the principle of legality, examining the contours of the technique, the scope of its application, and its effect on constitutional development in that jurisdiction.[12] In the UK, despite a focus on the substance and reach of common law rights, there is insightful commentary on the principle of legality, examining its role in the relationship between parliamentary supremacy and the rule of law, as well as the extent to which it bridges the gap between common law and documentary rights.[13] This article seeks to join and expand on this discourse by considering the role of common law methods in constitutional adjudication across several common law jurisdictions. This analysis endeavours to contribute to the current discourse in two ways. First, the article considers the role and utility of methods as an analytical category, rather than studying the use of any one particular method. Second, the article aims to examine the place of methodological practices in common law constitutional adjudication across a range of common law jurisdictions.

The analysis draws lessons from countries that can be classified as core common law countries—that is, jurisdictions in which judges occupy a central role in developing legal norms and which, despite an increase in statutes, do not possess comprehensive legal codes.[14] One of the defining char-

---

11 See e.g. Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 92; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389; Vincent Kazmierski, "Draconian but Not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245.

12 See e.g. Dan Meagher, "The Principle of Legality and Proportionality in Australian Law" in Dan Meagher & Matthew Groves, eds, *The Principle of Legality in Australia and New Zealand* (Sydney: Federation Press, 2017) 114 [Meagher, "Proportionality"]; Dan Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35:2 Melbourne UL Rev 449 [Meagher, "Age of Rights"].

13 See e.g. Alison L Young, "Fundamental Common Law Rights and Legislation" in Elliott & Hughes, *supra* note 4, 223 at 229–45; The Honourable Sir Philip Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125:4 Law Q Rev 528 at 609–15 [Sales, "A Comparison"].

14 See AW Brian Simpson, "Common Law" in Peter Cane & Joanne Conaghan, eds, *New Oxford Companion to Law* (Oxford: Oxford University Press, 2008). Of course, this classification is not meant to suggest that the common law legal system is a closed category without influences from, and interactions with, other legal systems.

acteristics of such jurisdictions is that case law and the doctrine of precedent are prominent in legal development.[15] The jurisdictions cited range from the traditional political constitution framework (the United Kingdom) to countries that have embraced the supremacy of documentary constitutions (Canada). This range ensures that, while focusing on core common law countries, we are able to examine the operation of common law constitutionalism across a range of constitutional contexts. The transnational focus of the article reveals commonalities that exist across jurisdictions despite differences between applicable constitutional instruments. Evidence of common techniques and approaches can serve to establish and reinforce the role of particular techniques in constitutional adjudication in similar jurisdictions.[16] Alongside providing evidence of common practices, analysis of a range of jurisdictions can also indicate reasons for divergence in applying interpretive techniques.[17] The transnational approach therefore enables a more accurate and complex understanding of the interaction of the common law constitution with written constitutional rules, an exercise which is necessitated by the global advance of documentary constitutionalism and textual human rights guarantees.[18] Ultimately, the transnational perspective offers a wider view of the impact of common law techniques in advancing common law constitutionalism and in injecting elements of legal constitutionalism into traditionally political constitutions while retaining elements of unwritten constitutionalism in jurisdictions with textual constitutions. The following section explores the concept and elements of common law constitutionalism, and provides evidence of its operation in core common law countries.

II. Common Law Constitutionalism

Common law is used to denote law that is developed from judicial decisions, "generated by authoritative precedents."[19] The common law is therefore understood as a system of law characterized and sustained by judge-made law. Norms existing at common law derive their authority not from

---

15 See Curran, *supra* note 10 at 75–77.

16 See Jeremy Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (New Haven: Yale University Press, 2012) at 48–49.

17 See Esin Örücü, "Developing Comparative Law" in Esin Örücü & David Nelken, eds, *Comparative Law: A Handbook* (Oxford: Hart, 2007) 43 at 53–55.

18 See David S Law & Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism" (2011) 99:5 Cal L Rev 1163 at 1167–87, 1194–202.

19 Peter Jaffey, "Two Ways to Understand the Common Law" (2017) 8:3 Jurisprudence 435 at 448.

appearing in written form but from a combination of reason and practice.[20] Reason, indeed, is said to underpin unwritten law. In Mark Walters's view, unwritten law is

> a discourse of reason in which existing rules, even those articulated in writing, are understood to be specific manifestations of a comprehensive body of abstract principles from which other rules may be identified through an interpretive back-and-forth that endeavours to show coherence between law's specific and abstract dimensions and ... between law's various applications.[21]

Common law norms are accordingly definitionally distinct from statutory norms, though the division between the two is tempered by the reality that (statutory) language tends to be accompanied by vagueness, which permits courts to shape the meaning of statutes.[22] The diffusion of the common law through English colonization also leads to an understanding of the common law as a legal family, a legal tradition, or as part of a common law family tree.[23] While mixing and overlapping with Indigenous as well as other introduced legal systems, core features of the common law have become embedded in diverse locations across the world. This has, in part, facilitated the capacity of the common law to grow as a transnational model.[24]

The belief that common law generates fundamental norms that act upon the institutions of state and the relationship between the people and the state underlies the idea of common law constitutionalism. The common law performs some of the core functions of constitutionalism by generating and applying norms that assign, organize, and restrain state powers. Common law principles such as separation of powers assist in the assignation and distribution of powers among the institutions of state. The early years

---

20 See TRS Allan, "Text, Context, and Constitution: The Common Law as Public Reason" in Douglas E Edlin, ed, *Common Law Theory* (Cambridge, UK: Cambridge University Press, 2007) 185 [Allan, "Text, Context, and Constitution"]; AWB Simpson, "The Common Law and Legal Theory" in AWB Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 77 at 92–94.

21 Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 33 at 35 [Walters, "The Unwritten Constitution"].

22 See the more critical discussion in JD Heydon, "AWB Simpson's 'The Common Law and Legal Theory'" (2016) 35:1 UQLJ 21 at 27.

23 See Esin Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden: Martinus Nijhoff, 2004); Jaako Husa, "The Future of Legal Families" in *Oxford Handbooks Online: Law* (Oxford: Oxford University Press, May 2016), online: <www.oxfordhandbooks.com> [perma.cc/5ST9-9S2F].

24 "Transnational" is used to denote "non-state relations across frontiers," as defined by William Twining in "Globalization and Legal Theory: Some Local Implications" (1996) 49 Current Leg Probs 1 at 5.

of new constitutions in countries like Australia[25] and Jamaica[26] have been aided by appeals to the separation of powers. The concept of separated powers helped to concretize constitutional understandings of the allocation of responsibilities to the branches of government, and in particular to outline the exclusive province of judicial power. The common law also supplies fundamental constraints on governmental activity through the rule of law, which gives rise to a range of requirements and values that are activated in common law judging and in the interpretation of constitutional instruments.[27] The rule of law famously played a central role in the *Quebec Secession Reference*, with the Canadian Supreme Court highlighting that "[t]he rule of law principle requires that all government action must comply with the law, including the Constitution."[28] Compliance with the rule of law and constitutionalism meant that amendment of an entrenched constitution by secession could not be achieved by a simple majority vote.

Common law rights and principles fill gaps in constitutions and constitutional legislation and thereby restrain governmental (and, in some countries, legislative) acts that interfere with fundamental individual interests.[29] A right of access to justice was developed in Canada from the core function of superior courts, intertwined with rule of law considerations.[30] The Supreme Court accordingly held that a hearing fee scheme in the province of British Columbia was unconstitutional, as the scheme effectively prevented some persons from accessing superior courts. In the United Kingdom, common law principle mandated that the government could not issue a notice to withdraw from the European Union under the prerogative power:

> [I]t is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law. As Lord Hoffmann observed in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, "since the 17th century the prerogative has not empowered the Crown to change English common or statute law". This is, of course, just as true in relation to Scottish, Welsh or North-

---

25 See *R v Kirby; Ex parte Boilermakers' Society of Australia*, [1956] HCA 10.

26 See *Hinds v R*, [1977] AC 195 at 213, [1976] 1 All ER 353 (PC, Jamaica) [*Hinds*].

27 See generally Se-shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Portland: Hart, 2017) ch 4 [Wheatle, *Principled Reasoning*].

28 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72, 161 DLR (4th) 385 [*Secession Reference*].

29 In the Australian context, see James Spigelman, *Statutory Interpretation and Human Rights* (St Lucia: University of Queensland Press, 2008) ch 1.

30 See *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at paras 30–40 [*Trial Lawyers*].

> ern Irish law. Exercise of ministers' prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament.[31]

The culmination of the Brexit withdrawal notice litigation in *Miller* demonstrated the ability of common law norms to condition the process by which decisions are made, even if they do not dictate the substance of the decision. Operating in the background was the general principle that the common law places restrictions on the removal of individual rights. Further, the attempt of the UK Prime Minister to prorogue Parliament for an unusually long period of five weeks in the month preceding the UK's scheduled withdrawal from the EU was ruled unlawful by the UK Supreme Court, as it was incompatible with the constitutional principles of parliamentary sovereignty and accountability.[32] While the dominance of parliamentary sovereignty in the UK means that common law norms do not restrain legislative choices, they do give special protection to important imperatives by affecting the means by which laws can be made or unmade. Such special protection can be observed in the doctrine of constitutional statutes, developed by judges to recognize and accord due impact to the special significance of statutes that condition the relationship between the individual and the state, alter the scope of fundamental rights, or regulate state institutions.[33] Statutes considered "constitutional" can only be repealed or contradicted by subsequent statutes using express terms. The doctrine thereby qualifies the ordinary common law rule that terms in earlier statutes can be impliedly repealed by contradictory terms in later statutes.[34]

At the heart of common law constitutionalism lies a paradox which is also a central characteristic of a constitution. Philip Selznick has helpfully described the "paradox of the common law tradition": it is centred on a vision of law "as *given*—if not by divine authority, then by history and practice—and yet as *adaptable* to changing needs and circumstances."[35] In similar terms, Philip Sales argues that in the common law, "the courts strive to achieve a coherent fit with previous case law dealing with the same or similar topics whilst at the same time trying to adjust the law to changing

---

31 *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 at para 50 [references omitted].

32 See *R (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland*, [2019] UKSC 41 at paras 40–52 [*Miller & Cherry*].

33 See generally *Thoburn v Sunderland City Council*, [2002] EWHC 195 (Admin) [*Thoburn*]; Farrah Ahmed & Adam Perry, "Constitutional Statutes" (2017) 37:2 Oxford J Leg Stud 461.

34 On the doctrine of implied repeal, see *Ellen Street Estates, Limited v Minister of Health*, [1934] 1 KB 590, [1934] All ER Rep 385 (CA).

35 Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992) at 449 [emphasis in original].

social needs or expectations."[36] This requires navigation between certainty and fluidity, tradition and change. This vision runs parallel with Joseph Raz's view that a constitution must face both backwards and forwards, maintaining continuity while facilitating and recognizing change.[37] In this sense the "split personality"[38] of the common law is mirrored in the dual objectives of constitutional law: maintaining tradition while permitting development. The challenge that characterizes both systems is to delicately navigate between the past, present, and future. Both the common law and constitutional law seek to maintain coherence, ensuring that new rules and principles fit within the matrix of existing understandings. The common law accordingly bears some of the hallmarks of a constitution and has the capacity to perform constitutionalist functions. The following sections discuss the constitutionalist functions of the common law through the lens of methodology. Part III addresses the capacity of common law methodology to retain continued relevance over time, demonstrating the centrality of methods to the sustained influence of common law constitutionalism in an era of written constitutionalism.

III. Endurance

The endurance of methodology over time furnishes a partial explanation for the temporal endurance of common law constitutionalism. Methods endure in part as a result of the common threads that run between common law adjudication and statutory interpretation. The existence of these common threads means that certain methods continue to be utilized despite legislative enactments, amendments, or repeal. The precise scope or impact of methods may evolve but core elements remain, as a result of the similarities between statutory and common law adjudication as well as adjudication under a codified constitution.[39] Institutional culture and the influence of history also account for the staying power of common law methodology within jurisdictions in spite of constitutional changes. The influence of a historical course on institutional behaviour, as expressed in path dependence theory, reveals an almost organic process by which methodological practices become embedded within an institution and influence future in-

---

36 Sales, "Context and Method", *supra* note 10 at 47.

37 See Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 343–51.

38 Sales, "Context and Method", *supra* note 10 at 55.

39 On the continuing impact of stare decisis in adjudication under a codified constitution, see Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases" (2012–13) 44:3 Ottawa L Rev 467 at 472–74.

stitutional choices and approaches. The endurance fostered by the connections between common law and statutory judging as well as the influence of path dependence are explored in this part of the article.

A. Commonality Between Common Law and Statutory Methods

Robert Leckey has persuasively argued that the differences between common law rights approaches and those emanating from statute law are best understood as a matter of degree rather than kind.[40] Leckey starts from a rejection of what he terms "bill-of-rights exceptionalism," which he describes as a point of view that

> adjudication under a bill of rights is a bounded, novel practice that emerges after a rights instrument enters into force. In this way, many authors regard judges' interpretation and enforcement of entrenched rights as an enterprise autonomous from their work in private law, the body of rules regulating relationships between individuals and between individuals and property.[41]

Rights exceptionalism tends to under-appreciate enhancements of judicial power that predate the introduction of a bill of rights, to conceal or ignore the continuity between the pre- and post-bill of rights judicial role, and to prioritize the power to invalidate legislation to the detriment of other exercises of judicial power. In opposition to this viewpoint, Leckey draws attention to questions of procedure and technique in preference to a focus on substantive issues. His approach advocates "situat[ing] rights adjudication in the long-term trajectory of the common law and the tradition of judging within the Commonwealth."[42]

This line of argument is similar to commentary that scholars such as Aileen Kavanagh have made in the context of interpretation under the HRA.[43] The introduction of the HRA sought to "bring rights home" to the UK by incorporating rights set out in the *European Convention on Human Rights*. The Act struck a balance between rights guarantees and parliamentary sovereignty by allowing courts to interpret legislation consistently with rights or issue declarations that a statute contravenes Convention rights without affecting the validity of legislation. The terms of the debate surrounding the interpretation of the HRA have largely implicitly accepted continuity between common law modes of reasoning and HRA interpretation. Subsection 3(1) of the HRA contains the following interpretive mandate: "So far as it is possible to do so, primary legislation and subordinate

---

40 See Robert Leckey, *Bills of Rights in the Common Law* (Cambridge, UK: Cambridge University Press, 2015).

41 *Ibid* at 9.

42 *Ibid* at 18.

43 See Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge, UK: Cambridge University Press, 2009) [Kavanagh, *Constitutional Review*].

legislation must be read and given effect in a way which is compatible with the Convention rights." The boundaries of the interpretive power (and duty) encapsulated in this subsection are often discussed in relation to the baseline of pre-HRA interpretive powers and often using the language of pre-HRA powers. Kavanagh, for example, casts the interpretive power under subsection 3(1) of the HRA as a "strong presumption of statutory interpretation" and convincingly argues that "presumptions of statutory interpretation are a familiar and long-standing judicial tool by which judges have protected fundamental rights in the common law."[44] Such presumptions—including the presumption that powers conferred by statute should be exercised in accordance with fundamental rights—have been collectively referred to as part of "the common law of the constitution" and as a long-standing method of judicial constitutional review.[45] Understood against this common law history, subsection 3(1) can be viewed as a more intense or stronger form of presumption; under subsection 3(1), courts may be more assertive in adopting an interpretation that achieves rights consistency. The provision has therefore been construed as conferring power to adopt strained interpretations and even change the meaning of a statute.[46]

Further, techniques of "reading in" and "reading down" are used under subsection 3(1) to alter the meaning of legislation. While these techniques are strong remedial powers of statutory alteration, they are far from novel practices; they have been a mainstay of British judicial interpretation predating the HRA. It has long been recognized that "words can be read into a statute" to save it from "absurdity, inconsistency or illogicality."[47] Cross's *Statutory Interpretation* advised prior to the HRA that courts possessed a "limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute."[48] These

---

44 *Ibid* at 91, 95, 97.

45 Timothy Endicott, "Constitutional Logic" (2003) 53:2 UTLJ 201 at 203. See also Kavanagh, *Constitutional Review*, *supra* note 43 at 98.

46 See generally *Ghaidan v Godin-Mendoza*, [2004] UKHL 30 [*Ghaidan*].

47 John Snell, "Trouble on Oiled Waters: Statutory Interpretation" (1976) 39:4 Mod L Rev 402 at 403. See also *Federal Steam Navigation Co Ltd v Department of Trade and Industry*, [1974] 1 WLR 505 at 524, [1974] 2 All ER 97; Neil Duxbury, "Reading Down" (2017) 20:2 Green Bag (2d) 155 at 156.

48 Sir Rupert Cross, *Statutory Interpretation*, 3rd ed by John Bell & Sir George Engle (London, UK: Butterworths, 1995) at 49, cited in Kavanagh, *Constitutional Review*, *supra* note 43 at 102.

techniques also feature heavily in constitutional interpretation and remedies under constitutional bills of rights in other common law jurisdictions,[49] including Canada[50] and the Commonwealth Caribbean.[51]

B. Path Dependence

The influence of history on the present and future of common law development can be partly understood in terms of path dependence theory. Path dependence speaks to

> a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage. At the most basic level, therefore, path dependence implies that "what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time."[52]

This theory has relevance to common law systems on account of decision rules that are operative under common law adjudication. Among such rules are stare decisis—that prior decisions of a higher court are binding on lower courts in cases with similar facts—and the rule that courts will tend to follow their own decisions even if those decisions are not binding.[53] These decision rules serve to create and maintain coherence and consistency within the legal system.

Courts follow precedent for a variety of reasons, including factors such as judges' desire to preserve their own reputation and prestige, awareness that their decisions may be overruled if they fail to follow binding precedent, and that if they dismiss precedent, they thereby undermine part of the foundation for the acceptance of their own decisions. Reasons of consistency and coherence also play an important role. The internal coherence of norms within the system—whereby rules and principles exist in accord—is facilitated by respect for past decisions.[54] The desirability of temporal consistency within the common law is a further driver of judicial regard for precedent; the system and its agents would be undermined if citizens were

---

[49] See e.g. Roger Masterman & Se-shauna Wheatle, "Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart, 2018) 123 at 129 [Masterman & Wheatle, "Unity, Disunity and Vacuity"]; Leckey, *supra* note 40 at 40–51.

[50] See *Schachter v Canada*, [1992] 2 SCR 679 at 698–703, 93 DLR (4th) 1.

[51] See e.g. *AG v Joseph*, [2006] CCJ 1 (AJ) at para 25 (Wit J).

[52] Oona A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601 at 604.

[53] See *ibid* at 622–23.

[54] See Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 239; Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1994).

without the guidance that the past offers to the likely decisions and approaches the courts would take. Commitment to a level of temporal consistency is also manifest as a core characteristic of the rule of law, which encourages certainty to enable decision-making informed by awareness of likely legal consequences.[55] A belief in basic fairness and rationality, which both demand that like cases should be treated alike, also tends in favour of upholding precedent and encourages faith in the legal system. Oona Hathaway is perhaps correct though in opining that "[p]erhaps most important, judges conform to the doctrine of stare decisis because the principle of precedent is deeply ingrained in our ... legal culture."[56]

One might challenge the continuing relevance of path dependence theory when legislated constitutional norms have been introduced. The argument could be made that the intrusion of statutes—particularly entrenched, supreme statutes—produces a material change and shifts the conversation from one about common law norms to one of statutory and constitutional interpretation. However, common law constitutionalism continues to be activated in two respects. First, interpretation remains within the province of the judges, who will be constrained to some extent by the past—by rules of statutory interpretation developed by the judiciary and by norms that inform the relative scope of judicial, legislative, and executive power. Second, the past will supply a constraint in an institutional sense. The institutional culture that has evolved within the judiciary will influence interpretive choices made under statutory norms. The former constraint is therefore based on the separation of powers while the latter is more cultural and amorphous. Neither of these two constraints *prevents* change, even radical change, from occurring. Nonetheless, they do exert some influence on the pace and contours of that change. For instance, the tepid approach of the Judicial Committee of the Privy Council in early interpretations of Commonwealth Caribbean constitutions can be understood in the context of path dependence. The constitutions were described as "evolutionary" and were characterized as instruments that provided continuity with the rights and constitutional principles of the past.[57] More specifically, the rights guaranteed in the new constitutions were ruled to be mere restatements of rights pre-existing under common law, which thereby limited the development or discovery of new rights based on current interpretations of the constitution.[58] As late as 1996, this reasoning was used to

---

55 See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) ch 2; Hathaway, *supra* note 52 at 651–52.

56 *Supra* note 52 at 627. Hathaway there spoke to the "Anglo-American legal culture," but the reflexive preference for upholding precedent is almost certainly a feature of judging in the United Kingdom and other common law countries as well.

57 See *Hinds*, *supra* note 26 at 212.

58 See *Director of Public Prosecutions v Nasralla*, [1967] 2 AC 238 at 247–48, [1967] 2 All ER 161 (PC, Jamaica).

deny the existence of a right to trial within a reasonable time in Trinidad and Tobago.[59]

Judicial attitudes do not remain fixed indefinitely; early attitudes to the constitutions of the anglophone Caribbean eventually gave way to more assertive and transformative interpretive practices. However, the key takeaway is that judicial choices and approaches were influenced by precedents and behaviour predating the constitutions.

The influence of path dependence does not exclusively tend toward conservative approaches or outcomes. Constitutional changes can influence judicial activity and attitudes in a more activist or assertive direction. This trajectory is observed in the United Kingdom as a result of reforms such as the *European Communities Act 1972* (ECA) and the *Human Rights Act 1998*. While UK courts traditionally played a subordinate role to the legislature as a result of the doctrine of parliamentary supremacy, the courts have, due to legislation such as the ECA and HRA, come to exercise powers of quasi-constitutional review.[60] Masterman and Murkens suggest that

> [j]udicial review is still limited by Parliamentary sovereignty. However, this limitation has been significantly reduced by membership of the European Union, the increased effect of the European Convention on Human Rights, and the determination of some judges to protect fundamental constitutional rights. This trend may continue, should the courts claim an inherent power to strike down legislation or, at least, to render ineffective any Act of Parliament viewed as "unconstitutional".[61]

Lord Steyn has argued that the ECA, the HRA, and the devolution of regional power under the *Scotland Act 1998* established that the UK does not have "an uncontrolled constitution," noting that "[m]oreover, the *European Convention on Human Rights* as incorporated into our law by the *Human Rights Act 1998*, created a new legal order."[62] The new legal order included a complexification of the UK's constitution as seen in the acknowledgement of constitutional statutes that are insulated from implied repeal. The constitutional statutes doctrine has been used to explain why, under the ECA, ordinary domestic law had to be disapplied in the face of inconsistent EU law. Statutes such as the ECA were deemed constitutional statutes, and express words were required to contravene or repeal such statutes.[63] Even

---

59 See *Director of Public Prosecutions v Tokai*, [1996] AC 856 at 862, [1996] 3 WLR 149 (PC, Trinidad and Tobago).

60 See Roger Masterman & Jo Eric Khushal Murkens, "Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court" [2013] 4 Public L 800 at 809–11.

61 *Ibid* at 819–20.

62 *R (Jackson) v AG*, [2005] UKHL 56 at para 102 [*Jackson*].

63 See *Thoburn*, *supra* note 33 at paras 62–63.

more indicative of the complex constitutional framework developing in the UK and the role of the courts in constructing and navigating the new constitutional landscape are judicial statements on the interaction between constitutional statutes. Lords Neuberger and Mance proffered that in light of the "constitutional instruments" and constitutional common law principles now recognized by the courts

> [i]t is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[64]

Moreover, in Lord Reed's assessment, the task of resolving conflicts between constitutional norms fell to the courts: "If there is a conflict between a constitutional principle ... and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom."[65] The constitution accordingly became highly textured, requiring renewed reflection on the constitutional precepts that govern the institutions of state. Courts were not only empowered under the new statutes but also assumed great importance in working out the terms of the new constitutional settlement and reconciling new legislation with pre-existing constitutional norms.

These legislative changes were accompanied by an expansion of the grounds of judicial administrative review and the intensity with which courts carried out such review. The combination of legislative and common law changes has been reflected in a changing judicial culture. Graham Gee and Richard Ekins, arguing for a winding back of judicial power in the UK, observe that

> EU membership has not only elevated judicial power within the sphere of EU law itself. There has been an additional (and, from our vantage point, very troubling) "spill over" effect: the legal implications of EU membership have encouraged some judges to grow sceptical about parliamentary sovereignty and to speculate about introducing proportionality as a general ground of ordinary judicial review.[66]

Judicial assertiveness was vividly displayed in *Privacy International*, in which the UK Supreme Court restrictively interpreted an ouster clause in the *Regulation of Investigatory Powers Act 2000*. Subsection 67(8) of the Act—which stated in relevant part that "decisions of the [Investigatory

---

64 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, [2014] UKSC 3 at para 207 [*HS2*].

65 *Ibid* at para 79.

66 Richard Ekins & Graham Gee, "Putting Judicial Power in Its Place" (2017) 36:2 UQLJ 375 at 379–80.

Powers Tribunal] (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court"—was interpreted as insufficient to exclude judicial review where the tribunal made an error of law, including an error of law in determining whether the tribunal had jurisdiction. The Court's construction undoubtedly challenges the apparent intention behind the words "including decisions as to whether they have jurisdiction" and the Court has accordingly been accused of "challenging the legislature's legally unlimited law-making authority."[67] Yet, it is on this point that the Court's assertiveness meets the evolving constitutional order, for the view is emergent within the judiciary that the issue in such cases is constitutional interpretation and not ordinary statutory interpretation. So understood, the judicial task is not merely one of discerning the intention of Parliament; the task in constitutional interpretation within a modern constitutional order is rather to apply and secure respect for constitutional rules and principles. Lord Carnwath accordingly explained in *Privacy International* that where ouster clauses are at issue, "conventional principles of statutory interpretation, based on the ordinary meaning of the words used by Parliament, have yielded to a more fundamental principle that no inferior tribunal or authority can conclusively determine the limits of its own jurisdiction."[68] The Supreme Court thereby prevented local law developing in localized courts, free from the regulation of common law; in this way, the Court furthered order and coherence within the legal system. UK courts have accordingly used the common law to achieve similar results to those of the Canadian Supreme Court, which has relied on the terms of its Constitution to limit the effectiveness of ouster clauses.[69]

Further revealing the effect of the constitutional authority with which British courts have been imbued, Lord Carnwath offered, *obiter dictum*, in *Privacy International*:

> I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to

---

67 Mike Gordon, "Privacy International, Parliamentary Sovereignty and the Synthetic Constitution" (26 June 2019), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org> [perma.cc/3KRA-23LL].

68 *R (Privacy International) v Investigatory Powers Tribunal*, [2019] UKSC 22 at para 34 [*Privacy International*].

69 As held in *Crevier v Quebec (AG)*, [1981] 2 SCR 220 at 234, 127 DLR (3d) 1, "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court." Section 96 of the *Constitution Act, 1867* speaks to the power to appoint superior, district, and county judges in the provinces. See also *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 51–55, 130 DLR (4th) 385.

> exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal.[70]

This controversial view was supported in part by reference to statutory recognition of the rule of law in the *Constitutional Reform Act 2005* and the courts' recognition of the constitutional status of such legislation through the doctrine of constitutional statutes.[71] The Court's treatment of ouster clauses has, in Lord Carnwath's view, come to reflect both respect for inferred legislative intention and "the fundamental principles of the rule of law";[72] and the courts were the ultimate arbiters of the rule of law's requirements. This understanding of the relationship between the courts and Parliament was described as "wholly consistent with the modern constitutional settlement."[73] The evolution of the British constitutional settlement during the late twentieth century therefore contributed to the evolution of judicial behaviour and judicial perception of institutional roles and responsibilities.

Judicial behaviour is manifested in techniques and interpretive approaches, as in *Privacy International* and *Evans*. Techniques and approaches can become embedded within an institution and outlive statutory changes. The potential persistence of strong judicial interpretive techniques is now mooted in the UK against the background of the governing Conservative Party's proposal to repeal the HRA.[74] Renewed common law constitutionalist jurisprudence in British courts, which has seen courts reclaim the importance of the common law in settling human rights issues, should be understood within the context of preparations for a post-HRA country. Ekins and Gee therefore posit that the revival of common law rights constitutional discourse "may be an attempt to anticipate the HRA's possible repeal and to render it less significant than would otherwise be the case."[75] Any such attempts must rest on "a new disposition that eschews the traditional limits on judicial technique and authority."[76] In other words, the survival of human rights protections in the UK after a possible repeal of the HRA rests in large part on the retention—and expansion—of judicial techniques and approaches; in short, it rests as least as much on methods as it does on substantive norms.

---

70 *Privacy International*, *supra* note 68 at para 144.

71 See *ibid* at para 120; *Thoburn*, *supra* note 33 at paras 62–63; *HS2*, *supra* note 64 at para 207.

72 *Privacy International*, *supra* note 68 at para 130.

73 *Ibid* at para 131.

74 See Conservative Party, "The Conservative Party Manifesto 2015" (2015) at 73, online (pdf): *Lancaster University* <ucrel.lancs.ac.uk> [perma.cc/3NHQ-XT8Z].

75 *Supra* note 66 at 381.

76 *Ibid* at 382.

IV. Portability

Judicial techniques are such an integral facet of the common law tradition that an analysis of methodology is central to an account of the development of the common law as a transnational constitutional enterprise.[77] This section reflects on the operation of common law constitutionalist reasoning across jurisdictional borders and the role of judicial techniques in facilitating this transnational activity. First, I examine the concept of the unity of the common law, discussing the drive for unity in the common law world during colonialism and the extent to which the lingering desire for harmony persists among common law courts today. Secondly, I turn toward specific methodological practices that foster the transnational movement of common law constitutionalism by examining the principle of legality and judicial implications of constitutional principles.

A. Common Law Unity

Part of the driving force for the common law's transnational capacity is the inclination toward unity in the common law. Esin Örücü refers to "a consciousness that common law is a whole and that this unity is a very real tie between the jurisdictions within the legal tradition."[78] In past centuries, English colonial administration was typified by an effort to impose the English legal system throughout the colonies, and the common law was seen as a means of establishing "order" within and across colonial territories. While "conquered" or "ceded" territories retained threads of previous legal traditions, existing alongside common law norms, colonies that were deemed "settled colonies" were made to wholly adopt the common law legal system.[79] The desire for maintaining commonality across colonial territories persisted even after the majority of colonies gained independence. The Privy Council played an important centralizing role in preserving a level of unity among post-colonial jurisdictions. In hearing an appeal from Belize on the issue of the onus of proof in provocation cases, for instance, the Privy Council favourably commented that the decision that the onus should lie on the prosecution would "bring Belize into line with other Commonwealth countries of the Caribbean."[80]

---

77 See Leckey, *supra* note 40 at 36.

78 Esin Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, vol 59, Nederlandse Vereniging voor Rechtsvergelijking [Dutch Association of Comparative Law] (Deventer: Kluwer, 1999) at 37.

79 *Ibid* at 35. Settled territories were those without a previous European ruler, while ceded territories referred to lands that were conquered or ceded by a previous European colonizer. These categories were therefore decidedly Eurocentric—Indigenous legal traditions and systems were ignored so that in the absence of an imperial power, the land was considered *terra nullius*. See *Mabo v Queensland (No 2)*, [1992] HCA 23 at paras 31–46.

80 *Vasquez v R*, [1994] 1 WLR 1304 at 1314, [1994] 3 All ER 674 (PC, Belize).

There has, over time, been recognition that complete harmony among common law countries is unrealistic, as countries become more experienced and confident in the interpretation of their own constitutions in line with local circumstances that prevail in their jurisdictions. Accordingly, the Privy Council in *Invercargill City Council v. Hamlin* acknowledged the wisdom of the New Zealand Court of Appeal's departure from English law in the field of negligence.[81] The Privy Council even painted diversity within the common law as a strength:

> The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.[82]

In spite of this recognition of the need for, and desirability of, divergence among common law countries in some legal fields, there remain judicial expressions of support for common law unity. Lord Reed has recently argued that "in a globalised world, there are practical advantages in the common law jurisdictions achieving a degree of coherence and consistency in their case law."[83] As recently as 2014, the UK Supreme Court expressed a desire for harmonization:

> As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.[84]

The Court thereby expressed a preference for harmonization but more importantly emphasized the importance of common law countries learning from each other. This tempered, modern expression of common law unity is more relevant today. This vision correctly recognizes the value in the common law's adaptability to divergent and changing circumstances.[85]

There is strong evidence of continuity in interpretive techniques and methods across jurisdictions with codified constitutions and those with

---

81 [1996] AC 624 at 624, [1996] 1 All ER 756 (PC, NZ).

82 *Ibid* at 640.

83 Robert Reed, "Comparative Public Law in the UK Supreme Court" in Elliott, Varuhas & Stark, *supra* note 49, 243 at 248.

84 *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45 at para 45.

85 The impact of secession from Privy Council jurisdiction has resulted in a tempered approach that can be described as "respect and evolution." The treatment of Privy Council decisions by the Caribbean Court of Justice, for instance, has included a balance of acceptance of a generally generous interpretive approach to human rights and a more skeptical approach to pre-colonial laws. See e.g. *Nervais v R*, [2018] CCJ 19 (AJ) [*Nervais*]; *McEwan v AG of Guyana*, [2018] CCJ 30 (AJ) at paras 29–34, 41–45 [*McEwan*].

largely uncodified constitutions.[86] The potential for common law constitutionalism to exert influence through and alongside a written constitution was observable as early as the adoption of the Constitution of the United States. James Stoner has explained that the US Constitution's innovations, including the separation of powers and a bill of rights, were part of a reform of the legal order rather than a replacement.[87] Even "in adding the Bill of Rights, they gave written constitutional status to numerous common law privileges and immunities, summed up in the phrase 'due process of law.'"[88] Moreover, the US Constitution and subsequent constitutions in common law countries were enacted against a background of common law traditions and norms. This background helps to shape the textual provisions of a written constitution and contributes to the meaning given to those provisions through constitutional interpretation. It is through interpretation that the real meaning of the text comes forth, and in this sense the common law animates the words of the constitution.[89]

Common law unity continues to be sustained by comparative engagement between jurisdictions. However, the historical origins of the transnational spread of the common law complicate both judicial engagement with, and academic analysis of, common law doctrine and methods. In post-colonial jurisdictions there is an inherent challenge in placing reliance on a legal tradition that is itself bound up with colonialism.[90] In the United Kingdom, the (post-)colonial shadow arguably persists in preferences expressed through the selection of comparator jurisdictions. A rise in constitutionalist legislation in the UK from the late twentieth century—in part occasioned by the *European Convention on Human Rights*, membership of the European Union, and devolution of power to the regions of Scotland, Northern Ireland, and Wales—has substantially enlarged the constitutional responsibilities of the judiciary. In discharging its increased constitutional duties, the UK House of Lords and subsequently the UK Supreme Court have proved to be receptive to foreign judgments, particularly in its human rights decisions.[91] The appeal of a common legal family and common language can be seen in the selection of common law countries, with

---

86 See Leckey, *supra* note 40 at 18–19.

87 See James R Stoner Jr, "Natural Law, Common Law and the Constitution" in Edlin, *supra* note 20, 171 at 177.

88 *Ibid*.

89 See Allan, "Text, Context and Constitution", *supra* note 20.

90 See Alastair Pennycook, *English and the Discourses of Colonialism* (London, UK: Routledge, 1998) at 60–62; Tracy Robinson, "Gender, Nation and the Common Law Constitution" (2008) 28:4 Oxford J Leg Stud 735 at 739–44.

91 See Hélène Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart, 2018); John Bell, "Comparative Law in the Supreme Court 2010–11" (2012) 1:2 Cambridge J Intl & Comparative L 20 at 24.

Elaine Mak observing that "sources most often referred to come from Commonwealth legal systems and from the US legal system."[92] The very willingness of UK courts to invoke judicial decisions from other common law jurisdictions evinces some openness to learning from those countries. This suggests an acknowledgement that former colonies may have useful knowledge to impart to British institutions. While receptivity to an exchange of knowledge from the "New World" to the Old may superficially appear to disrupt colonial relationships, further interrogation of comparative exchanges within the common law world suggests that colonial dynamics have not been completely unsettled. In explaining the utility of comparative law in the public law field, Lord Reed referred predominantly to Canada, Australia, New Zealand, and the United States of America, observing that

> the court in the common law world whose judgments are most frequently cited to us in public law cases is the Canadian Supreme Court: its *Charter jurisprudence applies similarly worded guarantees to those of the ECHR* in the context of a broadly similar system of government and law to our own.[93]

The italicized phrase suggests that the Canadian *Charter of Rights and Freedoms* is drafted in similar terms to the ECHR. However, there are significant differences between the two instruments, particularly in their treatment of limitations on rights guarantees. Moreover, multiple rights instruments in Africa and the Commonwealth Caribbean were drafted using the ECHR as a direct or indirect model.[94] Indeed, the ECHR served as a model for the Nigerian *Bill of Rights*, which then became the model for bills of rights in other newly independent anglophone states.[95] While the Canadian *Charter* of 1982 was influenced by international instruments that include the *European Convention*, bills of rights in the Global South that were specifically modelled on the ECHR bear at least as many similarities with that instrument as the Canadian *Charter*. Lord Reed's articulation of the Supreme Court's preference for Canadian jurisprudence therefore requires further interrogation. The preference for Canada may also lie in Lord Reed's approval of references to "developed countries" and "courts in broadly comparable societies, such as Canada and the United States."[96] The persistent imbalance in jurisdictional citations and influence undercuts a narrative that judges are engaged in "dialogue," as the term dialogue

---

92 Elaine Mak, "Why Do Dutch and UK Judges Cite Foreign Law?" (2011) 70:2 Cambridge LJ 420 at 436.

93 Reed, *supra* note 83 at 252 [emphasis added].

94 See Charles OH Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford: Oxford University Press, 2007) at 17–18.

95 See *ibid* at 17.

96 Reed, *supra* note 83 at 247, 248.

implies a mutual flow of information and ideas. Accordingly, a tendency toward common law unity and harmonization does endure, but what also endures is a tendency toward hegemony in transnational interactions. Awareness of this hegemony and continuing reflection on the factors that influence it must colour our assessment of the transnational dimension of the common law.

Enduring inclinations toward common law harmonization are cultivated in part by the common threads between written and unwritten constitutionalism, as explored in Part II. The commonalities between these two models enable similar methods to exert relevance in jurisdictions across the spectrum from unwritten to written constitutionalism. The transnational spread of common law constitutionalism despite the advance of written constitutionalism is also facilitated by the reality that constitutions and constitutional statutes do not provide an exhaustive guide to the methods that may be employed to elucidate their meaning. This provides interpretive space to courts to make judgments about the techniques that may be used to give concrete expression to the constitutional values embodied in text. Further, methodologies, which are less influenced by specific moral conclusions, are capable of adaptation to suit a variety of constitutional contexts and moral preferences. Methodological techniques are accordingly well suited to facilitate continued harmonization of the common law and play a substantial role in enabling the growth of common law constitutionalism across jurisdictional barriers. The following section explores the contribution of two techniques to the endurance and transnational dimension of common law constitutionalism.

B. Principle of Legality and Implication of Constitutional Principles

Through judicial recognition that statutes are enacted against a background of constitutional norms that constrain the meaning and implications of legislation, courts sustain methodological connections across borders.[97] Prominent among techniques that influence and foster the retention of common law constitutionalist practices across jurisdictions are the principle of legality and the implication of constitutional principles. The principle of legality finds its most meaningful operation in jurisdictions with significant constitutional lacunae—countries with an uncodified constitution (e.g., the UK and New Zealand) and countries without a constitutional bill of rights (e.g., Australia). The interpretive principle serves to bring such countries closer to jurisdictions with more comprehensive codified constitutions (such as Canada). Simultaneously, the implication of unwritten constitutional principles into codified constitutions keeps the latter group of countries connected to common law constitutionalism. As an archetypal

---

[97] See TRS Allan, "In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law" (2009) 22:1 Can JL & Jur 187 at 198 [Allan, "In Defence"].

common law technique, reasoning by principle inherently connects constitutionalism to the common law system. This intrinsic connection is furthered by judicial references to legal history or modern comparative sources to develop the contours of the interpretive technique or the content of norms applied through the technique. Through the continuing and transnational operation of interpretive methodologies such as the principle of legality and implying constitutional principles, common law norms continue to exert influence in constitutional development in the common law world.

1. Principle of Legality

Legislation is subjected to the constraints of common law through the principle of legality, which encapsulates a presumption that legislation is not meant to violate fundamental rights or fundamental constitutional principles.[98] Express and clear words are required to override the presumption of consistency and authorize interference with constitutional fundamentals.[99] While the principle of legality is most often deployed in defence of fundamental rights, and while it has been said that "the catalyst for the contemporary renaissance for the principle of legality can be traced to '[t]he rise and rise of human rights,'"[100] the presumption has a broader remit. It also seeks to protect fundamental constitutional principles. The plurality judgment of the UK Supreme Court in *R (Evans) v. AG*[101] has been useful in this regard, as it mobilized the principle of legality to interpret a statute against the requirements of the rule of law. *Evans* was the result of litigation initiated by a journalist, Rob Evans, in an attempt to view correspondence between Prince Charles and ministers of government. Evans requested access to the communications under the *Freedom of Information Act 2000* (FOIA), but his request was denied. In response to a challenge to this refusal, the Upper Tribunal ordered disclosure. However, the Attorney General then issued a certificate under subsection 53(2) of the FOIA stating that he had "on reasonable grounds" concluded that the government departments were entitled to refuse disclosure. On appeal to the Supreme Court, it was held that because the Upper Tribunal is "a judicial body ...

---

98 See *R v Home Secretary, ex parte Pierson*, [1997] UKHL 37, [1998] AC 539 at 587–89 [*Pierson*]; *R v Home Secretary, ex parte Simms*, [1999] UKHL 33, [2000] 2 AC 115 at 132 [*Simms*]. A wider understanding of the principle of legality mandates that the state must exercise its powers subject to and in accordance with pre-established law. See also David Dyzenhaus, "The Puzzle of Martial Law" (2009) 59:1 UTLJ 1 at 13; Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28:4 Oxford J Leg Stud 709 at 730–32.

99 See *Coco v R*, [1994] HCA 15 at para 9; *Pierson*, *supra* note 98 at 575; *Simms*, *supra* note 98 at 131.

100 Meagher, "Age of Rights", *supra* note 12 at 453.

101 [2015] UKSC 21 [*Evans*].

which has the same status as the High Court,"[102] the Attorney General's certificate could not be upheld, as that would permit executive override of a judicial decision. Such an override was described as a breach of the rule of law requirements that a decision of a court is binding and cannot be set aside by anyone, including the executive, and that executive decisions are reviewable by a court.[103] Lord Neuberger surveyed judicial exposition of the principle of legality, demonstrating that it encompasses both "fundamental rights" and "basic principles."[104] He was therefore able to find that the FOIA—interpreted in line with the rule of law as applied through the principle of legality—does not authorize the Attorney General to override an Upper Tribunal decision.

The principle of legality's relevance in comparative constitutionalism is reflected in Lord Hoffmann's assertion in *Simms* of the similarities between constitutional interpretation in the UK and constitutionalism as practised in common law countries with codified constitutions:

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[105]

This passage represents a demonstrable "constitutionalization" of the interpretive principle.[106] Lord Hoffmann's description of the principle of legality has come to be viewed in other common law jurisdictions as the "definitive modern restatement of the principle"[107] and his comparison has been cited approvingly by Australian federal courts in *Plaintiff S157*[108] and *Evans v. New South Wales*.[109] Even in countries with codified constitutions, the principle of legality retains force where there is a lacuna in the constitution. Thus, the presumption is activated when courts are required to determine whether legislation should be held to override common law

---

[102] *Ibid* at para 2.

[103] See *ibid* at paras 53–59.

[104] *Ibid* at paras 56–57.

[105] *Simms*, *supra* note 98 at 131.

[106] Young, "Fundamental Common Law Rights and Legislation", *supra* note 13 at 226–29.

[107] Matthew Groves, "The Principle of Legality and Administrative Discretion: A New Name for an Old Approach?" in Meagher & Groves, *supra* note 12, 168 at 168.

[108] *Plaintiff S157/2002 v Australia*, [2003] HCA 2 at para 30 [*Plaintiff S157*].

[109] [2008] FCAFC 130 at para 72.

rights.[110] The absence of a bill of rights from the Australian federal constitution has triggered judicial attempts to subject legislation to rights constraints through the principle of legality.[111] The principle is said to protect a common law bill of rights including the right to property, personal liberty, natural justice, and access to courts.[112] Interpretation therefore thrives as a rights protective process under the principle of legality, underscoring that invalidation through a written bill of rights is only one route to judicial rights protection.

The *Simms* passage undoubtedly underestimated both the impact of constitutions that confer strong powers of judicial review and the limits of common law interpretation within the constraints of parliamentary sovereignty. Nonetheless, Lord Hoffmann did highlight core underlying similarities in the objectives and mechanisms of large *C* and small *c* constitutionalist adjudication.[113] Both the common law principle of legality and judicial enforcement mechanisms under codified constitutions rest on the understanding that legislation must be interpreted against a background of relevant constitutional rights and principles. Where constitutional norms are engaged, the character of interpretation is impacted, with the effect that priority is accorded to the constitutional precept. This dynamic is seen in the operation of the principle of legality in cases such as *Privacy International*, in which Lord Carnwath rejected the government's submission that interpretation of a purported ouster clause should be approached "by reference not simply to a general presumption against ouster clauses of any kind, but rather to careful examination of the language of the provision."[114] Lord Carnwath (joined by Lady Hale and Lord Kerr) explained:

> The main flaw in this argument, in my view, is that it treats the exercise as one of ordinary statutory interpretation, designed simply to discern "the policy intention" of Parliament, so downgrading the critical importance of the common law presumption against ouster.[115]

As Sir Philip Sales has explained, "the effect of the application of the principle is to change what appears to be the natural meaning of a legislative provision."[116] The interpretive exercise then moves along the spectrum from ordinary to constitutional interpretation and the objective is no longer

---

110 See Meagher, "Age of Rights", *supra* note 12 at 451.

111 See *ibid*.

112 See *ibid* at 461. See also Dan Meagher, "The Principle of Legality and a Common Law Bill of Rights: Clear Statement Rules Head Down Under" (2016) 42:1 Brook J Intl L 65 at 68. See e.g. *Saeed v Minister for Immigration and Citizenship*, [2010] HCA 23.

113 See Allan, "In Defence", *supra* note 97 at 198.

114 *Supra* note 68 at para 106.

115 *Ibid* at para 107.

116 Sales, "A Comparison", *supra* note 13 at 605.

simply to discern the intention of Parliament. The court's task becomes determining whether the words can be interpreted consistently with the constitution and, if so, adopting that interpretation.

Both the legality principle and textual interpretive mechanisms embody the presumption that legislation is to be interpreted consistently with the norms of the constitution unless it is impossible to do so.[117] The point of divergence emerges where there is no possible interpretation that achieves consistency with the constitution; when a remedy requires either that the statute lose its validity or be subject to legislative amendment, the common law principle is, under accepted understandings of the constitution, exhausted. The next step taken by the courts then depends on the terms of the written constitution. Yet, this passing of the baton from the common law to textual constitutional provisions does not undermine the transnational relevance of the principle of legality. Rather, the strength of the common law mechanism is revealed in its ability to work in tandem with written constitutional provisions.

While the interpretive power flowing from the presumption of constitutional consistency gives the appearance of judicial empowerment at the expense of legislative will, the constitutional implications of the presumption are more subtle. It embodies both respect for legislative decision-making and respect for the constitution as fundamental law. Moreover, encapsulated in the presumption is the idea that the legislature itself plays a role in maintaining constitutional norms, and as such, does not generally intend to legislate in contravention of those norms. Yet, the legislative intent involved in the principle of legality is constructive rather than a discernment of an actual state of mind:

> [A]scertainment of legislative intention does not involve discovery of an objective, collective mental state but is asserted as a statement of compliance with the applicable principles of construction, both common law and statutory, which are known to parliamentary drafters and the courts.[118]

The requirement is therefore that the legislation make it clear that the legislature has directed its mind to interference with the right or principle in question and decided that the interference should occur.[119] Ultimately, the constitutional role of the legislature is respected by requiring judicial ac-

---

[117] See Alexis Henry-Comley, "The Principle of Legality: An Australian Common Law Bill of Rights?" (2013) 15 U Notre Dame Australia L Rev 83 at 107.

[118] *Lee v New South Wales (Crime Commission)*, [2013] HCA 39 at para 45 [*Lee*]. See also Brendan Lim, "The Normativity of the Principle of Legality" (2013) 37:2 Melbourne UL Rev 372 at 389–94 on the "normative justification" for the principle of legality, which avoids the need for reliance on actual legislative intentions.

[119] See *Lee*, *supra* note 118 at para 314.

ceptance of clear legislative expressions. Accordingly, "[t]he principle provides no licence for a court to adjust the meaning of a legislative restriction on liberty which the court might think unwise or ill-considered."[120] By responding to the sometimes competing imperatives of constitutionalism and legislative will, the principle of legality thereby bridges the gap between parliamentary supremacy and the rule of law.[121] This mediation between constitutional forces that are seen to represent, respectively, political power and legal power is particularly useful in the very countries—including the UK and Australia—in which parliamentary supremacy continues to hold significant sway despite the rising tide of constitutionalism and human rights.

Despite its valuable contribution to constitutional interpretation in multiple common law jurisdictions, the principle of legality faces serious contention over its core features. First, while the principle seeks to vindicate fundamental constitutional norms, it lacks a definitive list of prevailing rights and principles. Second, once applicable norms are identified, there remains vagueness about their content. Vagueness is, however, not unique to common law norms, as constitutional concepts carry with them an inevitable level of vagueness. Third, it is unclear whether a constitutional norm is entirely displaced by clear words or whether there should be a proportionality analysis to determine the permissible extent of interference with the norm.[122] Finally, while the principle requires clear expression of legislative intention to override conflicting fundamental common law norms, the degree of clarity demanded of statutory language is itself subject to debate. Specifically, the clarity required by the principle of legality can refer to one of two options—clarity could be understood as the use of unambiguous words, or it could be understood as the use of words specifically expressing an intention to override a specified right or principle.[123] *Evans* exhibits the constitutional significance of the debate over the clarity of statutory language in applying the principle of legality.[124] In the view of critical commentators, section 53 of the FOIA clearly authorized the Attorney General to override decisions of the Information Commissioner or the Tribunal, so the effect of the plurality's restrictive interpretation was to

---

[120] *North Australian Aboriginal Justice Agency Limited v Northern Territory*, [2015] HCA 41 at para 81.

[121] See Alison Young, "*R (Evans) v Attorney General* [2015] UKSC 21: The Anisminic of the 21st Century?" (31 March 2015), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org> [perma.cc/6Z3G-CVWW].

[122] See Meagher, "Proportionality", *supra* note 12 at 114. *Cf UNISON*, *supra* note 3 at paras 88–89.

[123] See Francis Cardell-Oliver, "Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality" (2017) 41:1 Melbourne UL Rev 30 at 48–54.

[124] See *supra* note 101.

"render the clear language of a statute utterly insignificant."[125] However, the interpretive disagreement between Lord Neuberger and critics of *Evans* can be explained in part by disagreement over what constitutes "clarity." For Lord Neuberger, it would appear that legislation had to specifically state that the Attorney General was empowered to override a Tribunal decision. On this view, clarity required specificity as to the constitutional interference authorized and not merely a lack of ambiguous words. Since the statute did not contain specific permission to override a judicial decision, the clarity threshold was not met.

Despite lingering areas of opacity surrounding the principle of legality, the interpretive principle remains valuable; it mediates between norms of political and legal constitutionalism within jurisdictions while facilitating the reach of common law constitutionalist reasoning across jurisdictions. Indeed, the unresolved features of the interpretive technique allow space for judges to apply the principle within the context of their respective jurisdictions, with sensitivity to differing normative and institutional imperatives. That room for judicial adaptation is useful in permitting the relevance and utility of the principle of legality across a range of jurisdictions.

2. Implication of Constitutional Principles

While the principle of legality serves to bring unwritten constitutionalism closer to written constitutionalism, the implication of constitutional principles injects elements of unwritten constitutionalism into codified constitutions. The Supreme Court of Canada has embraced this practice, having recognized an "internal architecture" of the Constitution informed in part by foundational constitutional principles, including democracy and the rule of law.[126] These principles informed the Court's opinion on the legality of unilateral secession by Quebec and, more recently, the constitutional requirements for reform and abolition of the Senate.[127] Though implied constitutional principles are substantive norms that act upon the reasoning and resolution of judicial decisions, invocation of such principles results from the technique of implication. Implication is an active process that involves locating and incorporating relevant principles into a constitutional text. The process of implication can occur in at least five ways. First, the equivalence method observes terms within a constitutional text that are synonymous with the constitutional principle.[128] Second, provisions in a constitutional text are sometimes construed as expressions or

---

[125] Michael Gordon, "The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond..." (2016) 27:3 King's LJ 333 at 340.

[126] See *Reference re Senate Reform*, 2014 SCC 32 at paras 25–26 [*Senate Reference*].

[127] See *Secession Reference*, *supra* note 28; *Senate Reference*, *supra* note 126.

[128] See e.g. *Thomas v Baptiste* (1999), [2000] 2 AC 1 at 22, [1999] 3 WLR 249 (PC, Trinidad and Tobago) [*Baptiste*].

manifestations of a constitutional principle.[129] Third, principles can be implied by reference to the structure or architecture of the constitution.[130] Fourth, principles are identified in non-justiciable[131] sections of the constitutional document, such as preambles or directive principles.[132] Finally, courts locate principles in the unwritten English constitution, elements of which have become embedded in other common law countries as a consequence of colonial rule.[133]

Reasoning by principle is embedded within the common law method. As "relatively general standards,"[134] principles are able to explain the existence of more specific standards. Indeed, for common lawyers, "[r]ules of law explicitly recognized in cases were taken to be evidence of a comprehensive body of legal principle."[135] The rule of law, for example, can serve as a basis for the relatively more specific rule that individuals must have access to court to claim their legal interests and rights. The generality of principles also helps to explain their ability to speak across jurisdictional boundaries and to develop their content in part through comparative judicial engagement. By supplying underpinning explanations for a range of constitutional rules, principles help constitutional actors make sense of these rules and their interaction. Principles thereby justify the rules of the constitution and contribute to coherence within the legal system.[136] Principles that have been employed in this fashion include the rule of law, separation of powers, judicial independence, democracy, and equality.[137]

The separation of powers, alongside judicial independence, has been invoked in interpreting codified constitutions. Separation of powers is seen as a core component of the "Westminster model of written constitutions,"

---

[129] See e.g. *Leeth v Australia*, [1992] HCA 29 at para 7; *Plaintiff S157*, *supra* note 108 at paras 92–104. See Jeffrey Goldsworthy, "The Implicit and the Implied in a Written Constitution" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2018) 109 at 124–26.

[130] See *Hinds*, *supra* note 26 at 213; *Senate Reference*, *supra* note 126 at paras 25–26.

[131] "Non-justiciable" in this sense means that the constitutional document is not interpreted as conferring jurisdiction on the courts to provide relief for a breach.

[132] See e.g. *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 750, 19 DLR (4th) 1 [*Manitoba Language Rights*].

[133] See *ibid*; Wheatle, *Principled Reasoning*, *supra* note 27 at 19.

[134] Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass: Harvard University Press, 1988) at 80.

[135] Walters, "The Unwritten Constitution", *supra* note 21 at 35.

[136] See Sales, "Context and Method", *supra* note 10 at 54–59.

[137] See *R (Purdy) v DPP*, [2009] UKHL 45; *AG v Joseph*, *supra* note 51; *Australian Communist Party v Commonwealth*, [1951] HCA 5, 83 CLR 1 at 193; *Hinds*, *supra* note 26; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3, 155 DLR (4th) 1; *Ghaidan*, *supra* note 46; *Trial Lawyers*, *supra* note 30.

more concretely expressed in the separation and independence of the judiciary from executive and legislative organs.[138] While the UK, the seat of Westminster, was slow to give full-fledged recognition or normative force to the separation of powers, the principle has become more explicitly embraced by British judges and has been utilized to grapple with the demands of independent and impartial adjudication pursuant to Article 6 of the *European Convention on Human Rights* as applied domestically through the HRA.[139] The ascendance of separation of powers reasoning in the UK is reflected in Lord Steyn's observation in *R (Anderson) v. Home Secretary* that "Article 6(1) requires effective separation of powers between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be exercised by the courts."[140] Even prior to the HRA's implementation, the House of Lords referred to the "constitutional principle of separation of powers" in addressing the Home Secretary's power to fix minimum detention periods for life sentence prisoners.[141] Moreover, judicial characterization of separation of powers imperatives highlights values that transcend national borders. In this vein, the Caribbean Court of Justice has explained that "[a]pplication of the separation of powers doctrine upholds the Constitution, advances the rule of law and promotes the description of Belize as 'a sovereign democratic state.'"[142] Specifically, in *Belize (AG) v. Zuniga*, the court explained the relationship between the implied separation of powers principle and the written constitution:

> [I]n the post-independence Anglophone Caribbean the doctrine of the separation of powers derives its force from the fact that the fundamental law upon which the legal order rests, i.e. the Constitution, disperses the power of the sovereign State among various branches.[143]

More demonstratively, courts in the common law world connect the rule of law to foreign or universal imperatives. Accordingly, Lord Neuberger in *Evans* expressed a global view of the rule of law requirement that court decisions be respected, by claiming that a "statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United

---

138 See *Fuller v Belize (AG)*, [2011] UKPC 23 at paras 38–41; *Mauritius v Khoyratty*, [2006] UKPC 13 at paras 12–18.

139 See Roger Masterman & Se-shauna Wheatle, "Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the UK Constitution" [2017] 3 Public L 469 at 478–81.

140 [2002] UKHL 46 at para 40.

141 See *R v Home Secretary, ex parte Venables*, [1997] UKHL 25, [1998] AC 407 at 526.

142 *Belize (AG) v Zuniga*, [2014] CCJ 2 (AJ) at para 40 (Saunders J).

143 *Ibid*.

Kingdom."[144] The question was thereby placed within a global context, and the court's interpretation could consequently be construed as consistent with a wider constitutionalist tradition. There is a similar pattern discernible in the Privy Council's description of protection of due process of law in the Constitution of Trinidad and Tobago as inclusive of respect for rule of law, which in turn upholds "universally accepted standards of justice."[145] By implying into statutory or constitutional text principles that are described as common to constitutionalism itself and the very bedrock of justice accepted throughout the constitutional world, judges subtly indicate their engagement in a transnational constitutionalist tradition. At times, the common law connections are made explicit, as in the Caribbean Court of Justice's claim that the rule of law "incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England."[146] Indeed, the interpretive relevance of the idea that the rule of law in a basic and universally understood sense requires the presence of law, which underpinned the *Manitoba Language Rights Reference*, was also justified by its place in the common law constitution inherited from England.[147] The court could accordingly conclude that while a large swath of the province's legislation had contravened mandatory language requirements, the rule of law required that the court confer temporary validity on the laws to avoid a vast legal vacuum.

Yet there are issues that complicate the implication of unwritten constitutional principles and are raised as a challenge to the legitimacy of this practice. This article does not seek to address or respond to these challenges in detail, as the objective of the article is to show the centrality of methodology to common law constitutionalism, rather than to debate or establish the legitimacy of the methods used. However, three main issues can be briefly outlined. First, as with the principle of legality, the contested nature and vagueness of the principles being applied is ever-present. Accordingly, the very appeal of principles in the cross-jurisdictional sphere—their general, abstract nature—simultaneously emerges as a challenge to their legitimacy. Jean Leclair, for instance, cautions that the abstract nature of unwritten constitutional principles creates the risk that courts will sculpt the content of these principles to suit judicial preferences.[148] However, the inherent vagueness and contestability of the most common and

---

144 *Evans*, *supra* note 101 at para 51.

145 *Baptiste*, *supra* note 128 at 21.

146 *Nervais*, *supra* note 85 at para 43. This understanding of the rule of law has influenced the court's decision that a law forbidding cross-dressing in public for "an improper purpose" was unconstitutionally vague (see *McEwan*, *supra* note 85 at paras 80–85) and that the mandatory death penalty was an unconstitutional violation of the right to protection of the law (see *Nervais*, *supra* note 85 at paras 43–45).

147 See *Manitoba Language Rights*, *supra* note 132 at 750.

148 See Leclair, *supra* note 11 at 431.

fundamental constitutional norms suggests that this worry is not primarily about the method employed in using unwritten principles, or even unique to unwritten principles themselves. Vagueness is inextricably tied to constitutionalism and constitutional adjudication.[149] More pertinent are unsettled practices regarding legitimate methods of implication and the function played by the principle once implied. The purpose of interpretation is to ascertain the meaning of the text, and consequently, implication methods should be geared toward that objective.[150] All five main methods of implication can be employed as means of discovering the intent or meaning of the constitutional instrument, and much depends on the judges providing justification for the method employed within the context of the respective constitution. Ultimately, judicial choice is involved in adopting a method of implication and determining what principles should be employed. Such choices can also reflect deeper—substantive—views on the part of judges regarding the relationship between written constitutional text and unwritten norms as well as relative institutional roles of the judiciary and the legislature. Variations in judicial approaches to implication can therefore sometimes reflect different value commitments between judges and between judicial cultures across jurisdictions.[151] However, again, judicial choice is unavoidable in constitutional interpretation, as constitutional interpretation requires "substantive evaluation"[152] of vague terms.

Finally, the use to which the principle is put—primarily either as an interpretive aid or as a basis for invalidating legislation—is subject to debate. Using principles as interpretive aids is more generally accepted, as such use poses fewer challenges to both the text of the constitution and democracy. Where, however, legislation is struck down for contravention of an implied constitutional principle, the principle can be seen as sidelining the constitutional text, subverting democratic will, and aggrandizing judicial power. Importantly, however, this use of constitutional principles is not the inevitable result of implication of constitutional principles—it only arises in few jurisdictions and pursuant to a limited subset of principles.[153] The upshot in relation to the method of implication and the specific use of

---

149 See James B Kelly & Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" (2001) 16:1 CJLS 3 at 10–12.

150 *Cf* Goldsworthy's distinction between "clarifying interpretation" and "creative interpretation" in Goldsworthy, *supra* note 129 at 110–12.

151 See Rosalind Dixon & Gabrielle Appleby, "Constitutional Implications in Australia: Explaining the Structure—Rights Dualism" in Dixon & Stone, *supra* note 129, 343 at 362–67; Mark Carter, "The Rule of Law, Legal Rights in the *Charter*, and the Supreme Court's New Positivism" (2008) 33:2 Queen's LJ 453 at 468–70, 472–75.

152 Aileen Kavanagh, "The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998" (2004) 24:2 Oxford J Leg Stud 259 at 265.

153 See Wheatle, *Principled Reasoning*, *supra* note 27 at 184–89.

unwritten principles is that the practice of implying principles into constitutional text offers a range of options for constitutional interpretation and can thereby be adapted to fit the institutional and wider constitutional context of the relevant jurisdiction. The core of the practice is a familiar method in common law jurisdictions, and the specific contours of the practice in each jurisdiction can be determined and adjusted in accordance with the features of respective constitutions.

V. Coherence and Common Law Methods

The prevalence and development of common law constitutionalist methods may, however, present a challenge to the coherence of the common law. As stated in Part II of this article, the common law is sustained by coherence among its constituent parts. Yet, an imbalance between methodology and substantive norms has been identified as a flaw in the advance of common law constitutionalism in the UK.[154] While the traditional incrementalism of the common law restrains the growth of doctrine and substantive principle, it does not exert the same restrictions on methodology. The result is that though the content of the law must evolve slowly, methods continue to blossom and expand in reach while the principles and rules being applied by interpretive methods see relatively little development and definition. The result is a lack of definitional certainty to the content of the law that is being funnelled through increasingly powerful interpretive techniques.[155] While such imbalance challenges the integrity of internal domestic constitutional law, the potential difficulties prompted by methodology outstripping substantive norms is less pressing for the transnational flow of common law constitutionalism. There is relatively little imperative for the content of constitutional norms to be concretely developed across states, as each jurisdiction retains relative freedom to create and adjust the moral content of its constitutional laws in accordance with the textual, institutional, and cultural context of each respective jurisdiction.

A more pressing challenge for the coherence of common law methods and the internal coherence of the constitutions of which they form part is the clarity of the mechanisms themselves. Both the principle of legality and the implication of constitutional principles include elements that are susceptible to varying interpretations and call for evaluative judgment. While interpretive methods are free of some of the moral contestation that accompany substantive norms, they are not completely free of evaluative choices. For instance, both methods rely on judicial assessments of which principles qualify as constitutional. Accordingly, to legitimize the techniques being employed by courts, judges must articulate "a defined and defensible legal

---

[154] See Masterman & Wheatle, "Unity, Disunity and Vacuity", *supra* note 49 at 130–35.

[155] See the limited attention to the content of the rule of law in *Jackson*, *supra* note 62 at paras 107 (Lord Hope), 159 (Lady Hale).

methodology to protect against the accusation that they are illegitimately imposing their own idiosyncratic values in the interpretation of legislation."[156]

Further, each technique also challenges the role of parliamentary intention and parliamentary will within constitutional interpretation.[157] The appropriate respect to be afforded to the legislature in constitutional adjudication has never yielded simple answers; the constitutional project is at the very least agnostic about the effect of legislative will in the face of constitutional requirements. The tension between constitutional precepts and legislative will is heightened when the precept relied upon to moderate or trump legislation is not expressed in the text of a constitutional document. These methodological techniques can accordingly be seen to pose additional challenges to the democratic consistency of constitutional review. Nonetheless, the broad acceptance of the use of these constitutional methods—despite debate regarding their normative effect and which principles should qualify as constitutional—means that the task for courts is to shape the specifications of these techniques by according due respect to both democratic and constitutional imperatives. The solution, in sum, is to work toward coherence within the constitutional system. The adaptability of both techniques and constitutional principles allows for that coherence to be achieved within each jurisdiction and for the mechanics of the techniques and the substance of principles to be continually developed and adjusted to meet the evolving constitutional context of a variety of common law states.

The transnational dimension of common law constitutionalism—particularly the commonality of methods across jurisdictions—can aid in both the internal reasonableness of this model of constitutionalism as well as its acceptance by other constitutional actors. The use of familiar methods by multiple jurisdictions solidifies their place within constitutional adjudication in common law states. Moreover, engaging with other jurisdictions and other judges provides a ready and continual means of checking or measuring the appropriateness of these methods and updating their use in light of new thinking and new information. This form of comparative engagement speaks to Jeremy Waldron's view that judicial comparativism contributes to the rationality of judicial decision-making on human rights issues.[158] For Waldron, rationality—in the sense that likes should be treated alike—is enhanced by judges examining case law from other jurisdictions when those cases address similar issues. The underpinning idea here that similar

---

156 Rt Hon Lord Justice Sales, "Modern Statutory Interpretation" (2017) 38:1 Stat L Rev 125 at 131.

157 Note, however, that constitutional principles may also protect or enhance parliamentary power, as seen in the nullification of the UK government's attempted prorogation of Parliament in the *Miller & Cherry* litigation (*supra* note 32).

158 See Jeremy Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (New Haven: Yale University Press, 2012).

issues arise in multiple jurisdictions, thereby making their resolution in other countries relevant, has force in relation to engagement with both substantive law and methods.

Conclusion

Exclusive focus on substantive law without attention to the impact of common law methodology in shaping rights and other constitutionalist developments would produce a limited understanding of the common law as a constitutional and transnational force. Methods and processes facilitate much of the endurance, transferral, and adaptability of common law constitutionalism. The similarities of common law and statutory judging mean that adjudication under written constitutional instruments cannot be entirely separated from common law adjudication. Moreover, the influence of path-dependent outcomes and institutional culture result in the continuing influence of embedded common law practices and attitudes beyond the adoption of written constitutionalism. Accordingly, this article argued that the continuing influence of embedded methodological techniques within common law jurisdictions helps to sustain common law constitutionalism both within and across jurisdictional boundaries.

Reflection on the development and use of two particular techniques—the principle of legality and the implication of constitutional principles—highlights the role of methods in common law constitutionalism but also reveals some of the challenges that arise. In particular, these methodological practices provoke fundamental questions about the relative relationship between written constitutions and unwritten norms and between the judiciary and political branches. Yet, neither the use of these methods, nor common law constitutionalism itself, is meant to ultimately resolve these persistent questions. Nor does common law constitutionalism seek to replace legislative power with judicial supremacy. However, there is bound to be continuing disquiet about the role of judges in using these methods to apply unwritten norms alongside a written constitution. The unwritten source of the limits being applied by judges to political decision-making under common law constitutionalism presents a problem of democratic legitimacy and accountability that has not been sufficiently resolved. While this article did not seek to tackle this issue, it is hoped that the analysis it develops will contribute to the debate on the appropriate role of the common law constitution and the judiciary in modern constitutional states in the common law world.