



The United Kingdom and the United States: A Constitutional Dialogue

Tuesday, May 24, 2022

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center, in person and online. I'm Tanaya Tauber, Senior Director of Town Hall programs. This week we hosted a conversation comparing the legal systems of the United States and the United Kingdom on a range of topics, including the relationship between the origins of the U.S. Constitution and British law, how the courts in both countries decide major issues, and how each constitution gets amended.

[00:00:33] Joining us is Richard Albert, William Stamps Farish Professor in Law, Professor of Government, and Director of Constitutional Studies at the University of Texas at Austin, Nicholas Cole, Senior Research Professor at Pembroke College at the University of Oxford, and Alison LaCroix, Robert Newton Reid Professor of Law at the University of Chicago Law School. Lana Ulrich, Senior Director of Content at the National Constitutional Center moderates. This conversation was streamed live on May 24th, 2022, and is presented in partnership with the University of Oxford. Here's Lana to get the conversation started.

[00:01:11] Lana Ulrich: Welcome friends to the National Constitution Center and to another exciting program of America's Town Hall. I'm Lana Ulrich, Senior Director of Content at the center. I'd like to thank our partners at the University of Oxford for partnering with us on this program, and I'd also like to give a special thanks to Alexandra "Mac" Taylor, who's a former fellow at the center, who's been studying at Oxford, uh, with Professor Cole and who helped to conceive of and put this program together. So, thank you Mac.

[00:01:41] Thank you for joining us, Richard Albert, Nicolas Cole and Alison LaCroix, to discuss The United Kingdom and the United States: A Constitutional Dialogue and Comparison. Professor Cole, um, I'd like to start with you, and I was hoping that you could just provide a very brief overview of the differences and the similarities in the two constitutional systems between the United Kingdom and the United States.

[00:02:06] Nicolas Cole: Gosh, well, uh, that's a... that's an incredibly, uh, big topic for a very quick answer. But broadly I think the UK constitutional system would look very familiar at a very high level to Americans. We have an executive branch, we have a judicial and a legislative branch, we have subordinate, uh, governments with- within the- the United Kingdom, but all of the detail would look very, very different.

[00:02:30] We have no single written constitutional text, we've never had that for the United Kingdom. Um, we have no, uh, clear sense of federalism, although the UK is sort of heading in a... in a more federal direction, and the role of our courts is very different and- and particularly has been very, very different historically. Uh, in fact our- our United Kingdom Supreme Court only formally started existing in 2009, and already there are calls for, uh, reform, uh, in many parts of politics.

[00:03:01] So, al- although we- we come from a sort of single legal tradition, uh, the, uh, the United States and United Kingdom, uh, look- look very different, uh, in- in almost every aspect of detail at the moment. I think a lot of people in the United Kingdom look to the U.S., uh, for inspiration when they're thinking about constitutional reform and constitutional changes, and I think a few people in the U.S., uh, sometimes look this way as well, although that's probably rarer.

[00:03:29] Lana Ulrich: Great. Thank you for that brief intro to the two constitutional systems, and we'll definitely dig in a little bit more to those, um, similarities and differences. Um, Professor Albert, please feel free to add to anything that Professor Cole said and, um, you know, to shed a little bit more light maybe on some of the unique features of both constitutional systems, um, including, you know, this idea that, uh, many people tend to focus on that the U.S. constitution is written versus the UK being unwritten. Is that true, and if so, what is the implications, um, of that?

[00:04:01] Richard Albert: Well, it's- it's a fascinating question, because what you're doing is bringing us back to basics. If you look at constitutional texts, what you'll see is an opposition. The U.S. constitution is opposed to the UK constitution. The idea being that they're completely different, but in fact they're quite similar in their operation. Uh, let me say a couple of points. First, the U.S. constitution today is virtually unamendable, but it changes all of the time.

[00:04:28] And in that way it's becoming more like the UK constitution, it's becoming more unwritten, more disaggregated, and more flexible as a result of changes in norms, the passage of what we call here in the U.S. super-statutes, and the disaggregation of rights across federalism. And this is something that we can talk about later if you wish, in so far as the U.S. Supreme Court's recent leak suggests to us that a very important fundamental right is going to be sent back to the states. That's fascinating.

[00:04:59] Now, the UK constitution on the other hand, is seen as a pa- paradigmatically political constitution. It's thought to be unwritten, but in fact it's not. It's written in different sites of constitutional significance. It's just uncoded in one master text constitution. What's interesting, however, is that much like we see in the U.S., courts in the UK have increasingly asserted themselves much like U.S. courts are known to do. And so what you see happening is that als-... although the U.S. and UK constitutions look different, they actually work and operate quite similarly.

[00:05:38] I would add one more point, which is that there is a very interesting similarity that we're seeing today in constitutional politics in both countries, on both sides of the Atlantic

[laughs]. What we have is the UK and U.S. political actors trying to clip the wings of judges, only that in the U.S. the effort is coming from the left to bring a conservative Supreme Court to heel, and in the UK the effort is coming from the right, which wants decisions to be made by elected officials. But the consequence is the same, is that the court in both jurisdictions is the target.

[00:06:14] Lana Ulrich: Thanks Professor Albert, and for bringing up a couple different points, um, including, um, you mentioned the Dobbs Leak, which I do want to touch on later and talk... when talking specifically about the differences in our judicial systems as well. Um, and professor LaCroix, I know you've- you've written about this too, uh, but before we focus on the judiciary, um, I just wanted to ask a little bit, uh, more about the origins again of the constitution, um, again focusing on the comparisons. And I know you've written a bit about the influences of the British constitution or constitutional system on the U.S. Could you say a little bit more about that? To what extent was the U.S. constitution influenced by, um, the British constitution and, um, does it continue to be influenced by it today?

[00:06:55] Alison LaCroix: Yes, definitely there were influences, I think, that ran from, um, what, even at the early stages we might think of as the English constitution to the, um, Anglo-American constitutions [laughs], plural. Um, and this gets us certainly back before the drafting of the U.S. constitution and into the Imperial Colonial period. But, um, you know, I think most people, and this is worth remembering, that many, um, settlers, colonists in what became British North America thought of them-... and then later the United States, thought of themselves as English or British.

[00:07:30] Um, and so the kind of, um, ideas of I mean really going back to the Glorious Revolution in England of 1688, but the idea that it was a novel concept to have legislatures that represented the people and that sovereignty lay in the legislature as opposed to just, uh, the Crown, um, and you really see that in the, I would say, the 1760s, sort of immediately before the American Revolution, those kinds of ideas really taking off.

[00:07:58] Um, and so British North Americans thinking of them... of themselves, talking about themselves as inheritors of this English/British unwritten constitutional tradition, but believing that it had real content. So, again this idea of legislatures that were local, that had representation. Now, certainly not representation by any stretch of our modern imagination, but the idea that the people in some sense were represented. Um, some notion of writtleness, I mean even in the British colonies or even English colonies, again, before formal Great Britain was created in 1707, the writing down of founding texts, we find this in New England in the 1620s and '30s.

[00:08:41] Um, Virginia as well in the... earlier even in the 1600s. So, even just this idea of writing down a frame of government, um, even though the English constitution was technically unwritten, was something that the earliest English, um, colonists really- really had, and some of that I think was- was in part also because of their, um, religious orientations, but not entirely. So, constitutionalism writ large I think was a... was part of the- the kind of Anglo-American legal tradition that we see very early in British North America.

[00:09:13] Professor Richa...: Can I just pick up on that, if I could? Because I think that's a powerful point, Professor LaCroix, which is that when the U.S. constitution was codified, the idea was to create a political bible, drawing from very much this tradition of religious, uh, belief, uh, and the sacrality of texts. I think that's a powerful point you've made.

[00:09:35] Lana Ulrich: Yes, definitely. And thanks, uh, thanks to Professor LaCroix and Professor Albert for, um, you know, building upon that point. Um, Professor Cole, do you have anything more to add to, um, you know, what Professor LaCroix said about the, uh, you know, origins of the constitution of British influences. And I know through the Quill Project you've studied, you know, the founding in great detail and the process of how constitutions are written. Is there anything else you'd like to add to- to what, uh, what's been said on that?

[00:10:02] Nicolas Cole: Well, thank you. It's interesting, isn't it? Because I, you know, I'm very interested in how constitutions get written, and- and yet Britain's never- never done this. And I- I've- I've often reflected whether writing a constitution is a good idea. I- I definitely agree that given the legal and constitutional heritage of the colonies after independence, it was almost inconceivable not to write down constitutional text. Uh, the- the colonies had had, uh, charters that they- they were used to relying on and being governed by, um, and, you know, the- the idea of persisting, al- although a couple of- of early states did persist for a while with the idea that the constitutional law could simply be written by the legislature, that becomes incredibly uncomfortable really early after the... after the revolution.

[00:10:48] And I- I think it's absolutely right that although the- the United Kingdom writ large and- and England in the 18th Century didn't have a written constitutional text, in fact colonists were very, very familiar with the idea of relying on written text as the sort of basis of their political system. I think that's absolutely correct.

[00:11:07] Lana Ulrich: Mm-hmm [affirmative]. Um, Professor Albert, I don't know if you wanna add a little bit more to, um, what you had said about, you know, the difficulties in amending the U.S. constitution? Um, you know, when you look at the ease of amending the UK constitution, do you think that the U.S. constitution would benefit by hea-... by heading more toward that direction? Are there other reforms that you would suggest to the amendment process? And- and maybe just say a little bit more about constitutional development in the U.S. over time, from the founding, you know, to where we are today?

[00:11:36] Richard Albert: The first thing I would say about the U.S. constitution is that it is ancient, outdated and broken. And the very first thing I would change about it is Article V. Article V is the site in the constitution that codifies the rule to change the constitution's text. It's been used, um, only 27 times successfully in American history, but there have been over 13,000 efforts to use it to change the constitution.

[00:12:03] And this ratio, for me, is just out of whack. A- a constitution should never be that difficult to amend, but that's the case in the U.S., which probably has the world's most difficult constitution to amend. And that's a bad thing. That's not a good thing. I'm thinking of John Locke's Constitution for the Carolinas in the 1600s, uh, which was made unamendable. Now, it

didn't survive for more than a year [laughs]. The U.S. constitution now is the same. It's virtually unamendable in its text, and that's not a good thing. It's a bad thing, because what it does is that it redirects the reform energies that are alive and well in this country, to other channels.

[00:12:48] Channels that are not as accountable, that are not as representative, and that are maybe not as sustainable as the formal rules of constitutional change that are codified in Article V. So, the first thing I would change about the U.S. constitution, and by the way this is impossible because you have to use the amendment procedure to change Article V, but if it were possible, I would change Article V to create an escalating structure of change where you'd have multiple procedures of constitutional reform, where each procedure can be used to amend different parts of the constitution.

[00:13:24] Each getting harder and harder, each associated with more and more important things in the constitution. Here's an example, in American history the same procedure, Article V procedure which requires two-thirds agreement in the congress and three quarters of the states to ratify that amendment, that same procedure has been used for all 27 amendments, including an amendment to abolish slavery, to introduce a ringing declaration of equality in the constitution. Same procedure was used to do that, as was used to change the date of the president's installation from March 4th to January 20th. That's the 20th amendment.

[00:14:07] That should be much easier to implement than something big and transformative as the introduction of an equality principle in the constitution. And so that's the first thing I would change about the U.S. constitution. And indeed the U.S. model is the standard model, it's the first model, but it's outdated. Constitutions today do codify this escalating structure of change and with good reason, because it works. It serves the purpose of stability, legal continuity and also greater public participation and ownership of the constitution.

[00:14:43] Lana Ulrich: Great. Thanks, Professor Albert, for those thoughts on Article V of the amendment process. And Professor LaCroix, interested in your c-... in your thoughts on that, um, about the federal constitutional amendment process and then also, you know, I just wanna bring into, uh, the discussion state constitutions. And- and Professor Cole, I know we talked about this too, um, but we have a unique federal system in the United States and I know you've written a lot about the origins of federalism too. So, um, so, yeah, please feel free to respond to any comments about, you know, the federal constitutional amendment process, but also the unique features of the U.S. system, which includes state constitutions as well.

[00:15:19] Alison LaCroix: Sure. Well, one thing I like to say about the constitution, I think, uh, Professor Albert had a sort of encapsulating phrase, and one phrase that I like to have that I often mention to my constitutional law classes is that the U.S. constitution is very old, very short, and very vague. Um, it's the oldest still functioning constitution in the world, it- it's still one of the shortest, um, and it's vague. And I think all of those things are connected, and so there is, I mean I think historically, it's very interesting to try to look at periods in which people thought of the U.S. constitution as potentially amendable, um, and when they didn't, and how these things change.

[00:15:59] So, again, there's a sort of I think the historian, um, view of many things in constitutional law is to sort of remind people, "Well, we may have been here before, but also don't be too quick to assume that there's total similarity." So, it's the, um, it's complicated point. Uh, and one aspect of this that I think is quite interesting that relates to my current research as well, um, is this period between sort of the very kind of early U.S. constitutional amendments and then the reconstruction amendments.

[00:16:30] And so if you think of obviously the Bill of Rights, the first 10 amendments ratified 1790/91, sort of right after the constitution was ratified. And then you get the 11th amendment about sovereign immunity of the states, uh, in response to a Supreme Court decision in 1795, and then the 12th amendment, um, changing the way the president is elected. So, changing it from the first and second winner and runner-up become president and vice president, to the system we have now.

[00:17:00] Um, I... that line in Hamilton, um, about, "We can change that." "Why?" "Because I'm the president, I always know." No, not exactly. That's not how it works. But it is because of the election of 1800 that the 12th amendment was passed. So, the 12th amendment ratified in 1804, then you have no amendments for 61 years until the 13th amendment at the very end of the Civil War. Um, that's actually a pretty long period in which people were thinking consciously about various constitutional amendments.

[00:17:30] So, proposing things from constitutional amendments, abolishing slavery, or guaranteeing slavery, it's important to remember that the power of the federal government on slavery, um, went potentially both ways. Um it's not necessarily the case that federal power was emancipatory by any means in that period, but also more specific things about limiting congress's power to fund public works projects, changing the way Supreme Court, uh, review worked. Um, and one thing that I think is quite notable is this kind of hangover of, I think of it as the long founding period where people in this sort of early 19th Century pre-Civil War, Antebellum era, they're kind of haunted by this question of, "What do we do about this constitution?"

[00:18:15] Because they revere it in some ways, but they feel like it has problems, some of which are detailed and some of which are more, uh, large-scale. Um, and so even the process by which slavery was finally abolished by constitutional amendment, was itself historically specific. F- fi... Lincoln first abolished slavery through the Emancipation Proclamation, but only in certain states, only under the war powers, in a way that wasn't necessarily durable. Um, and so even the meaning of what it... what it is to amend the constitution itself has changed. And I think I mean to Professor Albert's point, I think... I think that should embolden us to think it's possible, not that the constitution is fixed and changing it is off the table.

[00:19:01] I think that's part of the problem of current legal and political debates, and it's just not the case. Within the system the constitution created, is the ability to change and amend the constitution.

[00:19:13] Richard Albert: Can I just pick up on two- two points? One is on, uh, Lincoln, uh, and, uh, two is on let's call it temporal variability in constitutional amendment across American

history. So, second point first. Um, it is true that the U.S. constitution today, I think, is virtually unamendable, but that doesn't mean it will be unamendable tomorrow, or next week, or next year. Because Article V has never changed. The rules that you need to follow to change the U.S. constitution, they haven't changed since the very beginning, and yet in the nineteen teens, in the progressive era, people argued that it was too easy [laughs] to amend the constitution.

[00:19:57] So much so that proposals were introduced to amend Article V to make it harder to change, and that's because in a span of eight years, seven/eight years, there were four amendments passed enacted to change the U.S. constitution. So, that was then Article V. Today Article V is the same, but it's impossible. The point here is only that the configuration of constitutional politics changes over time. Today there's a stalemate. Might not be the case next year, in a decade, when perhaps a charismatic leader is able to rally support across the states to get a super majority, uh, sufficient to change the constitution.

[00:20:35] On Lincoln, Lincoln and slavery, I think, this is a story that- that must be told and it has to do both with Lincoln and with amending the U.S. constitution. Lincoln is of course known as a great emancipator, but he wasn't always that. He campaigned on something called the Corwin Amendment, which would have amended the U.S. constitution to give states the irrevocable, unamendable right to practice slavery forever and all times. So, Lincoln campaigns on this, he gets elected on this, he proclaims his commitment to this Corwin Amendment in his first inaugural address.

[00:21:17] And then the Civil War breaks out and he changes course. And then he becomes the great emancipator and then he fights for the 13th amendment. In an interesting twist of American history, had this Corwin Amendment that Lincoln campaigned on been passed, that would have been the 13th amendment. But instead as a 13th amendment we get the opposite, we get the abolition of slavery, rather than the unamendable right of states to practice slavery.

[00:21:46] Nicolas Cole: I don't want to make any normative claims about whether America should amend its constitution, but I- I think it's helpful to think in slightly less abstract terms. I mean the- the federal document is doing something very complicated, uh, it's distributing power between the federal government and the states, and as Professor LaCroix says, vaguely, and there's a lot... there's been argument for 200 years about exactly where... how that distribution should work. It balances power within the union between a crudely large and- and small states, populated and less populated states, and it lists a set of rights, although with nothing like the sort of comprehensive statement of rights that you find in most state constitutions.

[00:22:30] And I... and I do wonder on all three of those questions, uh, you know, whether there would be a sufficient consensus during a co-... reform process, um, to- to actually unite around a new constitutional text, because it seems to me that all three of those, uh, questions have always been but are now especially exceptionally controversial within America. And, you know, looking at the sort of statistics about, um, you know, what amendments have been proposed and not been proposed, um, yes, highlights the fact that the American constitution is very hard to reform, but I think if it were easier to reform, that would- would highlight rather than dampen down some of the controversies about it.

[00:23:12] Richard Albert: That's the key, it's the federal structure of the constitution that complicates amendment. If you look at constitutions of the world and you were to rank the most difficult constitutions to amend, it's no secret, it's no surprise that they're federal countries. Canada, Australia, the U.S., for example.

[00:23:29] Lana Ulrich: Yeah. Well, I- I- I wanted to- to elaborate more on this, because I think it's a really interesting point, and just bring in now the judiciary and the role of the- the courts in the United States and, you know, constitutional reform and constitutional development. And Professor Albert, you mentioned the Dobbs leak, um, and right now, you know, we ha-... we're having a debate about, um, the future of Roe in this country. And- and Dr. Cole, you- you had noted that in the UK, what the UK has come to is more of a legislative compromise, I think, on an abortion law that I think has been in place since the '60s and '70s.

[00:24:01] Um, and but here in the United States, um, after Roe, you know, it's been a subject of much debate and now it looks like the Supreme Court is poised to overturn Roe. So, I guess, Professor Albert, my question to you is, you know, looking at the role of the courts in constitutional reform over time in the United States, what has... what has been the role of the courts, what- what should the role of the courts be, and what do you think the future of, you know, the court as an institution might be in the wake of this leak, um, and, you know, the f-... thi- thi- this opinion that might come out in Dobbs?

[00:24:31] Richard Albert: I have to say, I'm worried about the court as an institution, and we can set aside the content of the judgments that they issue. I happen to disagree with many of them, but that's not the point. The point is that the court today is seen as a political institution. Now it's always been political, right, in the sense that courts, judges always make value-based judgments. It's inevitable in a constitutional democracy for that to be the case. A common law constitutional democracy for that to be the case.

[00:25:00] But I'm worried about the institution when it is seen as a political institution, as an arm of a given political party, which is the case today for most Americans, and that's a problem. And what we're going to see is increasing attacks on the court from its opponents, and then the supporters of the court will want to gird themselves to defend the court. And so the court is always going to be, for the near future to the midterm, it's going to be the key battleground in elections. That's what we're going to talk about in the midterm elections coming up in a few months in November, and then the 2024 presidential election.

[00:25:37] That shouldn't be [laughs] the role of the court. It should not have a place in that kind of competitive political discourse in an election. But yet, here we are.

[00:25:49] Lana Ulrich: Professor LaCroix, you were on the- the Biden Supreme Court Commission. Based on your work on the commission, do you... do you agree with, you know, Professor Albert's comments about, you know, the concern over the court, I guess? And then have things changed in light of this leak? Uh, we'll link... we'll link to the full report in the chat below for anyone who's interested in reading it. Um, but, you know, I'm just interested in your thoughts on- on both the history of the courts and where you see the future of the courts today.

[00:26:15] Alison LaCroix: Well, it's a great question and- and certainly only becoming more timely. My view, I mean I think one- one of my views on this was something that, uh, very much I think is embodied in the report of the Supreme Court commission, is this idea that the court itself as an institution, the Supreme Court, has a history. And what we take to be the current state of the court has not always been its state, or its place in- in the U.S. political system, nor need it be.

[00:26:48] Um, and I think that's part of what is interesting, and I think to many, troubling about- about current debate. So, the report, which I really commend to the audience, because it's very- very much worth reading [laughs], I think I say that not only as a member of the commission. But it- it begins with a chapter, chapter one, that goes through the history of the Supreme Court in the U.S. system since the beginning. And one of the themes of the report, especially this history chapter, is to say conversations about reform began simultaneously with the drafting of the U.S. constitution.

[00:27:25] So, there's often this- this kind of theme or- or refrain in modern political debate that says, "Well, even talking about changing the court, reforming the court, altering the court in any way, is some sort of constitutional heresy." And I think the commi-... the commission report shows that as the constitution was being drafted in the first congress when it was being, um, kind of bolstered by statutes, people were already saying, "Here are some changes we should make." And so it's not illegitimate to talk about changing the court, and I think that to... in some ways very basic point, is also foundational and existentially important.

[00:28:06] So, you know, when... and- and I think this gets to some of the points that others have raised too, that the court is political and- and there's a sort of reaction to that, that well, no, the court can't be political because that would delegitimize it. Well, the court has to be political, because the only way it has legitimacy in our system is that it is part of the separation of power structure. And so within certain limits set by the constitution, the political branches, meaning congress and the president, have controls over the court.

[00:28:37] Appointment, control of jurisdiction, control of structure, and that is our system. And so I think there's a clouding of the issue of... and it's not helped frankly, I think, by the justices in many cases going out and saying, "We're not political." Well, one individual justice does not have to be embodying and enacting a partisan agenda for the court itself to be political. And again, in many ways salutarily political, we want it to be political. And then some of the things that I think we take to be fixed about the court, nine justices, for instance.

[00:29:13] The court first got nine justices in 1837, 50 years after the constitution was drafted, in what was clearly a court packing scheme by President Andrew Jackson, um, there were proposals to take it up to 10 at various points during the Civil War and reconstruction. So, I think just kind of peeling away some of these clouds of things have always been this way and to say otherwise is heresy is, I think, one of the most important things that the commission report, but also just we as- as scholars, I think, need to do. Because it also combats the kind of simplistic takes on these issues.

[00:29:51] Lana Ulrich: Professor Cole, definitely interested on your thoughts, um, you know, both with respect to, um, you know, anything about the, uh, U.S. Supreme Court as an institution in light of this leak. And also, you know, if you could just bring in a little bit more detail about the UK court, um, which I think was, you know, the Supreme Court was created in 2005, I think, by parliament. Um, and so yeah, just I guess, uh, saying a little bit more about our, um, judicial system compared to that Supreme Court reform, um, law and, um, your thoughts on, you know, both h-... how both systems, I guess, function. I know you, again, mentioned the legislative compromise about abortion in the UK. Um, and I think, you know, it would be interesting to hear just a little bit more about the differences there.

[00:30:36] Nicolas Cole: Yeah. I- I mean I- I'm a historian not a lawyer, so maybe I can say this a bit more freely than others, but the interpretation of law is always political in some sense. There have be-... there were disputes, uh, before the American Revolution in Britain over the interpretation of law that looked surprisingly partisan. And it is not a surprise that there will be partisan views on how to interpret the law. And the question really is what do you do with that and how do institutions respond to that.

[00:31:05] I think pretending that the law can be apolitical and mechanical is not very helpful. I- I completely agree with that. The- the, uh, UK didn't have a Supreme Court until I- I think it's formally opened in 2009. Uh, before then, um, the- the- the kinds of judgments that would be finally decided in the UK judicial system were decided by a committee of the House of Lords, in other words by the upper house of the legislature. Although... and although in practice in modern times that was always a separate judicial committee composed of judges, I- I think the reason that lasted so long was a kind of recognition that at a certain level a final determination about what the law means i- is- is also a political thing.

[00:31:50] Now, w- we looked at America and we looked at the Supreme Court and we thought actually a proper separation between the legislative and judicial branches is- is more correct, and so the Supreme Court was created. But in creating the Supreme Court and in writing the, um, Human Rights Act in the 1990s, parliament was very keen not to give up its sovereign power to legislate in all areas. And so the- the UK Supreme Court is not allowed to strike down legislation in the same way that the- the U.S. Supreme Court does. Pa- parliament explicitly said, "Actually we will say finally what the law is and should be. Even if there is a Human Rights Act, um, we- we reserve the right in a sense to- to overrule it."

[00:32:38] Now, the court has of course, uh, waded into some very interesting areas recently. There was a... there was a dispute a little while ago, uh, over whether the Prime Minister of the day could, uh, prorogue parliament, which is a terribly technical thing and it just means sort of end the session so that all bills fell. And this is something that is not codified in law, or anything else. Uh, it- it's a- a prerogative power of the Crown exercised normally by the Prime Minister. And- and a lot of constitutional scholars thought that actually the Prime Minister had an uncontrolled power to do this, even though it was being done in a way that really breached a lot of constitutional conventions.

[00:33:17] And I think a lot of us were incredibly surprised when the- the UK Supreme Court did something, uh, very unexpected and unanimously concluded that this was a void action and breached a- a- a more overarching, uh, sort of principle of the rule of law. So, I- I think even though the UK Supreme Court is much less powerful on- on paper than- than the U.S. Supreme Court, um, it- it's- it's become politicized in- in interesting ways recently, um, and particularly as well for its oversight of executive actions.

[00:33:51] Um, so- so there are... there are some crucial differences, but I think in the... in the UK as well as the U.S., we are... we are grappling with the idea that the interpretation of law is in fact political and the institutions need to both, um, retain the confidence of the public, um, but- but also, uh, you know, re- reflect different views about how the law should be, uh, interpreted. And I don't think we have any easy answers yet either.

[00:34:19] **Lana Ulrich:** Mm-hmm [affirmative]. Professor Albert, before I, um, turn to you to p-... to respond, um, uh Professor Cole, I just want to follow up with just one quick question we have from Bonnie Zedek who asks, "Has the UK had any leaks similar to the recent leak from the U.S. Supreme Court?"

[00:34:33] **Nicolas Cole:** No, there- there's- there's- there's really nothing comparable, uh, to- to that, but- but- but in a sense the- the- the UK Supreme Court has not been as involved in defining fundamental rights in quite the same way, or defining, um, policy in quite the same way. And so I really just c-... I can't think of anything comparable to the... to the leak you've just had, or indeed to the- the type of case that that is, because it's not the kind of case that the UK Supreme Court would typically deal with.

[00:35:03] **Lana Ulrich:** Mm-hmm [affirmative]. Yeah. Professor Albert, interested in your thoughts in response to that.

[00:35:07] **Richard Albert:** Yeah. I- I should say first of all, uh, I'm Canadian and we have not had any similar [laughs] kind of leak in the Canadian Supreme Court, certainly not when I was a law clerk to the Chief Justice, uh, nor before or- or since. Um, on the UK Supreme Court, the increasingly assertive conduct of that court has led to some resistance, uh, from the current, uh, government, uh, proposing in fact in December, if I'm not mistaken, something known as the Interpretation Bill, that would allow ministers to nullify court rulings over the previous year that they disagree with.

[00:35:43] And so what you see is this is an effort to weaken the power of courts to reinforce parliamentary sovereignty over what is an unelected judiciary. And so many of the s- same debates that we're seeing in the United States are playing out differently, but similarly in the UK. And it's absolutely correct to say that courts and judges are political institutions and political actors respectively. Absolutely. The point is that they should not be politicized in the way that they have been and are today in the United States. That's- that's the point, that's the crucial difference.

[00:36:21] Lana Ulrich: Professor LaCroix, um, you know, feel free to- to respond to that. And, um, there's a question, um, not, you know directly related, but it's an interesting one that talks about the origins of the constitution from Greg Blonder who asks, "Wasn't the U.S. predilection for a written constitution partly traceable to many of the colonies starting as corporations with legal charters?" Is that, um, do you know if that's the case, or, um, what are your thoughts on that?

[00:36:50] Alison LaCroix: Well, one thing to note is that there's a sort of very blurred line between the corporation, um, and the kind of civil- civilly constructed polity, I guess, if we're talking about the 1600s when many of these charters were written. So, yes, it's true that, uh, many charters started out as, uh, some combination of business and political or governmental entities, in part because you would have a group that got a charter from the Crown, in many cases, um, to say go and sort of settle, you know, this part of what we understand to be the Queens or the King's dominions, and set up a company there.

[00:37:29] And so there... I think the- the- the real thing to note is that the modern idea of the private business corporation is the anomaly here. Um, that both corporations and charters and- and sort of municipal or s-... or political corporations, governmental corporations, and business corporations come from a kind of joined history here. And so, um, that I- I think helps explain some of the kind of connection between these charter/constitution documents. But it's also worth noting that many of the earliest, what I think we could fairly call proto-constitutions, um, do-... aren't specifically about sort of the business side of the colonial enterprise.

[00:38:13] So, uh, one I find particularly interesting is the Fundamental Orders of Connecticut from 1639, um, so very early, and this is actually federal in the sense of joining polities together, because, um, a few different Connecticut colonies joined, um, to form a kind of agreement about how they were going to operate together. And, um, the Fundamental Orders of Connecticut talk explicitly in terms of having the power to do this, because, uh, because of the sort of inherent authority in the people. So, there's a sort of popular sovereignty idea, and also their kind of, um, charter with the king in some way.

[00:38:54] And so it's sort of... and- and with god. There's a sort of divine authority, or sort of something behind the King. So, um we can see the sort of popular sovereignty impulse to write down organizations of government that, to Professor Cole's point, are also about coordinating and- and joining polities together in 1639, well, you know, before we're into anything like the revolutionary moment. So, yes, charters, constitutions, corporations and also compacts. Um, so the- the, um, one I also like is John Winthrop's sermon preached aboard the ship Arbella in 1629.

[00:39:33] Um, this is the Massachusetts Bay Company, so a company, uh, but Winthrop in hi-... this sermon, A Model of Christian Charity, sort of lays out the authority that the Massachusetts Bay, um, colony will have. And he says at one point, "Thus stands the cause between god and us, we are entered into covenant with him for this work." So, they kind of completely shut the King out of it and say, again, there's a kind of popular but also fundamental law based foundation for this system of government that is also in some ways about structuring societies and- and

certainly also had a- a kind of business in, uh, leaning. So, it's very interesting, I think, to look at these- these early charters.

[00:40:18] Richard Albert: If I could just drop a footnote to that, uh, I wanna recommend a paper by Mary Bilder on the origins of judicial review in which she discusses this- this point, uh, about the relationship evolution from corporate charters to constitutions and their judicial review. Fascinating paper that I... that I recommend.

[00:40:37] Lana Ulrich: That's great, thank you. Yeah, we'll definitely drop a link to that in the... in the chat. Professor Cole, um, uh, Alison mentioned popular sovereignty, this concept of popular sovereignty, and we have a couple questions about that in relationship to the UK. Uh, so I wanted to just tie back in her remarks to some of these other questions, um, from, uh, Mitchell Kiter. He asks, "If British constitutionalism is unwritten and judge made, how can we, the people, amend it?" Is that how it works in the UK, or, um, maybe say a little bit more about- about that process?

[00:41:09] Nicolas Cole: I- I thi-... I think... I think we've tended to over emphasize the extent to which the British constitution is unwritten. It- it- it's... a- a lot of the structure of government is written in statute. So, the frequency of elections, for example, uh, the distribution of power between, uh, different subordinate authorities in the United Kingdom, the- the- the way in which various executive bodies should behave.

[00:41:32] The- these are all... these are all written in statute. Um, rights to appeal various decisions to different bodies, um, the- these kinds of things that might be in the U.S. case in- in constitutional texts, are- are in the UK in statutes. And- and in fact the- the Human Rights Act in the UK is a- a statute that- that, um, ra- rather than a... than a piece of entrenched constitutional law. Um, but- but like- like the U.S., we have a lot of conventions and traditions, um, that are... that are outside of sort of formal constitutional law, um, but which we nevertheless feel are part of the constitution.

[00:42:11] Uh, and perhaps there's a... there's a greater preponderance of that in the U-... in the United Kingdom than the- the U.S., although I think that's a very arguable point. But- but that brings us to the question of how does the UK constitution get amended, and the answer is it gets amended by statute. And, uh, so the- the- the Scottish government in the UK, for example, uh, can be and has been recently granted additional powers by the U- United Kingdom parliament that has said, "We- we will not legislate in this area. This is now competence of the- the Scottish government."

[00:42:43] So- so, you know, popular views about what should and shouldn't be constitutional become part of this of normal political process. Um, you know, the w-... the word constitution in the UK is perhaps a little bit vaguer than in the U.S., it perhaps retains a little bit more of its older meaning. You know, when we talk about things being constitutional and unconstitutional, we mean sort of conforming to the political order as we- we- we think it should be, rather than referring to a- a single, um, statute.

[00:43:15] But you- you can do this in the... in the U.S. as- as well. I- I mean many people, for example, feel that things like the- the filibuster are part of the constitution, even though the Senate filibuster is not part of the constitution, it's part of the rules of business in the Senate. But it- it feels to many Americans as if it is part of the constitutional order. And so- so, you know, the- the distinctions between the- the two are sometimes overstated. Um, but- but the- the specific answer to the question is that, um, if a political party is elected with a mandate to amend elements of the British constitution, it does it through statute.

[00:43:51] Uh, and- and there's very little that can restrain a party determined to do that. Um, the composition of the House of Lords, uh, will eventually be changed again, I am sure, through a- a statute, uh, for example.

[00:44:06] Lana Ulrich: That's really interesting. Um, and definitely, uh, you know, a- a little bit hard for the U.S. [laughs] lawyers to wrap their heads around, that that is the case, although, you know, in the U.S. system we do have, you know, the constitution is supreme, but we have statutes and treaties that are, you know, supposedly somewhat on that level, although, um, not as- as... not higher than, you know, the constitutional text, but still the- the supreme law. So, I guess, Professor Albert, um, I'm interested in your thoughts on, uh, a little bit more about, you know, focusing on the U.S. constitution, and we haven't talked about the presidency yet.

[00:44:42] And, you know, you mentioned that you would amend the amendment process. Would you, you know, looking at the current structure of the U.S. executive, are there other changes that you would suggest to, um, you know, whether it's the impeachment process or anything else that's a unique function of our system that, you know, maybe looking at other constitutions, whether it's the way the UK is structured in the parliamentary system, or Canada, or any- any other constitution that you want to bring in that has unique, um, ideas, uh, to bear on- on our system?

[00:45:12] Richard Albert: There's a lot that needs changing in the U.S. constitution, but first let me try to explain [laughs] for, uh, American lawyers and American citizens, um, how the U.S. constitution actually operates quite similarly to the UK constitution, it just looks different. So, in the U.S., yes, there's a master text constitution and it can be reformed. The text can be altered. Okay. But, there also happen to be statutes that have constitution level status, and so what happens is that because the U.S. constitution is so hard to amend, sometimes you need to do things that you can't do by amendment and you look for another way to do it.

[00:45:53] So, statutes are passed in the congress that are given a special kind of treatment in politics, special treatment by judges. These are called super-statutes in the parlance. Uh, it derives from a paper in 2001 by Bill Eskridge and John Ferejohn, super-statutes. So, we have a U.S. constitution and there's ordinary statutes, and then there are super-statutes, have a special political salience that float between ordinary law and constitutional law. Some examples, the Civil Rights Act, 1964. The Social Security Act, for example. Okay.

[00:46:36] The UK constitution has a bunch of statutes and technically formally they have the same status, because they're passed the same way, they can be changed the same way, right?

Parliament has the power to make or unmake any law. What's interesting though is that much like there are super-statutes in the U.S., there are constitutional statutes in the UK, passed the same way as all ordinary laws, but they have a special treatment in constitutional politics.

[00:47:09] They're received differently. And so this is how you have in both the U.S. and UK a hierarchy of constitutional norms, they just look different. Now you asked what would I change about the U.S. constitution? A lot. Um, if you compare the U.S. constitution in terms of rights and freedoms that it codifies, it's well behind the vanguard of constitutional rights and freedoms around the world. There's no mention, no protection for social and economic rights in the U.S. constitution.

[00:47:41] You look at a modern constitution, you'll find them. And also the things that are in the U.S. constitution have been rejected abroad. You're not going to find any other example of the second amendment. There are maybe two or three others in the world, and it's not good company. So, I would change a lot about the U.S. constitution. The first thing I would change I mentioned to you already, is I would change Article V. The second thing I would change is that I would borrow from the state tradition.

[00:48:09] About 15 states in the United States are pre-programmed in their constitution to call a constitutional convention automatically after a certain interim period of years, in order to rethink the constitution. Citizens are asked, "Do you want to amend your constitution? Do you want to create a constitutional convention to talk about reforming the constitution of a given state and adopting a new one?" That, I think, is a great way to keep people engaged in the constitution, to require political actors to actually come to the table to confront the questions that are pressing at that moment, and to keep the constitution reflective of present modern day values. So, that's the second thing I would change about the U.S. constitution. I have a long list, but I'll pause there.

[00:49:02] Lana Ulrich: Great, thank you. Professor LaCroix, interested, uh, in your thoughts, um, both of this concept of super-statutes, uh, that was mentioned in the U.S. system and then, um, you know, any aspects of the U.S. constitutional system that, um, you know, what- what... maybe not that you would, you know, necessarily amend, but that you think, uh, maybe warrant a closer look, and if there's any other, you know, again constitutional elements from other countries that, you know, we could bring to bear, including the UK?

[00:49:31] Alison LaCroix: Well, yes, the- the whole sort of super-statute idea is- is interesting. I mean I think of it as structural statutes and I... there's a flip side to the story as well. Um, so there were a number of instances in the 1970s and 1980s when congress, particularly in the wake of the Watergate, um, scandal and the Vietnam War and associated, I think, lack... just a general sort of shaking of confidence in the executive branch in particular. Um, congress passed several statutes that were intended to, in various ways, give the president either more insight or more control over the law making power.

[00:50:11] So, this is the Line Item Veto Act, um, or to give congress a kind of way of looking back at what agencies might do. So, um, the- the Legislative Veto, and they're technical but I think the kind of important point is you can look at those statutes as real attempts at sort of

structural reform. And in both the instances I mentioned, the Line Item Veto Act and the Legislative Veto, in a particular instance, the Supreme Court struck them down as violating the separation of power.

[00:50:40] So, um, you can look at those examples and say, "Well, how should we think about this?" Because congress was trying to really, um, address problems, right? Say, well, congress passes these huge statutes and people are worried about the deficit, the budget deficit, let's give the president the ability to Line Item Veto, uh, li... drawing in many cases from other constitutional democracies. And the Supreme Court said, "Well, now you're changing the president's role in the legislative process. You're giving her- her or him too much of a role, and you're diminishing congress's role."

[00:51:14] And it's hard to know what to think about those, because in some ways you could sort of pull back from those cases, um, *INS v. Chadha* is the Legislative Veto. Um, *Clinton v. City of New York*, *Bowsher v. Synar* on the Line Item Vetoes. And- and there it looks like it's a victory for the court. I mean if you want to be very cynical, I think you could say, "Well, this is the Supreme Court asserting itself as the overseer of this separation of powers." You could say it's the Supreme Court keeping congress from, in some of these cases arguably, aggrandizing itself.

[00:51:47] Um, which I think is plausible, certainly. You know, how do you undo these things? But that to me is some of the difficulty about the super-statute when it's a structural statute, is that the court, uh, maybe for good reason, but in any event in many instances the court seems to be, uh, pretty unwilling to- to kind of allow that sort of experimentation. Um, for me I think something that an aspect of the constitutional structure that I think really does need revisiting and I think is deeply, deeply entrenched that make revisiting it quite difficult, is the United States Senate.

[00:52:24] So, um, I think the role that the Senate has in so many different aspects of other branches, whether you're talking about confirmation of judges, um, executive branch officials, the- the kind of role and impeachment, the filibuster is sort of a piece of this, um, I think there are lots of good- good arguments that the U.S. Senate really, um, was designed to serve purposes that we either think it no longer should serve, that we long ago rejected, um, that don't sort of fit current- current realities.

[00:52:58] And I feel like the Senate always comes up as the problem in a lot of conversations that start out as about something else. But the problem of course there, uh, is that the Senate is entrenched in the constitutional system. So, you are talking then about something like constitutional amendments, um, which bring us back to that part of our conversation.

[00:53:17] Lana Ulrich: Great, thank you for bringing that up. Yeah, we had a couple questions about congress as well. So, um, great that you were able to- to bring up the Senate and, uh, your thoughts on reforming there. So, we're almost out of time. Um, we have so many great questions, it's a shame we can't get to all of them. We'll hope-... maybe have to reconvene to cover this- this topic, 'cause it's such a great one and so many different aspects to cover.

[00:53:38] Um, so I think just for our- our quick closing round, um, Professor Cole, just if you could very briefly, um, share, you know, your final thoughts on, um, either an interesting similarity or difference looking at the UK and the U.S. constitutional systems, whether it's something that's been brought up, you know, before that you want to highlight, or something new that we haven't talked about. Um, if there's one thing that you, you know, you want to mention, um, as being, you know, of interest, or maybe the most important similarity or difference, what- what would you say it is?

[00:54:09] **Nicolas Cole:** I- I think thinking comparatively is always really fascinating. I- I think what's very interesting working across the Atlantic as I do is- is that the issues that are hugely controversial and partisan in the UK are not in America and vice versa. In other words, you know, the- the whole alignment of politics is very different. And I think a lot of that comes from the structure of politics and where sovereignty lies or... and the fact that we don't have a federal system in quite the same way that the U.S. definitely has a federal system.

[00:54:40] And I- I- I- I find reflecting on- on- on the fact that the things that are political in America are not political here and vice versa, really interesting. Uh, just to take one very quick example, you know, voting rights are hugely controversial, uh, in the U.S. right now, a- and in the UK there's a little bit of an argument about showing photographic ID, but it's essentially not the same kind of issue at all. Uh, and- and you could go down a huge long list of these things. A- and, uh, I- I think so- sometimes people like us are very interested in the minutiae of sort of institutional design, but I think looking at how that flows through into what is and is not a dividing issue in politics is- is really fascinating, and the two countries are very different in that way.

[00:55:25] **Lana Ulrich:** Okay. Thank you. Professor Albert, same question to you. One aspect, uh, that you'd like to highlight that we either have talked about or haven't talked about yet?

[00:55:33] **Richard Albert:** Yeah, well- well, thank you first of all again for the invitation. So great to be with you, and- and good to be with, uh, Dr. Cole and Professor LaCroix. What a... what a privilege. Um, I guess I'll say, uh, one good thing about the U.S. constitution, one bad thing about it, and then, uh, advice and warning for the UK. So, a good thing about the U.S. constitution is that it's been an inspiration around the world. People look to the U.S. Constitution as a picture of the possible, and that's good.

[00:56:00] But a bad thing about the U.S. constitution is that it doesn't work the way it seems to work when you read the text of the constitution. There's a vast gulf that separates the written constitution from the actual real political constitution. I think the work for constitutional designers and makers and political actors is to narrow that gulf, which means you've got to amend the constitution, reform it or revise it so that it actually says what it means [laughs]. And then the warning I would give to the UK is, you know, I'm thinking of the Conservative Manifesto from 2019 in which, um, the party that is now forming the government said that they want to ensure that judicial review is not abused to conduct politics by another means.

[00:56:49] That is getting very, very close to the kind of discourse that exists here in the United States, and it's not a profitable discourse, it's not a productive discourse. It's a discourse that undermines the court and the rule of law. So, my warning is don't attack the court.

[00:57:05] Lana Ulrich: Great. Thank you for that. And Professor LaCroix, last, uh, last thoughts to you, one interesting aspect, uh, you'd like to highlight?

[00:57:13] Alison LaCroix: Well, here I go to the history again, because I think there's a tendency in the United States to think, uh, that an answer to any question of U.S. constitutional interpretation is the founders were... had just fought a war against Britain, so anything that looks British wou-... must not be what they intended. And there are many, many examples where, in fact, the opposite is true. So, my... one of my favorites is the veto, the executive veto as we know it, which again is part of the process of law making.

[00:57:41] There's bicameralism, both houses of congress and presentment to the president. Uh, and the- the drafters of the U.S. constitution gave the president the power to veto. Well, the last time the royal veto, which is actually the withholding of ascent, had been exercised, uh, was in 1708 by Anne, uh, in response to the Scottish Militia Bill, so it also connects to m-... what I think of as federalism in Britain, which is the relationship between Scotland and England, as Professor Cole mentioned.

[00:58:10] Um, so many people in the Constitutional Convention sort of said, "Well, we can't give the president a veto, it's far too powerful." It hasn't even been exercised in- in Britain for, uh, at that point 70 years. Um, but the feeling was, no, that it was necessary in the U.S. system for lots of different reasons, but I think it points out this fact that, uh, the kind of simple story of if this looks like it was something that we might think of as royal power, whatever that means, it can't be in the- the American system, they were rejecting all of that, um, is not true.

[00:58:44] They- they, uh, had grown up in that system and- and many of them were lawyers and An-... fine Anglo-American lawyers. Um, so I think it, again, reminds us about the historical context and specificity in which the U.S. constitution was written, and not that it is sort of somehow out of history and unchanging.

[00:59:02] Lana Ulrich: Great. Thank you so much Professor Albert, Professor Cole and Professor LaCroix for this, uh, outstanding panel. Thank you to everyone for joining us, uh, thank you to our partners at the University of Oxford. Uh, we will post all of the resources in the chat, um, along with the video on our website. We'll also podcast it out on our podcast, Live at the National Constitution Center, um, and if you're interested in- in learning more, we also have a companion podcast, We The People, so please check that out and subscribe. And, um, hope to see you at another program sometime soon. Thank you again, and have a great afternoon.

[00:59:41] Tanaya Tauber: This episode was produced by Melody Rowell, Lana Ulrich, John Guerra and me, Tanaya Tauber. It was engineered by Dave Stotz. Visit constitutioncenter.org/tobe, to see a list of resources mentioned throughout this episode, find the

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