

## CONSTITUTIONAL CHANGE AND WADE'S ULTIMATE POLITICAL FACT

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The doctrine of parliamentary sovereignty in the United Kingdom may be alive but it is not exactly well. Over the last 40 years, the notion, most clearly articulated by Albert Venn Dicey at the end of the nineteenth century, that Parliament may make binding law on any question whatsoever has been buffeted by various political and judicial developments and attacked by numerous academic commentators.<sup>1</sup> Looking back, the 1950s might seem to have been a sort of golden age of the doctrine. But the first line of Sir William Wade's great article, 'The Basis of Legal Sovereignty', published in 1955, declared that a recent judgment had 'turned the thoughts of many lawyers to the subject of legal sovereignty'. Dicey's 'classic exposition', he said, 'is now widely controverted'.<sup>2</sup> Wade's immediate focus was the judgment of the Appellate Division of the Supreme Court of South Africa in *Harris v Minister of the Interior*, issued in March 1952.<sup>3</sup> That court held that the Parliament of South Africa could not, by ordinary legislation, change the law on the registration of 'non-European' voters in the Cape Province. This legislation was part of an unrelenting attempt to reduce the electoral influence of non-whites. The Appellate Division held that a law of this kind could only be enacted by the special procedure explicitly prescribed for such measures in the *South Africa Act 1909*, the United Kingdom statute that operated as South Africa's constitution. This procedure called for a two-thirds majority vote of the two houses of Parliament sitting together.<sup>4</sup> Further trouble for parliamentary sovereignty was signalled the following year, in *MacCormick v Lord Advocate*. The Scottish Court of Session had rejected a challenge to the legal effectiveness of the *Royal Titles Act 1953*, that had relied on the statute's claimed inconsistency with the 1707 Treaty of Union between Scotland and England.<sup>5</sup> While agreeing that the petition should be rejected, Lord President Cooper, indulging in an extended dictum, doubted that 'the Parliament of Great Britain should be "absolutely sovereign" in the sense that that Parliament should be free to alter the Treaty at will'. Wade quoted from Cooper's judgment on the first page of his article. He went on to list several academic commentators who had predicted that the Diceyan 'bedrock will turn out to be quicksand'.<sup>6</sup> So the validity of Parliament's claim to the right to 'make or unmake any law whatever' was indeed in the air in 1955.<sup>7</sup> The burden of Wade's exposition was to rehabilitate the rule and, at the same time, to provide a new explanation for it.

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<sup>1</sup> I summarized some of these developments in Richard S Kay, 'Changing the UK Constitution: The Blind Sovereign' in Richard Rawlings, Peter Leyland, and Alison Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (2014) 98.

<sup>2</sup> H W R Wade, 'The Basis of Legal Sovereignty' [1955] *Cambridge Law Journal* 172, 172.  
<sup>3</sup> (1952) 2 SA 428.

<sup>4</sup> The term 'non-European' referred to voters of mixed race and to Asian voters. A clear summary of the judgment is provided in Erwin N Griswold, 'The "Coloured Vote Case" in South Africa' (1952) 65 *Harvard Law Review* 1361. Black South Africans had been denied any vote in ordinary elections since 1936. *Representation of Natives Act 1936* (SA) (No 12).

<sup>5</sup> 1953 SC 396. In particular, the petitioners objected to an implied authorization for Queen Elizabeth to add 'the second' to her title as queen of the United Kingdom. See *ibid* 405-06.

<sup>6</sup> Wade, above n 2, 173.

<sup>7</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics

In 1955 Wade was 37-year-old law don at Trinity College, Cambridge. In 1961 he was to leave Cambridge for a chair in English Law at Oxford. (He returned to Cambridge in 1978). In the same year he published the first edition of what ultimately would become his magisterial treatise on administrative law, a subject on which he would exert a profound and permanent influence. He continued to be a respected and prolific scholar until his death in 2004.<sup>8</sup> ‘The Basis of Legal Sovereignty’ remains one of his most important and enduring contributions to constitutional law. One recent monograph refers to Wade’s argument as ‘classic’, ‘crucially informing certain approaches to parliamentary sovereignty’.<sup>9</sup> Another calls Wade ‘Dicey’s most powerful apologist’ and declares ‘The Basis of Legal Sovereignty’ to be ‘one of the most frequently cited [articles] in British constitutional law and theory’.<sup>10</sup> A recent public law textbook says the article ‘form[s] one of the foundations of the current debate on parliamentary supremacy’.<sup>11</sup> As one senior judge put it, it ‘remains for many the classic exposition of sovereignty theory in the British context’.<sup>12</sup> Wade’s striking contribution in that essay was to provide a new and forceful interpretation of the foundational rule of parliamentary sovereignty in the British legal system. He argued that the doctrine was not – and could not be – a mere rule of law. It was finally an ‘ultimate political fact’. Wade’s explanation had wider applicability. It demonstrated in a particularly clear way that *all* law must finally depend on a non-legal foundation.

## I WADE AND JENNINGS

Wade’s first object was to demonstrate, notwithstanding certain apparently contrary indications, that parliamentary sovereignty was still securely recognized in the United Kingdom legal system. He cited strong dicta in several judicial cases confirming the doctrine and he distinguished those judgments (including *Harris*) that had been argued to represent a different position.<sup>13</sup> Mainly, however, he sought to rebut the statements of academic commentators who had cast doubt on the intrinsic logic of the illimitability of parliamentary authority. Foremost among the academic sceptics he discussed was Sir Ivor Jennings just arrived at Cambridge from 13 years at the University of Ceylon. Jennings had addressed the subject in his treatise, *The Law and the Constitution*. He had argued that if parliamentary authority were truly plenary, it must include the capacity to make laws specifying how Parliament’s power could be exercised. Although recognition of such a parliamentary authority was in this version limited to ‘manner and form’ rules, it would, Wade noted, ‘swallow up the rule’ of

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1982) 3–4.

<sup>8</sup> Jack Beatson, ‘Obituary: Sir William Wade’, *The Guardian* (online), 24 March 2004 <<http://www.theguardian.com/news/2004/mar/24/guardianobituaries.highereducation>>.

<sup>9</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution*, 6. See 75-89 contesting Wade’s account.

<sup>10</sup> Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (2005) 20, 93.

<sup>11</sup> Lisa Webley and Harriet Samuels, *Complete Public Law* (2015) 226.

<sup>12</sup> Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (2003) 229.

<sup>13</sup> He devoted particular attention to *AG for New South Wales v Trethowan* [1932] AC 526 (‘*Trethowan’s Case*’) in which the Judicial Committee of the Privy Council had held that section 5 of the *Colonial Laws Validity Act 1865*, prevented the New South Wales legislature from repealing a statute which according to its own terms, was unrepealable except with the concurrence of a referendum. *Trethowan’s Case* was, at the time, a favorite citation for critics of the ‘continuing’ version of the sovereignty of the Westminster Parliament. Wade, above n 2, 181-182.

parliamentary sovereignty in its substantive aspect as well. Any law could be entrenched beyond change by requiring 'any repealing act to be approved by, say, ninety percent of the electors in a referendum'.<sup>14</sup>

Apart from showing that Jennings' hypothesis had had no success in the decisions of courts,<sup>15</sup> Wade attacked what he took to be a necessary assumption of Jennings' argument, namely that the permanent power of parliament was itself merely another legal proposition and, therefore, it was subject to parliamentary revision. He denied that parliamentary sovereignty was properly called a rule of law at all. In this he relied on the reasoning of Sir John Salmond in his treatise on jurisprudence.<sup>16</sup> In a famous example, Salmond demonstrated that every chain of legal authorization had finally to end in a non-legal source:

The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only not legal.<sup>17</sup>

That historical rule, Wade explained, was not created by any law-making act and it could not be abrogated by any such act. It was 'first and foremost a political reality', 'the ultimate *political* fact upon which the whole system of legislation depends'.<sup>18</sup> This did not mean that the rule of parliamentary sovereignty could not change, only that it could not change by any kind of legislation. Alteration of the ultimate political fact had to be the result of political change. That is to say it required a *revolution*. Wade cited the British revolutions of the seventeenth century as examples and explained the *Harris* case as an aspect of the revolution in which South Africa had been transformed from a colony into a sovereign state.<sup>19</sup> He used the term revolution advisedly. A revolution might be neither violent nor abrupt. It occurred whenever one set of political facts supporting a legal system was replaced by another.<sup>20</sup>

<sup>14</sup> Ibid 181.

<sup>15</sup> The one clear exception was the statement of the South African court in *Ndlwana v Hofmeyer NO* (1937) AD 229. This was expressly repudiated by the *Harris* court (1952) 2 SA, 436-37. The movement of that court from one understanding of parliamentary authority to an opposing one demonstrated for Wade the essentially political character of the question. Wade, above n 2, 192-93.

<sup>16</sup> Wade cites the tenth edition prepared by Glanville Williams (Wade, above n 2, 187, n 43) but Salmond made the same argument in the second edition published in 1907. See John W Salmond, *Jurisprudence or the Theory of the Law* (2<sup>nd</sup> edition, 1907) §49, 125.

<sup>17</sup> Qtd in Wade, above n 2, 187. If, however, as Peter Oliver has argued, the ultimate rule was 'unresolved, ambiguous or penumbral', its further specification in certain instances might take a more characteristically legal form. Peter C Oliver, 'Changes in the Ultimate Rule of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents and the Importance of Context' (2015) 26 *King's Law Journal* 367, 381-83. See also H L A Hart, *The Concept of Law* (3<sup>rd</sup> edition, 2012), 147-54. This possibility is discussed further below. See text below nn 55-57.

<sup>18</sup> Wade, above n 2, 188. Wade more or less took for granted that the ultimate political fact governing the United Kingdom legal system was – at least at the time he was writing – consistent with the Diceyan conception of parliamentary sovereignty.

<sup>19</sup> Ibid 188-89, 190-93.

<sup>20</sup> But see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999) 245 (hereinafter Goldsworthy, *History*) (arguing this usage is inappropriate for most constitutional change); Oliver, above n 10, 293-94, 315-16 (same). Goldsworthy subsequently argued that changes in the underlying basis of British constitutional law could not properly be characterized as revolutionary because that basis consisted of a kind of 'customary' law and that

One last feature of Wade's picture of the sources of legal power needs to be noted. Although the ultimate facts that support legal authority were political, information about them needed to be inferred from judicial decisions. At the end, the non-legal basis of law was 'in the keeping of the courts'.<sup>21</sup> Wade's attribution of this role to the judiciary, however, was more assumed than argued. This categorical description of this judicial function displayed a certainty that seems incongruous given the essentially political nature of the underlying facts at issue:

This is only another way of saying that it is always for the courts, in the last resort, to say what a valid Act of Parliament is; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts.<sup>22</sup>

Taken by itself, this statement looks like a reference to some *legal* power that is vested in the courts. That impression is reinforced by Wade's further assertion that the courts 'have to decide for themselves . . . what they will recognize as the proper expression of [a] new sovereign power' and that in this decision 'they have a perfectly free choice'.<sup>23</sup> Subsequent commentators have noted the importance of this feature of Wade's argument, one going so far as to describe his position as a 'court-based account of sovereignty and "revolutions"'.<sup>24</sup> In his Hamlyn Lectures, delivered in 1980, Wade recognized that legal revolutions might take the form of outright illegal actions but he also assumed that they could occur by a mere 'judicial shift in loyalty'. Remarkably, he went on to argue that entrenched limits on Parliament might be created by the simple enactment of a new judicial oath in which the judges pledged to recognize statutes as valid only if they respected the new restrictions. The effect of such hand waving would be a 'new fundamental law [that] is secured by a judiciary sworn to uphold it'.<sup>25</sup>

Working from Wade's own premises, however, things could hardly be this simple. If the courts are exercising this power in a genuinely revolutionary situation, the decisions of the judges of the pre-revolutionary regime can at best constitute one element of constitutional change. Any such transition must necessarily be 'a complex process of reshaping or reconstituting a community's system of government' involving 'multiple constitutional and political actors'.<sup>26</sup> H L A Hart thought that the 'rule of recognition', the basis of law-making authority in any legal system, had to be 'effectively accepted as [a] common public standard of official behaviour by [the system's] officials'. Those officials included, but were not limited to, the judges.<sup>27</sup> To be sure, courts sometimes issue creative rulings that purport to specify a new ultimate basis of a legal system. These rulings although necessarily made without the sanction of existing law, may sometimes be effective. But, as Hart noted, '[h]ere all that succeeds is success'. On other occasions, these questions 'may divide society too

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change occasioned by a gradually emerging consensus among all of the senior officials of a legal system was the ordinary way in which customary law changed. Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) 123-26 (hereinafter Goldsworthy, *Debates*).

<sup>21</sup> Goldsworthy, *Debates*, above n 20, 189.

<sup>22</sup> Ibid. See also H W R Wade, 'Sovereignty - Revolution or Evolution?' (1996) *Law Quarterly Review* 568, 574 ('It is for the judges and not for Parliament to say what is an effective Act of Parliament.').

<sup>23</sup> Ibid 192

<sup>24</sup> Nicholas Barber, *Ultra Vires as Institutional Interdependence in Judicial Review and the Constitution* (2000) 111, 122.

<sup>25</sup> H W R Wade, *Constitutional Fundamentals* (1980) 29, 35-36 37-39.

<sup>26</sup> Gordon, above n 9, 78. See also Goldsworthy, *History*, above n 20, 240-1.

<sup>27</sup> Hart, above n 17, 116; Goldsworthy, *Debates*, above n 20, 45-46.

fundamentally to permit of its disposition by a judicial decision'.<sup>28</sup> In such cases, sooner or later, the courts (with the old judges or with new ones) will fall into line with decisions that have been made elsewhere.

## II WADE, Kelsen AND HART

Wade's articulation in 'The Basis of Legal Sovereignty' of the essentially historical and political basis for the regime of parliamentary sovereignty and, therefore, for the binding quality of all enacted law, has an obvious resonance with two of the best known twentieth century writers in jurisprudence, Hans Kelsen and H L A Hart. Wade's 'ultimate *political* fact,' however, differs from the analogous concepts elaborated by each of these theorists and the distinctions help us better understand Wade's ideas.

Kelsen, the innovative and influential Austrian-American legal thinker, first expounded his version of the ultimate basis of law in *The Pure Theory of Law*, originally published in German in 1934. He arrived at it, in the first instance, by considering the necessary chain of validity of norms present in any legal system, an examination not unlike that of Salmond that was cited in Wade's article. If, in an effective legal system, we trace law-making capacity back to a 'first constitution', we then need to 'presuppose' that the makers of that constitution had authority to create valid law. This is the famous Basic Norm of legal validity on which so much of Kelsen's jurisprudence depends.<sup>29</sup> Its place seems to correspond to that reserved by Wade for the 'ultimate political fact upon which the whole system of legislation hangs'.<sup>30</sup> In a footnote to his discussion of Salmond, Wade referred to a 1940 book by J W Jones for a discussion of 'the similarity between Salmond's 'ultimate legal principle' and Kelsen's *Grundnorm* [Basic Norm]'.<sup>31</sup>

In fact, Wade's 'ultimate political fact' and Kelsen's Basic Norm are intrinsically different concepts. The latter is admittedly a difficult notion to pin down and it seemed to change shapes over time as it appeared in Kelsen's voluminous writings.<sup>32</sup> But one aspect is critical. Kelsen started with the basic Humean proposition that it was impossible to derive an 'ought' from an 'is'. The normative force of a legal rule is usually based on the fact that its making had been authorized by a higher legal rule. But from where did the *first* norm authorizing all subsequent law-making derive its binding quality? It was necessary to *presuppose* a valid norm simply positing that one ought to obey the rules promulgated by the makers of the historically first constitution.<sup>33</sup> This presupposed Basic Norm serves as a 'hypothetical foundation' supporting 'the normative import of all the material facts constituting the legal system'. Its content is inferred from the actual posited laws of an effective legal system. It is 'simply the expression of the necessary presupposition of every positivistic understanding of legal data'.<sup>34</sup> The Basic Norm, that is to say, is a *device*

<sup>28</sup> Ibid 149.

<sup>29</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of Reine Rechtslehre or Pure Theory of Law* (trans. Bonnie Litschewski Paulson and Stanley Paulson, 1992) 56-57.

<sup>30</sup> Wade, above n 2, 188.

<sup>31</sup> Ibid 187, n 43.

<sup>32</sup> For one recent examination of the possibly inherent obscurity of Kelsen's Basic Norm see Ricardo Guastini, 'The Basic Norm Revisited' in Luis Duarte d'Alameida, John Gardner and Leslie Greene (eds) *Kelsen Revisited: New Essays on the Pure Theory of Law* (2013) 63.

<sup>33</sup> Kelsen, *General Theory of Norms* (trans. Michael Hartney, 1991) 255.

<sup>34</sup> Kelsen, above n 29, 58.

for explaining, but only in a logical sense, the normativity of posited law. It is not the product of the will of any person nor the reflection of anyone's actual understanding. It has 'no substantive or material content'.<sup>35</sup> Late in his career, Kelsen was clear that the Basic Norm is a 'fiction'. It is premised on 'an imaginary authority whose (figmentary) act of will has the Basic Norm as its meaning'.<sup>36</sup>

For Wade, on the other hand, the foundation of law was a concrete historical reality. It consisted only of ideas but these ideas were held either explicitly or by implication in the minds of actual human beings. It is telling that Wade repeatedly described these basic beliefs as 'political'. And the examples he gave of the establishment of these facts had a distinct historical character. He mentioned the execution of Charles I, the accession of William and Mary and (as a counter-example) the failure of the Jacobite rebellions of 1715 and 1745.<sup>37</sup> Similarly, he viewed the emergence of a new ultimate legal basis in South Africa as a consequence of the state's gradual acquisition of political independence in the twentieth century. The independent status of the Dominions had been recognized, but it was not really created, by the Statute of Westminster, 1931.<sup>38</sup> And, as will be discussed in the next section, Wade would come to much the same conclusion about the political events that resulted in the subordination of parliamentary authority to European law after the *Factortame (No. 2)* judgment.<sup>39</sup> As noted, for Wade the ultimate *sign* of such a revolution was found in the behaviour of the judges but he was clear that in this respect the real action was outside the courts. Speaking of the South African case, he said that the 'courts have followed the movement of political events'.<sup>40</sup> In this respect, his conception of the basis of a legal system was qualitatively different from Kelsen's abstract and strictly logical Basic Norm.

H L A Hart whose great work, *The Concept of Law*, was published six years after 'The Basis of Legal Sovereignty', on the other hand, was, like Wade, convinced that all legal authority was rooted in actual social phenomena. Hart posited a 'rule of recognition' that stated the criteria for identifying valid law in a given legal system. So, in the United Kingdom in 1961, Hart hypothesized, the rule could be stated 'Whatever the Queen in Parliament enacts is law'.<sup>41</sup> In order to be a rule of recognition such a proposition had to be 'effectively accepted as [a] common public standard[] of official behaviour by [the legal system's] officials'.<sup>42</sup> Like Wade, therefore, Hart saw law as in the final analysis based on the behaviour and attitudes of real human beings. Law derived from 'social sources'.<sup>43</sup> In fact, when in 1996, Wade analyzed the change in United Kingdom law effected by judicial recognition of the priority of European law over parliamentary enactments, he asked whether the judges had adopted a new 'rule of recognition,' citing Hart.<sup>44</sup> Notwithstanding evidence that Hart had read and thought

<sup>35</sup> Stanley L Paulson, 'The Great Puzzle: Kelsen's Basic Norm' in Luis Duarte d'Alameida, John Gardner and Leslie Greene (eds) *Kelsen Revisited: New Essays on the Pure Theory of Law* 43, 43-44 (2013).

<sup>36</sup> Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William Twining (eds) *Essays on Kelsen* (1986) 111, 117.

<sup>37</sup> Wade, above n 2, 188.

<sup>38</sup> Ibid 190.

<sup>39</sup> Wade, above n 22.

<sup>40</sup> Wade, above n 2, 191.

<sup>41</sup> Hart, above n 17, 148.

<sup>42</sup> Ibid 113. A legal system had to have such a rule of recognition and also to be generally obeyed by the relevant population.

<sup>43</sup> Hart, above n 17, 269 (postscript).

<sup>44</sup> Wade, above n 22, 574.

critically about Wade's article,<sup>45</sup> there were only three abbreviated references to it in *The Concept of Law*, all in the notes. In the first he cited it as representing one answer to the question of whether the rule of recognition is law or fact.<sup>46</sup> In the second, he referred to Wade's adoption of the 'continuing' version of parliamentary sovereignty.<sup>47</sup> And finally, he noted Wade's argument that the Parliament Acts, 1911 and 1949 provided for a kind of delegated legislative power.<sup>48</sup> In contrast, Hart made very frequent reference to Kelsen, including a long text note in which he agreed that the rule of recognition 'resemble[d]' Kelsen's Basic Norm but then listed various respects in which the two ideas differed.<sup>49</sup>

Hart's analysis of the rule of recognition differed from Wade's ultimate political fact in at least two significant ways. The first, just averted to, concerns the extent to which the basic rule of the legal system was a matter of fact or of law. Wade's position was unclear but it was most consistent with a conclusion that it was both law and fact. He repeatedly stated that the content of the underlying rule had to be decided in the courts, thus suggesting that it was a matter of law. He was indeed ready to describe it as a rule of common law although, as such, it was in 'a class by itself'.<sup>50</sup> On the other hand, he was emphatic in describing it as 'the ultimate *political* fact' and, as we have already seen, its articulation by the judiciary responds to rather different factors than would be the case with the enunciation of ordinary legal rules. For this rule the judges 'follow[] the movement of political events' and make "a political or legislative decision, having no 'law' to guide them".<sup>51</sup> Hart built upon Wade's implicit understanding with a more careful description of the rule of recognition. For him, its characterization as law or fact depended on the perspective from which it was viewed. Looked at from within the legal system, by someone who accepts the normative force of that system, it was certainly a rule of law, the highest rule in the legal hierarchy. Looked at from the 'external' point of view, for such purposes as asking whether such a rule 'existed' or whether it was a suitable or unsuitable rule for a given society, it could only be regarded as a matter of fact. 'Both these aspects claim attention but we cannot do justice to them both by choosing one of the labels, "law" or "fact."'<sup>52</sup>

Secondly, Hart qualifies Wade's assertion that it is impossible, short of a revolution, for Parliament to impose any effective legal limitations on the legislative power of future parliaments. Wade's approach was not rigorously argued but it appears to have been based on parliamentary sovereignty's status as the ultimate foundation of legislative authority. It would be incongruous for the created power to be able alter the creating one.<sup>53</sup> Hart agreed that, when it comes to the replacement of one rule of recognition with a distinctly new one, mere legal authority would be insufficient even though such changes might be articulated using the rhetoric of law.<sup>54</sup> Where

<sup>45</sup> J W F Allison cites two letters and a postcard from Hart to Wade commenting on the article in 1955 and 1956. J W F Allison, 'Parliamentary Sovereignty, Europe and the Economy of the Common Law' in Mads Andenas (ed) *Judicial Review in International Perspective* (2000) 177, 185-86, nn 55, 63.

<sup>46</sup> Hart, above n 17, 295.

<sup>47</sup> Ibid 299. See text below nn 55-57.

<sup>48</sup> Ibid 299.

<sup>49</sup> Ibid 292-94.

<sup>50</sup> Wade, above n 2, 187-88.

<sup>51</sup> Ibid 173, 188-89, 191, 192.

<sup>52</sup> Hart, above n 17, 110-12.

<sup>53</sup> Wade, above n 2, 189.

<sup>54</sup> Hart, above n 17, 117-23, 153. On this practice see Richard S Kay, *The Glorious Revolution and the Continuity of Law* (2014); Richard S Kay, 'Legal Rhetoric and Revolutionary Change' (1997) 7 *Caribbean Law Review* 161.

Wade and Hart differed was whether or not it was possible to specify precisely the contents of a rule of recognition. Like all rules – indeed more than most rules – Hart’s rule of recognition has a certain open texture and may be susceptible of more than one interpretation. When in the course of adjudication, uncertainties in the rule are clarified, it would be inaccurate to say that a revolutionary change has taken place.<sup>55</sup> Exhibit number one for Hart was the British rule of parliamentary sovereignty. He agreed that it was ‘established’ that the rule of recognition accepted by the courts was one identifying ‘continuing sovereignty’ under which no one Parliament could bind its successors. But there was no ‘necessity of logic’ arising from the idea of sovereignty that required this understanding. A legislature could be sovereign even if its power was ‘self-limiting’ as suggested by Jennings. The received version of parliamentary sovereignty was ‘after all, only one interpretation of the ambiguous idea of legal omnipotence’. This question had to be answered ‘at any given moment’ as a ‘question of fact’. And in this case, doubtless based on the same authority marshalled by Wade, ‘the presently accepted rule is one of continuing sovereignty’.<sup>56</sup>

### III THE EBBING OF PARLIAMENTARY SOVEREIGNTY

If the orthodox doctrine of parliamentary sovereignty was being questioned in 1955, today it appears to be in full retreat. Several developments have had the effect of imposing limits, even if ill-defined limits, on parliament’s legislative power. This is not the place to discuss these changes in any depth but we can list the following, all of which at least tend in this direction: the priority of the law of the European Union;<sup>57</sup> the obligation to conform to the European Convention of Human Rights; the amenability of statutory enforcement to judge-made norms through the process of judicial review; the independence of former colonial possessions; the autonomy of devolved legislatures; the employment of referenda on important issues.<sup>58</sup> There are certainly others. It may be fair, in fact, to say that British constitutional waters are being roiled to an extent not experienced in the last hundred years.

Wade, we must recall, never suggested that the ultimate political fact at the foundation of the legal system could never be changed. He only asserted that it could not be changed by Parliament exercising its ordinary legislative power. The ‘ultimate legal principle’ was changed not by legislation but by revolution. ‘Of course,’ he said, ‘revolutions can and do occur.’ Wade expected the fact of such a revolution to be confirmed by actions of the courts but, as we have seen, in such cases the courts must rely on something other than the usual artifacts of law. This is what he understood to have happened in South Africa. Sometime between the enactment by the United Kingdom Parliament of the South Africa Act 1909 and the 1952 decision of the Appellate Division in the *Harris* case, the ultimate political fact upon which the South African legal system was founded changed. South African law ceased to trace its authority to the law-making power of the United Kingdom Parliament. The ‘seat of sovereign legal power . . . shifted from Westminster to Pretoria.’ This was *not*, however, a consequence of a legislative decision – neither the enactment by the United

<sup>55</sup> See Oliver, above n 17; Allison, above n 45. Peter Oliver provides a thorough and careful explanation of the emergence of the independence of the Dominions in these terms in Oliver, above n 10.

<sup>56</sup> Hart, above n 17, 149-50. Hart includes an elliptical reference to Wade in the notes to his discussion but it is unclear if he means it to support his conclusion about the prevailing understanding of the United Kingdom rule of recognition: at 299.

<sup>57</sup> This priority will remain an issue at least until the verdict of the June 23, 2016 referendum is translated into law by the repeal of the *European Communities Act 1972* (UK).

<sup>58</sup> See Kay, above n 1, 99-103.



Kingdom of the Statute of Westminster 1931 nor the enactment by the South African parliament of the South African Status of the Union Act 1934, both of which purported to effect such a change. Although the South African courts would, in fact, follow the declarations in these statutes, this behaviour would not follow from their 'legal pedigree'. The judgments of the courts would rather constitute a judicial acknowledgement that South Africa had 'thrown off [its] allegiance to the United Kingdom', that a political revolution had taken place. This was no less true just because, as in *Harris*, 'the whole case was argued as if there were a right or wrong legal answer'. Beneath this 'elaborate legal dress' would necessarily be 'the naked fact of revolution' even though that revolution had been accomplished 'in an atmosphere of harmony'.<sup>59</sup>

This raises for us the question of how Wade's understanding fits with the apparent change in the United Kingdom Parliament's law-making jurisdiction. He observed and commented on some of the indicators of this change but not others. Faithful to Wade's assumptions, we can examine those changes by considering what has been said about the question in the courts, most notably in the United Kingdom's court of last resort, the Judicial Committee of the House of Lords and, since 2009, the Supreme Court. While there is nothing in that court's judgments that can be interpreted as an explicit and definitive recognition of a new basic rule, something can be learned by examining the dicta in several opinions. In 1991 the House of Lords in its decision in *R. v Secretary of State for Transport ex p. Factortame Ltd. (No. 2)*<sup>60</sup> affirmed the propriety of judicial interim relief that prevented the application of an act of Parliament that had been found to be in conflict with European law. This decision was based on section 2(4) of the European Communities Act 1972, declaring that European law was to prevail over any statutes 'passed or to be passed'.<sup>61</sup> To the extent that this statute prevented Parliament from making enforceable law that contravened European law, it had done what Dicey had said was impossible. It successfully restricted the continuing plenary legislative authority of the Queen in Parliament. In his speech in the case, Lord Bridge described the holding in broad terms. By passing the 1972 Act, Parliament had embraced an 'entirely voluntary' 'limitation of its sovereignty'. And at the same time, the courts came under a duty to 'override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.<sup>62</sup> Wade understood the judgment to have acknowledged, a qualitatively new source of legal authority: 'While Britain remains in the Community we are in a regime in which Parliament has bound its successors successfully, and which is nothing if not revolutionary'.<sup>63</sup> Wade ascribed a critical role in this transformation to the judges, declaring that 'the courts are reformulating the fundamental rules about the effectiveness of Acts of Parliament'.<sup>64</sup> He seems to have understood, however, that they were simply responding to extrajudicial political change by recognizing the 'primacy [of European law] that practical politics obviously required'.<sup>65</sup>

<sup>59</sup> Wade, above n 2, 191-92.

<sup>60</sup> [1991] 1 AC 603.

<sup>61</sup> The House of Lords did not exactly hold the statute invalid since strictly, it only decided the appropriateness in the circumstances of interim relief. The law of interim relief predated the enactment of the *European Communities Act 1972* and could be subordinated to European law on much more conventional grounds. P P Craig, 'Sovereignty of the United Kingdom Parliament After *Factortame*' [1991] 11 Yearbook of European Law 221, 248.

<sup>62</sup> [1991] 1 AC 659.

<sup>63</sup> Wade, above n 22, 571. At 573: 'If that is not revolutionary, constitutional lawyers are Dutchmen.'

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 574.

The precise shape of this new constitutional situation was still unclear after *Factortame*. Wade was unwilling to assume that the judicial treatment of the *European Communities Act 1972* set a precedent for other new and different exercises of parliamentary self-limitation. Accession to the European Communities, he supposed, could be understood as providing a unique occasion for restricting future legislation.<sup>66</sup> He was also prepared to agree that while legislation would have to be consistent with European law as long as the United Kingdom remained a member of the European Communities, Parliament retained the power to terminate that membership and to repeal the *European Communities Act* altogether, something that, as a consequence of the referendum on the question on June 23, 2016, has been transformed from a hypothetical to a practical question.<sup>67</sup>

The fact of a constitutional revolution in the United Kingdom has been confirmed but its character has been revealed very imperfectly in the judicial expressions that have followed *Factortame*. Most attention has been paid to *R (Jackson) v Attorney-General*<sup>68</sup> in which the House of Lords affirmed the validity of a statute passed pursuant to the *Parliament Act 1949*. That act, permitting certain bills passed by the House of Commons to become law without the assent of the House of Lords, had itself been enacted pursuant to the *Parliament Act 1911* which had established a similar though somewhat stricter procedure for cases when the Commons acted alone. The complainants now argued that the 1949 Parliament, acting under the 1911 Act, had to have been exercising a kind of delegated legislative power and it had no right to enlarge its own authority: the 1949 Act was, therefore, invalid and so was the act at issue in *Jackson*.<sup>69</sup> The various speeches of the Law Lords rejecting this claim covered a great deal of ground and it is not easy to distill a single judgment. But the majority appeared to reject the premise that the 1911 Act had created only a form of subordinate law-making. Statutes enacted under the Parliament Acts were full-fledged primary Acts of Parliament.<sup>70</sup> The necessary inference was that the Parliaments of 1911 and of 1949, by dispensing with the requirement of approval by the Lords, had thereby redefined the ingredients of parliamentary legislation. Baroness Hale made the implications explicit: If Parliament could redefine the legislative process to make it easier, why couldn't it make it harder requiring, say, 'a particular parliamentary majority or a popular referendum for particular types of measure'.<sup>71</sup> This, of course, is exactly what Jennings and other proponents of the possibility of 'manner and form' limitation had argued. Lord Steyn took the opportunity to stress that a 'pure and absolute' parliamentary sovereignty was 'out of place in the modern United Kingdom'. It was not 'unthinkable', moreover, that 'the courts may have to qualify a principle established on a different hypothesis of constitutionalism'.<sup>72</sup>

In 'The Basis of Legal Sovereignty', Wade had discussed the relevance of the Parliament Acts, arguing, like the complainants in *Jackson*, that they allowed the Commons to exercise only a delegated law-making power. He supported this claim by noting that unlike the principal rule of parliamentary sovereignty that was based only on political fact, legislation under the Parliament Acts derived its validity from another

<sup>66</sup> Ibid 575.

<sup>67</sup> Ibid 570. See Anthony Bradley, 'The Sovereignty of Parliament – Form or Substance?' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6<sup>th</sup> edition, 2007) 25, 47.

<sup>68</sup> [2006] 1 AC 262.

<sup>69</sup> The government does not seem to have contested the court's jurisdiction to review the validity of an act of Parliament. This was in contrast to the holding of the Inner House in the judgment on appeal of *MacCormick v Lord Advocate* that had (its dicta on parliamentary sovereignty notwithstanding) explicitly held that Scottish courts had no such jurisdiction (19 SLC 263).

<sup>70</sup> Eg, *ibid* [24] (Lord Bingham), [64] (Lord Nicholls), [107] (Lord Hope).

<sup>71</sup> *Ibid* [163].

<sup>72</sup> *Ibid* [103].

instance of positive law. The Acts, in fact, required the Commons, in exercising the power created, to include a recitation that it acted 'in accordance with the *Parliament Acts 1911 and 1949* and by authority of the same'. Statutes so created, therefore, did not flow directly from the basic, legally ultimate empowerment of Parliament.<sup>73</sup> Wade's position clearly assumed that the ultimate principle remained beyond the reach of Parliament. He did not, however, as we have noted, preclude the possibility that a revolution might set up a new and different principle (one, as Lord Steyn said, based on a 'different hypothesis of constitutionalism') and that that principle might then be recognized by courts taking account of the new political reality.

The speeches in *Jackson* left the extent of parliamentary power to redefine legislative jurisdiction mostly undefined. Several, however, made it clear that the Law Lords believed that this power had limits. While rejecting the judgment below that the Parliament Act 1911 empowered only 'modest' changes in the unilateral law-making authority of the House of Commons, some of the judgments assumed that major or fundamental constitutional changes were excluded. So Lord Steyn doubted that the Parliament Acts could be used to abolish the House of Lords altogether. He questioned 'the validity of such an exorbitant assertion of government power in our bi-cameral system' even though it might be justified by 'strict legalism'.<sup>74</sup> And Lord Brown of Eaton-Under-Heywood was 'not prepared to give such a ruling as would sanction in advance the use of the 1911 Act for all purposes . . .'.<sup>75</sup>

In fact, it turned out that even the apparently clear rule about European Union law that stemmed from the *Factortame* case was more complicated than might first have appeared. In *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport*<sup>76</sup> the Supreme Court dismissed complaints that the procedure used for planning high speed rail routes in Great Britain was inconsistent with certain European Union directives. Because the attack on the planning process arraigned, in part, the adequacy of certain parliamentary procedures, some judges took the opportunity to speculate on the relationship between the judicial enforcement of European law and the Bill of Rights 1689, article 9. The latter provided that 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court [...]'. A straightforward reading of *Factortame* suggested that the Bill of Rights, like any other domestic statute, should be subordinated to European law. It was one thing, however, according to the joint judgment of Lords Neuberger and Mance, to refuse to apply the *Merchant Shipping Act* involved in *Factortame*. It would be quite another to subordinate the 'fundamental' principles 'enshrined in the Bill of Rights'— a 'constitutional instrument'. The judgment went on to list several other such instruments and it assumed that there might be other fundamental principles 'recognized at common law'. It would be reasonable to think that Parliament in 1972 'did not either contemplate or authorize the abrogation' of these basic rules.<sup>77</sup>

What this reasoning suggested was that there were at least three categories of laws, each immune in different degree from alteration by subsequent law —

<sup>73</sup> Wade's position was cited in *Jackson* but his ideas were not seriously engaged. Ibid [22] (Lord Bingham), [111], [120] (Lord Steyn). Hart also reviewed different possible interpretations of the Parliament Acts. Hart, above n 16, 151. See Nicholas W Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144, 146-48.

<sup>74</sup> [2006] 1 AC 262, [101].

<sup>75</sup> Ibid [194]. Lord Brown believed that this position was shared by a majority of the Law Lords.

<sup>76</sup> [2014] UKSC 3.

<sup>77</sup> In a more guarded reference, Lord Reed was also open to the possibility of European law yielding to the Bill of Rights, noting that *Factortame* did not deal with domestic law that governed the process 'by which legislation is enacted'. Ibid [79].

fundamental constitutional laws, European law and ordinary law, with the first and last appearing in either enactments or in common law. How exactly these categories would interact is impossible to know given the tentative and elliptical expressions of the judges. (Since the *European Communities Act 1972* was itself listed as a 'fundamental statute' it is possible, as Mark Elliott has observed, there could be some rank ordering even within that category.)<sup>78</sup> This would be a matter, these judges assumed, that would be for 'United Kingdom law and courts to determine'.<sup>79</sup> In this respect, the current situation conformed to what Sir Stephen Sedley called 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable — politically to Parliament, legally to the courts'.<sup>80</sup> Wade's ultimate political fact was fairly simple to understand at a time when, as he believed, it consisted solely of the acceptance of the unlimited ability of Parliament to make law. But, if the suggested reasoning of Lords Neuberger and Mance is followed, that fact will be a complex and compound fact. Beyond that it seems (at least so long as the United Kingdom fails to adopt a comprehensive written constitution) to support constitutional arrangements that are perpetually in flux while the courts (as Wade assumed) continue to read and re-read the political values prevailing in society.<sup>81</sup>

#### IV POLITICAL FACTS AND CONSTITUTIONAL TEXTS

Unsurprisingly, given his particular focus, Wade's analysis has received the most attention in the United Kingdom, where there is no single constitutional text at the top of the legal hierarchy, one created at a discrete historical moment. The absence of such a text makes it harder to defend or dispute any single argument about the ultimate source of legal authority, since multiple and conflicting theories may be consistent with the historical operation of that system. Wade, however, seems to have understood his explanation of the ultimate basis of a legal system to be also applicable to systems governed by written constitutions. His description of the South African Appellate Division's decision in *Harris* makes this clear. The court in that case held that the South African Parliament could not amend the constitution other than according to the terms of the South Africa Act 1909. The government had claimed that the amendment rules in that statute could be altered by a simple enactment of the Parliament of South Africa. It relied, in this regard, on the statement of the powers belonging to Dominion legislatures that had been recited in the Statute of Westminster 1931. That Act had recognized the authority of those legislatures to make laws inconsistent with United Kingdom statutes, including, one would have thought, the South Africa Act 1909. The Appellate Division disagreed, holding that the 1909 Act still bound the South Africa Parliament. According to Wade, this judgment showed two things. First, South African courts had 'thrown off their allegiance to the United Kingdom parliament', that 'a revolution had already taken place'. Second, in such circumstances the Appellate Division was obliged to 'seek 'ultimate principles' of [its] own'.<sup>82</sup> This inquiry was something for which 'there was no . . . necessary legal answer.' The court 'had in substance to make a political decision'.<sup>83</sup> Its holding that the

<sup>78</sup> Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014), 10 *European Constitutional Law Review* 379, 386-89.

<sup>79</sup> [2014] UKSC, [206-208]. For careful recent analysis of the cases see Mikolaj Barczentewicz, *Judicial Duty Not to Apply EU Law* (2016) <<http://ssrn.com/abstract=2706477>>.

<sup>80</sup> Stephen Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *Public Law* 386, 389.

<sup>81</sup> On the advantages and disadvantages of 'common law' constitution-making see Kay, above n 1.

<sup>82</sup> Wade, above n 2, 192.

<sup>83</sup> Ibid.

South Africa Act continued to limit the South Africa Parliament had nothing to do with the law-making authority of the United Kingdom Parliament in 1909 or 1931. A new 'ultimate political fact' had established the sovereignty of the South African parliament but only within the limits set by the Act. On Wade's view – as qualified above – this outcome emerged from the Appellate Division's reading of South African political opinion as to the proper exercise and shape of parliamentary power.

A court's political judgment, of course, is only as good as that court's ability accurately to estimate the relevant political facts on the ground. When courts engage in this kind of enterprise they run the risk of misreading the critical data. Subsequent history suggests that that was the case with the *Harris* judgment. Within months of the decision the offended South African Parliament passed legislation declaring itself a 'High Court' with the power to review all Supreme Court judgments that invalidated statutes. Armed with his new 'judicial' authority Parliament promptly reversed the *Harris* decision. The Appellate Division then held that, insofar as the 'High Court Act' permitted Parliament effectively to supersede the entrenched amendment rules, that Act was also invalid.<sup>84</sup> After some grumbling, the government submitted to this ruling and left the voting rolls unchanged for the next election.<sup>85</sup> In 1955, however, the year of the Wade article, Parliament reformed and enlarged the membership of the Senate in such a way as to give the government party enough Senators to command a two-thirds majority in a joint sitting. This allowed the government to pass the change in voting rights in the Cape Province according to the procedures specified in the South Africa Act. Parliament so constituted also repealed the entrenched special amendment procedure for such measures. These actions were, when brought back to the Appellate Division (the membership of which had been enlarged to permit the appointment of more government friendly judges) upheld.<sup>86</sup> Wade wrote a short commentary on this case. He confined his observations to a conventional, even a pedestrian legal analysis. Having determined that the South African legal system had been detached from that of the United Kingdom, Wade seemed content to treat the case as suitable for decision according to ordinary legal process in that independent system.<sup>87</sup>

The upshot of all of these events was, in fact, not one but two 'revolutions' the net outcome of which only became apparent after all three judgments had been issued. The first stage represented by *Harris*, recognized the autonomy of the South African legal system but held that it was controlled by the entrenched rules of the South Africa Act. At the second stage, the government's successful reformation of the Senate allowed the elimination of the entrenched procedure for manipulating the voter rolls. The result was a regime of unlimited parliamentary sovereignty.<sup>88</sup> Exploiting this power, the Parliament (after approval in a referendum of white voters) created a new constitution in 1961, establishing the 'Republic of South Africa', continuing the exclusion of all black representation. That constitution was in turn replaced by the 'tri-cameral' constitution of 1983. This document remodelled

<sup>84</sup> *Minister of the Interior v Harris* (1952) 4 SA 769.

<sup>85</sup> For the background of the case see D M Scher "'The Court of Errors" – A Study of the High Court of Parliament Crisis of 1952' (1988) 13 *Kronos* 23.

<sup>86</sup> *Collins v Minister of the Interior* (1957) 1 SA 552.

<sup>87</sup> H W R Wade, 'The Senate Act Case and the Entrenched Sections of the *South Africa Act*' (1957) 74 *South African Law Journal* 160, 165-66.

<sup>88</sup> The sole exception was a provision guaranteeing the equality of the English and Dutch or Afrikaans languages. This restriction could be amended only by the two-thirds majority of a joint sitting procedure at issue in the *Harris* case. *South Africa Act 1909*, ss 137, 152. A similar entrenchment for official languages was inserted in the 1961 constitution. *Republic of South Africa Constitution Act 1961*, ss 108, 118.

the parliament creating separate chambers for white, Asian, and mixed race electors but continuing the disenfranchisement of black South Africans. That constitution did entrench a number of provisions by requiring either simple or two-thirds majorities in all three houses for certain changes.<sup>89</sup> The 1983 constitution remained in effect until the dissolution of the apartheid state in 1993 and the enactment (negotiated among the relevant parties but formally approved under the 1983 amendment procedure) of the Interim Constitution of that year.<sup>90</sup>

This sequence of events illustrates how even legal systems with constitutional texts may respond to changes in the underlying political assumptions. Kelsen's description of the Basic Norm displayed a similar relationship. The Basic Norm 'presupposes that one is to behave as the historically first constitution prescribes'.<sup>91</sup> The Basic Norm 'empowers' the creators of the constitution to promulgate binding norms. When applied to the more concrete versions of ultimate facts relied on by Wade and Hart, this points us to the political data that allowed the historical creators of a written constitution to be accepted as legitimate law-makers. The resulting constitution then derives its force from those political facts.<sup>92</sup>

The juxtaposition of constitutional texts and logically prior 'ultimate political facts' has the potential to create a particular problem. One of the values of a written constitution is supposed to be the stability that its rules provide. Therefore, constitutions are deliberately made hard to modify. Over time, political values in a society are bound to change. When this happens there is no guarantee that the constitutional text will be able to keep up with these new political circumstances. There are various ways to deal with such a misalignment. The most straightforward response is simply to replace the constitution. When many United Kingdom colonies achieved independence in the middle of the last century, they initially operated under constitutions that were, in substantial part, written by British colonial officials in consultation with various local interests. These texts were then promulgated by the United Kingdom authorities usually as parts of Orders in Council. Typically, these 'independence constitutions' maintained the Westminster system of government and the formal role of the Queen as head of state. As time passed, some of the local governments began to feel it inconsistent with national dignity to continue to do business under these arrangements. The response was, at least sometimes, simply to scrap the offending document and initiate a fresh domestic constitution-making procedure.<sup>93</sup>

Often, however, a polity with a written constitution does not respond to fundamental political change by an explicit substitution of a new constitutional text. There are many reasons for this. There may be agreement that the old text is outdated

<sup>89</sup> *Republic of South Africa Constitution Act 1983* 110, s 99.

<sup>90</sup> *RSA Act 1993* 200 enacted under the authority of the *South Africa Constitution Act 1983* 110, s 99.

<sup>91</sup> Kelsen, above n 33, 255.

<sup>92</sup> See Hart, above n 17, 106 (the force of a textual constitution depends on an underlying rule of recognition.)

<sup>93</sup> See Richard S Kay, 'Constituent Authority' (2011) 59 *American Journal of Comparative Law* 715, 757 (discussing the Trinidad and Tobago Constitution of 1976). On the desire for an indigenous constitution-making procedure see Simeon C R McIntosh, 'West Indian Constitutional Authorship: The Role of the Caribbean Court of Justice' (Paper presented at Conference to Mark the 40th Anniversary of the OECS Supreme Court, St Lucia, February 8<sup>th</sup> 2008) 1. ('[O]ur independence constitutions were never simply the constituent acts of us as a sovereign people.'). See also Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) 101-02 ('If memories of the "source" of a constitution in an historical sense offend nationalist sentiment, it may, none the less, be a matter of some moment to secure specific proclamations of independence. . .') (footnote omitted).

but no agreement on what ought to replace it. There may be a strong cultural attachment to legal regularity that inhibits extralegal change. The old constitution may have attracted a symbolic importance that makes explicit replacement politically impossible. In these cases, a legal system might be stuck with a written constitution that had been created in a very different political situation. The problem for such systems is how, under these circumstances, to maintain the legitimacy of the constitutional regime. The policy of retaining a constitutional text after its original political basis has disappeared was responsible for some of the difficulties involved in the 'patriation' of the Canadian Constitution (the *British North America Act 1867*) in 1980-82. In that case, the participants had no *legal* directions for deciding the relative roles of the different actors (the federal government, the provinces and the Westminster Parliament) in modifying constitutional rules. At the end, a holding by the Supreme Court of Canada about a Canadian *convention* governing constitutional change was critically important.<sup>94</sup>

The most successful example of a constitutional text surviving critical political changes is probably that of the United States Constitution, now 230 years old and with relatively few amendments. It was drafted by an unofficial convention in 1787 and was then, in accordance with its own terms, ratified by specially called conventions in nine (and eventually all thirteen) states.<sup>95</sup> At the time, this kind of approval was understood to be the most effective way in which the 'people' could express its endorsement. The Constitution's subsequent acceptance – after a bitter and contentious national debate – may, in substantial measure, be attributed to this perceived popular approval.<sup>96</sup> The idea that the 'people' was the source of all legitimate constituent power was the master political dogma of late eighteenth century America. The very independence of the United States was founded on the 'right of the people to alter or abolish their governments'.<sup>97</sup> Widespread belief in that right constituted the 'ultimate political fact' at the time of constitution-making.

Perhaps more remarkably, the force of the United States Constitution *continues* to be justified by reference to the will of 'we the people'.<sup>98</sup> This understanding appears hard to reconcile with the actual assent that the Constitution received in 1787-89. The ratifying conventions were composed exclusively of propertied white men, chosen in elections with restricted franchises. The approval of those bodies is very far from today's beliefs about the way to register the approval of 'the people'.<sup>99</sup> That the Constitution remains legitimate is mainly due to a widespread refusal to delve too deeply into the actual historical facts associated with the Constitution's creation. Something quite similar happened in South Africa with respect to the acceptance of the

<sup>94</sup> *Reference Re Resolution to Amend the Constitution* [1981] 1 SCR 753. I set out the full chronology and many of the arguments in Richard S Kay, 'The Creation of Constitutions in Canada and the United States' (1984) 7 *Canada-United States Law Journal* 111. On the British side, the English Court of Chancery declined to hold that there was any legal inhibition on the Westminster Parliament's power to make changes to the Canadian constitution. *Manuel & Others v Attorney General* [1982] 3 All ER 822, [1982] EWCA Civ 4, [1983] Ch 77 aff'd (1982) 3 All ER 822 (Court of Appeal). Vice-Chancellor Megarry cited Wade's 'valuable article on sovereignty' at [1983] Ch 89.

<sup>95</sup> *United States Constitution* art VII.

<sup>96</sup> See Lance Banning, 'Republican Ideology and the Triumph of the Constitution 1789-93' (1974) 31 *William and Mary Quarterly* 167.

<sup>97</sup> *Declaration of Independence 1776*, para 2 (US). On the predominance of popular sovereignty at the time see Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969).

<sup>98</sup> See, eg, White House, *The Constitution* <<https://www.whitehouse.gov/1600/constitution>> (The Constitution is 'empowered with the sovereign authority of the people').

<sup>99</sup> On the difficulties of settling on an adequate surrogate for 'the people' see Kay, above n 93, 738-55.

Constitution of 1997. That constitution was promulgated by an interim parliament after a very extensive national consultation. Its content, however, was constrained by certain principles – some broad, some quite specific – that had been hammered out by a process of elite negotiation among the unelected representatives of various interest groups. The agreement that emerged from those negotiations resulted in the termination of the apartheid regime. The new Constitution's preamble, nonetheless, began with the standard assurance that it was the act of 'we the people of South Africa'. Within a remarkably short period, this dubious statement was widely accepted. A website created to celebrate the fifteenth anniversary of the Constitution and urging individuals to 'tell the world why we love our constitution' was hosted at 'wethepeople.org.za'.<sup>100</sup>

Wade had recognized that the political facts supporting any legal system could and inevitably would change over time. Periods when these facts are changing will generally be accompanied by some uncertainty as to the nature of the consequent 'revolution' and how that revolution may affect the legal reach of the constitution. This may be obvious in the United Kingdom, where the constitution, by virtue of its uncodified character, may be especially subject to contestation. But it is also true in countries where the constitution is incorporated in an identifiable text. The great controversy over the nature of the American union that dominated public discourse in the first half of the nineteenth century turned, in substantial part, on differing beliefs about the political assumptions underlying the Constitution. The parties disagreed on the question of whether the Constitution was effective as the agreement of the 'peoples' of the individual sovereign states or as the act of the undivided 'people of the United States'. The text itself (notwithstanding the opening phrase of the preamble) was not conclusive on this question. Finally, the matter was resolved by political and military means in favour of the latter interpretation. It would be ridiculous to suppose that this was a reliable way to decide the 'correct' historical basis of the Constitution. Rather, the 'ultimate political fact' on which the constitutional regime depended had itself to be settled by extra-legal means.<sup>101</sup> At the end of the day, as Wade's analysis demonstrated, the authority of all law must rest on a political foundation.

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<sup>100</sup> *We The People* <<http://www.wethepeople.org.za/>>. For some other examples of fictional recreation of the source of constitutional authority see Kay, above n 93, 756-61.

<sup>101</sup> See Richard S Kay, 'Comparative Constitutional Fundamentals' (1991) 6 *Connecticut Journal of International Law* 445, 460-63.