

PUTTING JUDICIAL POWER IN ITS PLACE

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I INTRODUCTION

The rise of judicial power throughout the common law world is a departure from a shared constitutional tradition. In this article we consider how and why the UK is departing from that tradition, and outline why and how this departure ought to be resisted. Our argument is that the rise of judicial power in the UK is a function in part of the exercise of political responsibility (notably, dubious political choices to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of foreign courts) and in part of how many judges, lawyers and scholars are coming to understand the idea of judicial power itself. These changes to constitutional law and practice compromise the rule of law, privilege irresponsible law-making, and undercut democratic self-government. They ought to be wound back. We suggest that this requires both the revitalisation of political responsibility by elected representatives and an accompanying cultural change within the legal class. We outline how the task of restoring sound constitutional principle in the UK ought to proceed, both in general and, in conversation with Professor Paul Craig, in relation to some of our own work to this end with Policy Exchange's *Judicial Power Project*. We begin, however, by restating the common law's constitutional tradition and the place of courts within it. The broad contours of the tradition traced below are (or at least ought to be) very familiar. Yet, appreciation of and commitment to the traditional constitutional learning amongst the political and legal classes are — it seems to us — waning, which is a main part of the problem. For only if the tradition is kept in clear sight can the real risks associated with the rise of judicial power be fully grasped.

II JUDICIAL POWER AND THE COMMON LAW CONSTITUTIONAL TRADITION

The common law constitutional tradition, in its mature form, makes provision for constitutional government that is capable of securing the common good. It enables a scheme of government that observes and upholds the strictures of the rule of law and extends to citizens a share in self-government. At its heart lies Parliament, with parliamentary sovereignty and responsible government anchoring a constitutional order that enables intelligent government (legislation, administration and adjudication), framed by and answerable to public deliberation and democratic contestation.¹ Courts fulfil a vital but limited role within this tradition, one grounded in fundamental constitutional principle and supported by legislation and convention. Courts can contribute to securing the rule of law by resolving disputes impartially and in accordance with the law, and by keeping faith with past legal commitments, whether common law or statutory. This includes upholding the legal rights of persons in dispute with the executive or administrative agencies. This conception of the judicial function, moored on a commitment to positive law and premised on the openness of legal proceedings to

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¹ For a treatment that explains the centrality of and rationale for parliamentary sovereignty within this constitutional tradition, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).

all who have an arguable cause of action, makes courts indispensable to the rule of law. Indispensable but plainly not sufficient: the rule of law would be imperilled without a legislature and legislators committed to enacting laws that are prospective, stable, coherent and capable of being obeyed, and an executive willing to do its legal duty.² (This is to say nothing of the scope for courts to undermine the rule of law, a risk to which we will return below).

The courts are not ‘the guardians of the constitution’: they apply positive law, not the constitution writ large.³ They are not, in other words, responsible for the constitution’s coherence or justice, or for upholding constitutional norms in general (as distinct from the subset of those norms that are also propositions of positive law).⁴ It is Parliament that enjoys primary responsibility for deciding the justice of the law, and for choosing how or whether the law is to change. One of the virtues of this tradition is that by eschewing judicially enforceable limits on Parliament’s law-making capacity, the practice of the tradition, and indeed the constitution itself, always remains open to change — and even more or less radical change — if secured openly in Parliament. Much is thus entrusted to Parliament, with reliance placed on the structures and dynamics of Parliament, including its exposure to electoral politics, as the discipline that ensures either that this trust is not abused or that abuses are promptly corrected.⁵ This commitment to parliamentary sovereignty, with its reliance on self-correcting political processes, is not a rejection of the idea of human rights or other constitutional goods, but rather an expression of the idea that decisions about the content of the law ought to be made fairly and openly by a representative Parliament. Thus, this constitutional tradition does not permit judicial review of legislation. Rather, the institution through which to challenge the justice of the law is Parliament, with no body enjoying authority to set aside its decisions. It is often important to protest vehemently against its decisions, but the object of this contestation is and ought to be change within, and by, Parliament itself.

The courts in the common law tradition do not review legislation, but they do of course accept challenges to the lawfulness of executive action, sometimes quashing actions as unlawful or awarding damages or other remedies. The responsibilities of the executive are far-reaching: in order to govern it must act within the frame of settled law, exercise its lawful powers and liberties, and direct the state’s personnel and resources. The apex of the executive is drawn from and answerable to Parliament, with most legislative proposals prepared by ministers with the advice of civil servants. Parliament holds the executive to account by sustaining it in office (and by remaining ever capable of withdrawing that necessary support), by scrutinising the executive’s actions in committees and plenary session, and by allowing opposition parties (and the official Opposition in particular) to present themselves as alternative electoral propositions.⁶ Robust mechanisms of parliamentary accountability do not dispense with the need for the executive to be answerable in court for arguably unlawful action. Rather, the

² See Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195.

³ *Pace*: Lady Hale, *The Supreme Court: Guardian of the Constitution*, Sultan Azlan Shah Lecture (9 November 2016); and Lord Mance, ‘The Role of Judges in a Representative Democracy’ (lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, 24 February 2017) [32].

⁴ A point made in Richard Ekins, ‘Constitutional Practice and Principle in the Article 50 Litigation’ (2017) 133 *Law Quarterly Review* 347; and Richard Ekins and Graham Gee, ‘Miller, Constitutional Realism and the Politics of Brexit’ in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart, forthcoming).

⁵ See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

⁶ See Grégoire Webber, ‘Loyal Opposition and the Political Constitution’ (2017) 37 *Oxford Journal of Legal Studies* 357.

possibility of judicial review upholding legal rights against unlawful executive action is a fundamental institutional support for the rule of law and a vital complement to parliamentary accountability. Nevertheless, judicial review of executive action has been available on specified kinds of ground only, has sought largely to eschew judicial second-guessing of the merits of policy choices, has not extended to all domains of public action, and — above all else — has been grounded, in its application, in a recognition of the constitutional importance of the executive and the primacy of political disciplines within the common law constitutional tradition.

Underpinning this constitutional tradition is a particular vision of the separation of powers, where the exercise of judicial authority is largely insulated from political authorities and pressures. This safeguards the rule of law, allowing courts to maintain fidelity with settled law whilst protecting them from exposure to inappropriate political criticism or influence. It also preserves the freedom of parliamentary and political deliberation and choice, with the executive able to pursue the common good as it sees fit, but for which it remains accountable to Parliament and voters. The tradition thus in practice separates judicial power sharply, but also takes care to limit that power. This runs hand in hand with a disciplined approach to legal materials. The judicial responsibility is to determine disputes in accordance with law, which requires judges to find and apply the law as it was, or should now be understood to have been, at the time of the contested action.⁷ In this way, judges contribute to the vital project of ordering social life over time in accordance with publicly promulgated standards, a project they compromise if they remake those standards when adjudicating. In interpreting statutes, the judge strives to find and give effect to the intention of the enacting legislature, insofar as it is made out by the statutory text read in the context of enactment.⁸ The judge rightly presumes that the legislature does not intend to depart from the existing constitutional order, or to qualify or change settled legal rights, but this presumption is defeasible. In relation to the common law, the judge strives to articulate principled rationales for the decisions of earlier courts. This involves a secondary law-making function, but one exercised as a by-product of adjudication. Hence, there are sharp limits on the ways in which courts may reasonably (or even lawfully) change the law. Putting the point at its lowest, no court should think of itself as a ‘mini-legislature’, free simply to change common law rules as it thinks justice requires. The court’s capacity to change the common law is instead rightly limited by its responsibility for fair adjudication in accordance with settled law.⁹

This common law constitutional tradition is grounded on the assessment that a people — at least in the conditions that have prevailed historically in England and thereafter the UK — should be free to exercise self-government by way of national, parliamentary democracy. The law by which subjects are governed is their law, either the common law as developed and articulated by the polity’s judges, or those legislative choices freely adopted by the Westminster Parliament. In this tradition, the realm is represented as one agent in the international domain and in that capacity undertakes obligations that bind in international law. However, these obligations do not govern within the realm unless and until adopted by Parliament. The task of the courts has been to uphold domestic law, to which international law is irrelevant unless incorporated, most notably by statute. This insulation from international law is an important facet of the separation of powers, inasmuch as it prevents the executive from overwhelming or avoiding the legislature by exercising its capacities in the international sphere.

⁷ See John Finnis, *Judicial Power: Past, Present and Future* (Policy Exchange, 2015).

⁸ See generally Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012).

⁹ See Grégoire Webber, ‘Judicial Power and Judicial Responsibility’ (2017) 36 *University of Queensland Law Journal* 205.

We have necessarily sketched the contours of this constitutional tradition with a very broad brush, but it should resonate inasmuch as it reflects a particular ‘political way of being’¹⁰ that has exercised a special hold on the constitutional tradition in the UK. Our use of the term ‘tradition’ is deliberate: the scheme of government outlined above is aptly characterised as a tradition insofar as it is an expression of customary beliefs and practices that have been transmitted from the past to the present and attracted the allegiance of many within the polity. A broad-based confidence in this scheme’s capacity to secure competent, responsible self-government in line with the rule of law — quite apart from international law and without expansive judicial power — goes some distance to explaining why this tradition was transmitted from generation to generation. This confidence has typically been anchored in the view that the UK has been well governed, in historical and comparative perspective. Support for and appreciation of this tradition — including the limited, secondary role envisaged for courts within it — has until recently not only spanned the ideological spectrum (in part because the constitution does not foreclose the possibility of radical change),¹¹ but also straddled both the political and legal realms, albeit its resonance has varied across the different constituent parts of the UK. However, this is changing. It is no longer clear that this constitutional tradition is being effectively transmitted, as the expansion of judicial power itself suggests.

III RISING JUDICIAL POWER: EUROPEAN LAW AND ITS RECEPTION

Judicial power in the UK has increased greatly in recent decades. Courts — domestic and foreign — no longer occupy the limited, secondary place envisaged under the common law tradition. This cannot reasonably be denied, although one may dispute the extent of the change, its precise causes, and — especially — whether it is a change to welcome.¹² Our argument is that this is a change for the worse, which ought to be unwound. The nature and scope of the change, as well as insight into how it ought to be addressed, can best be understood by reflecting on the reasons for the change. The rise of judicial power is doubtless in part a complex global phenomenon,¹³ but at least in the UK it has essentially been a function of decisions by national political authorities (especially in relation to European integration) combined with changes in the domestic judicial and legal cultures (including how the nation-state, human rights and politics more generally are understood).

¹⁰ Martin Loughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 183, 184.

¹¹ On this, see Richard Ekins and Graham Gee (eds), *Judicial Power and the Left: Notes on a Sceptical Tradition* (Policy Exchange, 2017).

¹² For an example of extra-judicial discussion acknowledging that courts now enjoy greater power and reflecting on reasons for this, see: Lord Neuberger, *UK Supreme Court Decisions on Private and Commercial Law: The Role of Public Policy and Public Interest*, Centre for Commercial Law Studies Conference 2015 (4 December 2016) [29]-[33].

¹³ See C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000); and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

A *European integration*

The UK's decision to join the European Economic Community, which became the European Communities and later the European Union ('EU'), was a watershed. The EU Treaties bind the UK in international law and nest it within the machinery of the EU legal order, which in turn makes provision for the authoritative interpretation of EU law by the Court of Justice of the EU ('CJEU'). From the perspective of the EU institutions, EU law is a superior source of law to domestic law.¹⁴ This is not the understanding of the UK or its institutions,¹⁵ yet the UK has given direct effect to much EU law, via the European Communities Act 1972 ('ECA'), and has taken pains to avoid legislating in violation of EU law. Parliament remains legally free to legislate as it wishes but EU integration imposes sharp practical limits on the exercise of that freedom.¹⁶ The scope of those limits has grown considerably since 1972 and, for the UK, integration into 'the European Project' has been undertaken with many hesitations and caveats — and is now in the process of being unwound.

Membership of the EU subjects the UK to the jurisdiction of the CJEU, which is a very strong court.¹⁷ The CJEU has been pivotal in European integration, often moving well beyond the legal materials, including the Treaties, and aiming always to strengthen the EU in relation to member states. It is both politically astute and institutionally secure, enjoying considerable freedom to make law in the course of adjudication, with limited prospects of resistance from member states or other EU bodies. (In this, the role and powers of the CJEU differ significantly from the function of national courts envisaged under the common law constitutional tradition.) The CJEU has used its freedom to pursue 'ever closer union',¹⁸ extending EU rights and limiting member state prerogatives, and disregarding even clear treaty commitments (for example, that the EU accede to the ECHR).¹⁹

Parliament's incorporation of EU law, and the role that this entails for the CJEU in relation to that law, has sharply elevated judicial power within the UK. Membership of the EU has implicated domestic courts in reasoning and action that departs sharply from the common law's perception of the sound limits on judicial power. Most obviously, applying EU law has required domestic judges to take Acts of Parliament to be limited by reference to EU law.²⁰ It has also required domestic judges to assume other novel responsibilities, including evaluating the proportionality of legislative and executive measures, and anticipating and/or following the CJEU's approach to the interpretation of EU Treaties and legislation. EU membership has not only elevated judicial power

¹⁴ See the classic statements in Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) and Case C-6/64 *Flaminio Costa v ENEL* (1964).

¹⁵ See *European Union Act 2011*, s18; *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3; and *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

¹⁶ See Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 *Law Quarterly Review* 582, 586- 590.

¹⁷ For a discussion of the CJEU's power, see Gunnar Beck 'Judicial Activism in the Court of Justice of the EU' (2017) 36 *University of Queensland Law Journal* 333.

¹⁸ Article 1, *Treaty on European Union*.

¹⁹ Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

²⁰ Per section 2(4) of the EC; notable examples include *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603; *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1; *R v Commissioners of Customs and Excise, ex parte Lunn Poly Ltd* [1999] EULR 653; and *R (British Telecommunications Plc) v Secretary of State for Culture, Olympics, Media and Sport* [2012] EWCA Civ 232.

within the sphere of EU law itself. There has been an additional (and, from our vantage point, very troubling) ‘spill over’ effect: the legal implications of EU membership have encouraged some judges to grow sceptical about parliamentary sovereignty and to speculate about introducing proportionality as a general ground of ordinary judicial review.

B *Rights adjudication*

The UK is soon to leave the EU, a change which in a sense demonstrates the continuing capacity of our representative democracy to reason about the limits to which EU memberships has subjected it, and to choose to bring them to an end.²¹ However, the UK, for now at least, remains a signatory to the European Convention on Human Rights (‘ECHR’) and subject to the jurisdiction of the European Court of Human Rights (‘ECtHR’). This is a controversial court, and like the CJEU has become a lightning rod in domestic political life. The UK ratified the ECHR to shore up fragile democracies in continental Europe. The prospect of having to comply with ECtHR judgments was a cost of doing so, albeit one that arose well after entry into the ECHR, when the UK government accepted the right of individual petition in 1966. These costs rose sharply in the 1970s when the ECtHR began to approach the ECHR as a so-called ‘living instrument’,²² assuming responsibility for updating its meaning and for developing and elaborating its requirements in light of what its judges deemed to be contemporary social and moral attitudes across Europe.²³ The UK has suffered some high-profile and significant defeats before the ECtHR, and has generally complied with its judgments, paying compensation when ordered and changing laws held to be incompatible with the ECHR.

The enactment of the Human Rights Act 1998 (‘HRA’) incorporated convention rights into domestic law, required domestic courts to take ECtHR case law into account in interpreting those rights, and thus makes ECtHR judgments loom large in domestic law.²⁴ Part of the HRA’s rationale was to make it much less likely for the UK later to be found in breach of the ECHR. For so long as the UK remained a signatory to the ECHR, it was vulnerable to adverse rulings in Strasbourg. Hence there was some sense in seeking to limit that vulnerability by bringing forward the relief that applicants might otherwise find before Strasbourg, so that no further legal action would be needed. The HRA makes convention rights actionable in domestic courts, requires other statutes to be interpreted consistently with convention rights if possible and authorises courts to declare those other statutes incompatible where it is not.²⁵ In this way, the HRA changes the kind of reasoning required of domestic courts, which now extends to questions including: how rights should be understood; whether particular legislation or executive action is a proportionate limitation on some general interest; how ECtHR case law, which is often opaque or uncertain, comes to bear in a particular case; and whether it is possible to read and give effect to legislation in line with convention rights or whether it ought to be declared out of line.

This is a remarkable and difficult set of responsibilities, the interpretation of which has itself been a major challenge. Acts of Parliament and executive action are routinely questioned in the courts, including questions of foreign policy and military action that

²¹ See Richard Ekins, ‘Restoring Parliamentary Democracy’ (2018) 39 *Cardozo Law Review* 101.

²² *Tyrer v UK* (1980) 2 EHRR 1.

²³ *Goodwin v UK* (2002) 35 EHRR 447.

²⁴ *Human Rights Act 1998*, s2.

²⁵ *Human Rights Act 1998*, ss3, 4 and 6.

the common law constitutional tradition treated as non-justiciable. Government victories in domestic courts are always liable to being undone in a subsequent application to the ECtHR.²⁶ Conversely, the domestic courts sometimes anticipate or aim to get ahead of ECtHR case law, which is difficult to undo insofar as the Government has no right of recourse to the ECtHR to challenge an adverse ruling by its own courts.²⁷ Parliament may choose to overrule (or disregard) the domestic judgment, but the scheme of the HRA is to expose such action to the criticism, fair or not, that in so doing the national political authorities are flouting human rights. Relatedly, in some recent cases domestic courts have taken the HRA to permit them to interpret convention rights in ways that are more demanding — that is, more restrictive of legislative and executive action — than equivalent ECtHR jurisprudence. In this way, domestic courts have chosen to interpret the HRA and convention rights with a view to developing a hinterland of constitutional rights. The HRA has always been controversial, with the Conservative Party for several years flirting with the possibility of its repeal. Interestingly, the courts have in the last three or four years revived a discourse of common law constitutional rights.²⁸ This may be an attempt to avoid neglecting the common law and to square rights adjudication with our legal history and tradition. Or, more worryingly, it may be an attempt to anticipate the HRA's possible repeal and to render it less significant than would otherwise be the case.

IV RISING JUDICIAL POWER: CHANGES IN LEGAL CULTURE

The UK's undertakings in European law, both ECHR and EU, have developed in tandem with a novel idea of the international rule of law, popularised in the UK by Lord Bingham.²⁹ This takes conformity by states to international legal obligations — including to the rulings of international courts — to be as much a requirement of the rule of law as conformity by the executive to the rulings of domestic courts. This view differs starkly from that which characterises the historic constitution, but it captures the imagination of many within the legal community. This was illustrated in 2015 by a flap over changes to the Ministerial Code. The 2010 Code said that it 'should be read [against] the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations'. This was changed in 2015 to say that it 'should be read against the background of the overarching duty on Ministers to comply with the law'. The excision of six words — 'including international law and treaty obligations' — caused outrage on the part of some lawyers. Their critique was misconceived: ministers are not under a duty to conform to international law and ministerial action that places the UK in breach of international law, or fails to remedy a breach, is not itself a violation of the constitutional principle of the rule of law.³⁰ It is very odd indeed to assert, as the lawyers in question did, that ministers will be in breach of the rule of law by refusing to promote legislation that conforms to the ECtHR's jurisprudence, a course of action deliberately left open and preserved by the HRA. The lawyerly outrage confirmed a failure to appreciate the tight nexus between domestic law and the rule of law. This shift in perspective is significant in view of the reach of

²⁶ The most notable example is perhaps *Hirst v UK (No 2)* [2005] ECHR 681.

²⁷ See, e.g., *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

²⁸ See, e.g., *Osborn v Parole Board* [2013] UKSC 61; and *Kennedy v Charity Commission* [2014] UKSC 20.

²⁹ Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 110.

³⁰ See Richard Ekins and Guglielmo Verdirame, 'The Ministerial Code and the Rule of Law' *Judicial Power Project* (28 October 2015); and John Finnis, 'Ministers, International Law and the Rule of Law' *Judicial Power Project* (2 November 2015).

international legal obligations and their generative character (that is, their openness to elaboration and extension, often in the course of adjudication in international courts).

The growing popularity of this new understanding of the relationship between international law and the rule of law is part of a wider change in judicial and legal culture. It is plausible to think that the HRA has refashioned this culture in important ways (and ways that chime with responsibilities imposed by EU law, as well as the requirement that courts review the validity of devolved legislation). For quite apart from human rights litigation, many judges and lawyers now share a new disposition that eschews the traditional limits on judicial technique and authority, and that has adopted novel accounts of constitutional principle along the way.³¹ This is clearest in relation to ‘legality’, now sometimes a device that courts engage to justify departing from Parliament’s clear law-making intent,³² and the rule of law, which is increasingly taken to require judicial oversight of all state action, including legislation and domains once exclusively reserved to the executive.³³ More generally, courts have at times taken the meaning of statutes to be open to judicial revision over time, in a way analogous to the ‘living instrument’ approach.³⁴ This has occurred alongside the trend in ordinary judicial review to introduce ever more grounds of review and to intensify their application. The origins of the growth of judicial review can be traced back to the 1960s, but the expansion of the availability and intensity of judicial review has accelerated since the 1980s. Over time, the traditional posture that judicial review of administrative action is concerned only with the legality of decisions, not with their merits, has largely withered away; hence the long-running debate about whether to introduce proportionality as a general ground of review, which some other judges have criticised in strong terms.³⁵

This last caveat bears further mention. There is a growing division within the judiciary, with some judges embracing the new dispensation and paying little heed to the traditional limits on their role, while others view it with very great caution.³⁶ The responsibilities imposed on judges by EU law and the HRA are not optional, so of course every law-abiding judge must undertake them. The point is how, and with what disposition, they are applied and to what extent, if at all, judges are keen to embrace, elaborate and go beyond them. This new judicial dispensation is grounded in wider trends in legal thought and practice, where the protection of human rights is taken to require a judicially enforceable bills of rights, whether of a national hue or, perhaps even better, international. This movement is dominated by the frame of reference of international human rights lawyers, for whom the state is a standing danger to citizens (and non-citizens) and in need of external legal restraint. This frame presupposes an understanding of the role of the judge, whose duty is to stand between citizen and state and protect the former from majority tyranny or at best indifference. That states are democratic is assumed to be no protection at all: the risk that animates human rights lawyers, at least in the developed world, is popular government acting for majority interests, not the rule of a narrow caste. From this vantage point, human rights are

³¹ See Danny Nicol, ‘Law and Politics after the Human Rights Act’ [2006] *Public Law* 721.

³² See, e.g., *Evans v Attorney General* [2015] UKSC 21; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

³³ See, e.g., Lord Hope, ‘Is the Rule of Law now the Sovereign Principle?’ in Richard Rawlings, Peter Leyland and Alison Young et al (eds) *Sovereignty and the Law* (Oxford University Press, 2013) 89.

³⁴ See, e.g., *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.

³⁵ See, e.g., Lord Justice Elias, ‘Are Judges Becoming Too Political?’ (2014) 3 *Cambridge Journal of International and Comparative Law* 1, 25.

³⁶ See, e.g., Lord Sumption, *The Limits of Law*, 27th Sultan Azlan Shah Lecture (20 November 2013), subsequently published in N.W. Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016).

defined in opposition to the public interest and the common good; the question for decision, in the end by a court, is when and whether to permit pursuit of the public good despite its infringement of human rights. The theory and practice of human rights law does not subscribe to the account of a legal right within the common law tradition: namely, a complete proposition fit to direct the action of a duty-holder and ready to be upheld in adjudication. Instead, rights are taken to be incomplete, to require a series of proportionality judgments to be made by courts to determine the legitimacy of the public act by reference to the fairness of its balance of individual and public interest. This understanding amounts to a loss of rights.³⁷ However, it is a great spur for judicial power, acting as a standing invitation for courts to decide, and then decide again, what is proportionate or fair.

There is little reason to think that human rights *law* is an apt means to secure human rights and other constitutional goods in a polity such as ours.³⁸ On the contrary, modern human rights law abandons rights and seriously undercuts constitutional principle. Still, the moral necessity of a justiciable bill of rights is widely assumed (especially within the legal class), even if only of a statutory bill of rights such as the HRA that Parliament need not follow or from which it may choose to depart. This assumption chimes with a wider loss of confidence on the part of judges, lawyers, and academics in the common law's constitutional tradition — and in national, democratic politics more particularly. Many judges share an image of the political process that is employed to justify bold judicial intervention, whether via the HRA, statutory interpretation or judicial review. For example, some judges keenly recite the simplifying claim that the executive dominates Parliament ever more,³⁹ implying that the constitution is already out of balance. The bold and unqualified claim that parliamentary accountability is ineffective as a restraint on the executive is widely held amongst judges and lawyers, with courts sometimes reasoning that either they should compensate for this assumed weakness (say by extending and intensifying the reach of judicial review) or that they should not limit themselves out of respect for a Parliament that is in reality just the tool of government. The growth of judicial review in the 1980s described above owed something to this perception and echoes of it are frequently heard in more recent times.

The extent to which the common law constitutional tradition has come under strain in the UK, together with the division amongst judges themselves about this matter, is illustrated by the scepticism about parliamentary sovereignty articulated by Lord Steyn and Lord Hope in *Jackson*.⁴⁰ They reasoned from the changes introduced by EU membership, the HRA and devolution to the conclusion that the doctrine of parliamentary sovereignty was no longer a good account of the constitution. For Lord Hope, 'the rule of law enforced by the courts' was now 'the ultimate controlling factor on which our constitution is based'.⁴¹ For Lord Steyn, parliamentary sovereignty 'can now be seen to be out of place', with it 'not unthinkable that circumstances could arise

³⁷ Grégoire Webber, 'On the Loss of Rights' in Grant Huscroft, B W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Reasoning, Justification* (Cambridge University Press, 2014) 123.

³⁸ Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34 *University of Queensland Law Journal* 217.

³⁹ Lord Neuberger, for example, blithely suggests that 'Parliament could often be controlled by the Prime Minister for much of the past few decades, parliamentary power has waned'. See Neuberger, above n 12, at [30]. Several senior judges also give voice to this misunderstanding in private conversation. See also Hope, above n 33.

⁴⁰ *R (Jackson) v Attorney General* [2005] UKHL 56. For a biting critique, see James Allan, 'The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition?' (2007) 17 *King's Law Journal* 1.

⁴¹ *Ibid* 107.

where the courts may have to qualify a principle established on a different hypothesis of constitutionalism'.⁴² Lord Steyn was prepared to countenance the Supreme Court invalidating primary legislation that attempted to abolish a constitutional fundamental such as judicial review. These were weak analyses made without authority, but for present purposes what is noteworthy is that they were repudiated extra-judicially by Lord Bingham, the leading judge of his generation.⁴³ Some judges have subsequently mentioned the scepticism with approval or without comment,⁴⁴ whereas others have disavowed it.⁴⁵ There seems at most only a small prospect of the courts in fact abandoning the doctrine of parliamentary sovereignty in the near future: most judges think, rightly, that this would be unlawful, and nearly all must know that it would attract a devastating political response. Still, the mere suggestion (from the bench) that judicial abandonment of the traditional constitutional cornerstone of parliamentary sovereignty was an option — together with the rationales advanced in its support — confirm the rise of judicial power in the UK and a loss of grip on the common law constitutional tradition.

We noted above that no serious person denies that judicial power has expanded substantially over recent years. The question that arises is whether it has grown too much. We believe it has, and in the next section point to a number of 'problems of principle' that substantiate our concerns. For now, we want to note four preliminary points relevant when grappling with the question of whether judicial power has extended too far. First, it is important to recognize that even if each individual instance of the expansion of judicial power (that is, each new interpretative technique that the courts adopt or extension of the grounds of review or new statutory responsibilities conferred upon the courts and so forth) were justifiable when viewed in isolation, still the cumulative consequences of some or all of those changes might prompt the conclusion that the judicial role has become overinflated. We happen to think that none of the individual instances discussed above can be justified, but those who are receptive to this or that extension of judicial power must reflect on the cumulative effect of the various changes traced above. Second, and relatedly, the growth of judicial power is cumulative: the gradual erosion of this, that and the next limit on the judicial role makes it easier over time for further inroads to be made, with the ultimate result that the judicial function may no longer resemble that envisaged for judges under the common law tradition. Third, the pressing question for those who defend the growth of judicial power in the UK is how much judicial power is too much? This requires that defenders of the expanded judicial role first identify and then justify some final endpoint for judicial power (that is, some optimal level of judicial power). Fourth, for sceptics of an enlarged judicial role, the questions are why is rising judicial power problematic, how should it be resisted and what level of such power is appropriate. We have already suggested that the common law constitutional tradition maps intelligent contours to the judicial function. In the next two sections, we explain why ascendant judicial power is problematic and offer some thoughts on how it ought to be rolled back.

⁴² Ibid 102.

⁴³ Bingham, above n 29, 196.

⁴⁴ See, e.g., *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [50]-[51], per Lord Hope; and *Moohan v The Lord Advocate* [2014] UKSC 67 at [36], per Lord Hodge.

⁴⁵ See, e.g., Lord Neuberger, *Who are the Masters Now?*, Second Lord Alexander of Weedon Lecture (6 April 2011).

V JUDICIAL POWER AND THE PROBLEMS OF PRINCIPLE

This rise of judicial power threatens the rule of law, responsible law-making and self-government. None of the departures from the constitutional tradition depicted above can be squared with the principle of the rule of law. We do not mean that the extensions of judicial power that they countenance have been introduced in violation of positive law, although some have been; rather, they have weakened the extent to which the UK is governed by a stable and coherent legal order. The responsibilities and innovations attendant upon these various changes to the judicial role implicate judges in reasoning and action that is not fitting for their office and blurs the basic distinction between the role of politicians (to make and administer policy, including deciding how best to secure the public interest) and the role of judges (to adjudicate disputes according to law). This, in turn, liberates judges from the discipline of positive law, which is fundamental to the rule of law.

A *International adjudication*

Accession to the EU Treaties and the ECHR subjects the UK to the jurisdiction of the CJEU and ECtHR, with judgments of the CJEU in particular being directly relevant to domestic law by virtue of the ECA. This subjection compromises the rule of law insofar as both institutions, in different ways, cannot be trusted to uphold the terms of the treaties. The CJEU has usurped the authority of member states, invented principles and misconstrued treaty commitments to advance the agenda of ‘ever closer union’.⁴⁶ In politically significant litigation, the CJEU cannot be trusted to apply the law, which it may remake in the course of adjudication. Likewise, the ECtHR openly asserts its authority to remake the ECHR by way of the ‘living instrument’ notion. Its disdain for the importance of continuity between past legal act and present action is not mitigated by the various doctrines that the ECtHR has devised in an attempt to stabilise its law-making endeavours, doctrines such as the margin of appreciation or balance of opinion amongst states.⁴⁷ The latter is best read as an admission that the court is departing from the agreed terms, which a court ought instead to be anxious to uphold. The ECtHR is less powerful, politically as well as juridically, than the CJEU, for membership of the Council of Europe does not bind states as tightly as membership of the EU. It is also less stable and coherent than the CJEU, partly because it faces a very difficult adjudicative challenge and a vastly greater caseload. It is a somewhat politically aware court and at times certainly calibrates its rulings to minimise political conflict. Enthusiasts for human rights law sometimes laud the ECtHR’s political sensitivity. In truth, this sensitivity confirms that decision-making in Strasbourg is nothing like how domestic judges can contribute to the rule of law.

B *Rights adjudication and the rule of law*

The ECtHR’s dubious legal technique need not directly have unsettled the rule of law in the UK, even if it necessarily compromised the reliance states should have been able to place on the terms agreed in the ECHR. But the HRA domesticates European human rights law, and we can see five main ways in which domestic rights adjudication undertaken in the shadow of the ECtHR undermines the rule of law. First, convention rights are incomplete, which requires domestic courts to determine how they are to be understood in relation to particular instances of legislative or executive action. This is

⁴⁶ See, e.g., the discussion in Beck, above n 17.

⁴⁷ Sir Noel Malcolm, *Human Rights and Political Wrongs* (Policy Exchange, 2017).

often a highly uncertain exercise.⁴⁸ It turns on the doctrine of proportionality, which is not a technical lawyerly discipline, but a way of making open law-making choices. It also turns on the ECtHR's case law, which is itself often incoherent and unstable, as well as the extent to which domestic courts follow that case law, which is again uncertain (as the saga of interpreting and applying section 2 of the HRA confirms).

Second, the interpretative scheme developed under the HRA undermines the stability of meaning of other statutes. Section 3 conferred a new interpretative duty to interpret legislation compatibly with convention rights, if possible. Uncertainty about the true meaning and effect of convention rights is often compounded by further uncertainty about whether a rights-consistent interpretation of any given statutory provision will be 'possible' under section 3 (and, if it is, this creates more uncertainty about what such an interpretation might be). The leading case law on section 3 takes this duty to encompass a power to amend the provisions of primary legislation, with retrospective effect, in the course of adjudication in order to arrive at an interpretation compatible with convention rights.⁴⁹ Interpreted in this way, section 3 requires the courts to flout the rule of law, to say nothing of riding roughshod over the separation of powers. Even if interpreted in a less expansive fashion, section 3 requires the courts to undertake a chain of reasoning that unsettles the law, and is a partial departure from the rule of law.⁵⁰ The courts have not always applied the section 3 duty as fully as their own case law permits, which makes it doubly uncertain how or whether convention rights come to bear in relation to other statutes. Indeed, in some cases, the courts have either given section 3 very short shrift or ignored it *tout court*, which is itself a breach of legal duty.⁵¹

Third, the HRA's impact is even more pronounced in relation to secondary legislation and statutory discretion. The validity of secondary legislation is often taken to stand or fall on its compatibility with convention rights, rather than by reference to the empowering statute alone, and this arms courts to invalidate secondary law-making and other executive action on very uncertain grounds.⁵² This encourages litigation and places a major source of law under a constant threat of challenge.

Fourth, in determining compatibility with convention rights, many judges have presumed that a policy is more likely to be proportionate (and therefore lawful) if it does without general rules and instead considers individual cases one by one.⁵³ This presumption is undesirable and inimical to the rule of law.⁵⁴ One sees the problem in unusual form when courts purport to advance the rule of law by requiring prosecuting authorities to promulgate an offence-specific policy in place of a policy applicable to a range of serious offences.⁵⁵ In its last ever judgment, *Purdy*, the House of Lords ordered the Director of Public Prosecutions (DPP) to promulgate a policy specific to the offence of assisted suicide. This turned the idea of the rule of law on its head by requiring the

⁴⁸ For elaboration of this, see Philip Sales and Richard Ekins, 'Rights Consistent Interpretation and the Human Rights Act 1998' (2012) 127 *Law Quarterly Review* 217.

⁴⁹ See, e.g., *R v A (No 2)* [2001] UKHL 25; and *Ghaidan v Godin-Mendoza* [2004] UKHL 30. See further Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009), 88-90.

⁵⁰ Philip Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System' in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, 2011) 189.

⁵¹ See, e.g., *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

⁵² See, e.g., *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

⁵³ See, generally Philip Sales and Ben Hooper, "Proportionality and the Form of Law" (2003) 119 *Law Quarterly Review* 426.

⁵⁴ Richard Ekins, "Legislating Proportionately" in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 343.

⁵⁵ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

DPP to inform would-be lawbreakers about the odds of prosecution if they chose to flout the criminal law. This was a tacit judicial attempt to legalise assisted suicide. It was not in truth permitted by the HRA or a sound construal of convention rights — the House of Lords went beyond Strasbourg — but the HRA equipped the court to undercut a statutory discretion and to challenge the integrity of the criminal law. Insofar as fault lies with Strasbourg in this case, it is only in respect of its undisciplined construal of Article 8(1) of the ECHR, which it simply took for granted to extend to a prohibition on assisted suicide. The unanimous judgment in *Purdy* shows how UK courts may invoke the majesty of the rule of law to violate the rule of law.

Fifth, the HRA encourages the courts to adjudicate with their eye on securing political outcomes, which compromises the integrity of their adjudication of legal rights. This is most obvious in the interplay of sections 3 and 4, the latter empowering courts to issue a declaration of incompatibility if it is not possible to arrive at a rights-consistent interpretation of legislation. The temptation for courts is to adjust their use of sections 3 and 4 in order to avoid or to provoke certain political outcomes, which is not a fit chain of reasoning for a court, and undermines actionable legal rights.⁵⁶ Thus, the problem with rights adjudication is not simply with the ECtHR's case law, worrisome though that often is. The domestic reception and elaboration of convention rights departs from the common law judicial tradition, undermines legal certainty, and tempts judges to reason politically.

C *Judicial review, 'legality', and the rule of law*

So, there are multiple ways, we suggest, in which domestic rights adjudication jeopardizes the rule of law. However, the problems of principle do not end there. The innovations in ordinary constitutional and administrative law discussed above also put the rule of law in doubt. Recall that in *Jackson* some judges (notably Lords Hope and Steyn) openly mooted the possibility of overthrowing parliamentary sovereignty. This proposed or contemplated judicial usurpation of that constitutional cornerstone, while unlikely to be carried out, is revealing. It would be flatly contrary to the rule of law's concern that positive law should frame and limit the exercise of public power, including judicial power. Parliamentary sovereignty is fundamental constitutional law that judges did not make and are not free simply to remake or unsettle. The proposal's premise is the assumption that the rule of law is better secured if Parliament is subject to judicially enforceable limits on its legislative capacity. Yet, what these senior judges contemplate is in truth a vague, free-wheeling judicial power to invalidate statutes with retrospective effect. This is a proposal so antithetical to the rule of law, and so unrooted in our constitutional tradition, as to be a lawless grab for power.⁵⁷ Yet, what it proposes only takes to an extreme some currents of thought already at work in constitutional law.

A distant analogy to the *Jackson* obiter dicta — not a close analogy, but not an unreal one either — can be found in *AXA*, where the Supreme Court refused to rule out the judicial invalidation of Acts of the Scottish Parliament for trespassing on some constitutional fundamental in a way deemed to flout the rule of law.⁵⁸ Though more defensible than *Jackson* (at least inasmuch as the Scottish Parliament is a statutorily created body that is subject to legal limits on law-making capacity), this was still problematic. The Court envisages making its determination of what breaches the rule of

⁵⁶ See *A v Secretary of State for the Home Department* [2005] 2 AC 68, where the court did not consider s 3 but rushed to s 4, and *R v A (No 2)* [2001] UKHL 25, where the court used s 3 rather than s 4.

⁵⁷ Ekins, above n 16, 600-605.

⁵⁸ *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

law into a hard-edged justiciable restraint on a democratic legislature, despite the absence of any foundation in the Scotland Act for a restraint of this kind. Though it may be only *in extremis* that the courts will hold that the Scottish Parliament has transgressed this restraint, even the assertion of this possibility is unwarranted and an invitation to needless litigation. What is at work in *AXA*, as in *Jackson*, is a judicial disposition to ‘thicken’ the rule of law: to create a ‘rule of law test’. As McCorkindale explains, this test might seem merely to reflect the comforting assertion that the rule of law safeguards (against the excesses of political disagreement) constitutional fundamentals that we hold dear. In reality, this comforting façade crumbles once it is realized that those fundamentals ‘are the very stuff of such disagreement, not least of all between the members of the judiciary themselves’.⁵⁹

This new judicial disposition that we are sketching is seen in the recent deployment of the principle of legality. In *Evans*, five of seven judges in the Supreme Court quashed the Attorney-General’s exercise of section 53 of the *Freedom of Information Act 2000*, which permits the Attorney General or a Minister to override a decision by the Information Commissioner, or the Tribunal on appeal, that the balance of public interest weighs in favour of disclosure of the requested information.⁶⁰ Three of the five judges invoked the principle of legality to undercut the section. Their judgment does not advance a remotely plausible reading of the statute, as the four other judges noted and as it virtually conceded.⁶¹ The other two majority judges joined the result by different means, ruling that the Attorney General or Minister could not lawfully simply take a different view to that of the Tribunal.⁶² The premise that runs across the two majority judgments is that it is unconstitutional for ministers to be able to override a court. This was a shaky premise, insofar as the matter was not one for a court as such to consider, requiring as it did judgment about the balance of competing public interests, rather than alleged breach of settled legal rights. In any case, the legislative scheme should not yield to the Supreme Court’s judgment about its merits. The Court undercut that scheme, in two different ways, and thereby put future uses of the statutory power in doubt. Notwithstanding the Court’s expressions of concern for the rule of law, the techniques it deploys — highly implausible interpretation of the statute and highly intrusive judicial review — serve to compromise that ideal by overturning settled law and encouraging more litigation.

The principle of legality has been put to strained use in other cases too, not least in the *Miller* litigation over Article 50.⁶³ However, the principle went unmentioned in the Supreme Court’s unanimous judgment in *Doogan*,⁶⁴ holding that Catholic midwives (or others with conscientious objection to abortion) did not have the right under the Abortion Act’s conscience clause to avoid supervising nurses involved in abortion procedures. This surprising chain of reasoning, which ignored the arguments of the applicants and the reasoning of the courts below, forces one to ask whether some judges’ willingness to invoke a muscular notion of legality varies depending on the controversial politics of a given case or, worse, because they have little sympathy for those who were insisting on their specific, enacted legal rights.

⁵⁹ Chris McCorkindale, ‘The New Powers of the Judiciary in Scotland: Part II’, *Judicial Power Project* (20 July 2016).

⁶⁰ *Evans v Attorney General* [2015] UKSC 21 (Lords Neuberger, Kerr and Reed).

⁶¹ See Richard Ekins and Christopher Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Courts* (Policy Exchange, 2015).

⁶² *Evans v Attorney General* [2015] UKSC 21 [116]-[151] (Lord Mance and Lady Hale).

⁶³ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁶⁴ *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

D *Responsible law-making and self-government*

Cases like *Evans*, we suggest, represents a failure of judicial method and discipline at the highest level. The new judicial disposition on display in *Evans* involves judicial law-making during adjudication (and not the secondary, interstitial law-making function exercised as a by-product of adjudication that is associated with the common law tradition). This is not an intelligent, open or responsible mode of law-making. Judges lack the information, processes and expertise necessary to make reasonable law-making choices. The choices made as part and parcel of judicial law-making under this new disposition are not in the proper form to govern future conduct. This is not a trivial concern. For example, judicial law-making — by the CJEU, ECtHR and domestic courts — has made sharp inroads into the prerogative of states to control their borders and to act for the good of their citizens.⁶⁵ These courts have devised and elaborated bodies of law that limit removal of non-citizens who are: suspected terrorists, serious convicted criminals, unlawful residents who are related to citizens, unlawful residents of long-standing, and so forth. Judges have created this body of law and have done so without insight into its economic, social, or political consequences or analysis of the competing public interests in play. Similar are decisions to change the legal regime that governs military action abroad,⁶⁶ and to overturn long-standing common law limitations on negligence suits relating to military action.⁶⁷ In relation to assisted suicide, to take one amongst many contested moral questions that are the subject of adjudication, some judges have been willing to denounce the legislative ban on the basis of a threadbare analysis of its intellectual structure, with no knowledge of relevant social or medical facts, without careful engagement with critical moral questions, and with a naïve confidence in the capacities of High Court judges to recognise and protect the vulnerable.⁶⁸ Litigation should not be an occasion for policy-making by other means: it is not oriented towards the making of good law.

The problem is not just competence, but legitimacy: the expansion of judicial power threatens robust democratic self-government and the separation of powers as well as the rule of law. Subjection to the jurisdiction of the CJEU and ECtHR entails that important questions about what our law is or must be are settled not by parliamentary law-making, or even by treaty-making, but by judicial fiat. This is subjection to foreign rule, notwithstanding that the UK has one judge on each court. It exposes the UK, like other member states, to the risk of arbitrary decision-making, departing from terms agreed in international law, and against which there is no recourse. True, the ECtHR's judgments do not themselves change domestic law and the UK may choose not to conform. However, the UK comes under enormous pressure to conform, partly from its own political and legal elites, many of whom now believe that the rule of law and sound foreign policy require conformity. In domestic law, the HRA has subverted the separation of powers by distorting the judiciary's relationship with Parliament and often

⁶⁵ See John Finnis, 'Judicial Law-Making and the "Living" Instrumentalisation of the ECHR' in N W Barber, Richard Ekins, and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016) 73.

⁶⁶ See, e.g., *Al-Skeini v UK* (2011) 53 EHRR 18; and *Serdar Mohammed v Secretary of State for Defence* [2014] EWHC 1369. For a critical response, see Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces From Defeat By Judicial Diktat* (Policy Exchange, 2015).

⁶⁷ See, e.g., *Smith v Ministry of Defence* [2013] UKSC 41. For a critique of the practical implications of *Smith*, see Tom Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange, 2013).

⁶⁸ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 (per Lady Hale and Lord Kerr in particular).

with the executive. It requires the courts to second-guess the merits of legislation, and either to reinterpret legislation (through section 3) or to denounce legislation they have concluded is inconsistent with the ECHR (through section 4). It also forces the courts to review modes of executive action that, but for the Act, would be thought rightly not fitting for courts to consider.⁶⁹ These are not appropriate responsibilities for Parliament to impose on courts. They wrongly empower courts to make choices about what our law should be and even if the choices may in the end be reversed, or may not be followed, by Parliament, nonetheless the Act shifts to courts the function that a free people ought to exercise itself by way of its parliamentary procedures.

Parliament is responsible for the HRA, and can — and should — be criticised for the political choice to enact it. Indeed, Parliament, the Government and other political actors can — and should — also be criticised for failure to challenge the excesses of judicial power and attendant problems of principle more generally. The extent to which political authorities are willing or able to challenge courts when traditional limits on the judicial role are overstepped is among the weightiest factors in determining whether ascendant judicial power takes hold in a given country.⁷⁰ Judicial attitudes are informed in part by how ministers, MPs, peers and others in the political realm respond to patterns of judicial decision-making. Or, put differently: the extension of judicial power is sensitive to, and to some degree takes advantage of, the political reception of judicial rulings.⁷¹ It is to the political responsibility for rising judicial power that we now turn.

VI POLITICAL RESPONSIBILITY FOR THE BALANCE OF THE CONSTITUTION

Politicians have a critical role in monitoring the changing contours of judicial power and responding when change threatens constitutional principles. The record of political elites in the UK in this respect is mixed. On the one hand, some expansion of judicial power has occurred at Parliament's direction, by way of the HRA and ECA, or with its apparent acquiescence (for example, the growth of judicial review). By and large politicians have seemed reluctant to use the tools available to them to check the improper exercise of judicial power. Ministers have not sought to legislate to reverse or otherwise respond to dubious decisions such as *Evans*, despite widely held, and justified, misgivings.⁷² Parliament has also seemed reluctant to exercise its freedom not to follow declarations of incompatibility issued by domestic courts. On the other hand, politicians have at times been willing to articulate and act upon concerns about the growing reach of judicial power. The best example is the way in which successive governments, supported by the vast majority of MPs, defied the ECtHR for twelve years over whether the UK's ban on prisoner voting breached the ECHR.⁷³ Similarly, the Government announced in 2016 that before embarking on significant military operations abroad it would derogate from the ECHR in order to reinstate international humanitarian law as the body of law regulating armed conflict involving UK troops.⁷⁴ Systemic concerns

⁶⁹ This point is usefully discussed in Elias, above n 35.

⁷⁰ See e.g., Nicholas Aroney and Benjamin B Saunders, 'On Judicial Self-Restraint and Self-Appointed Monarchs: The Rise of Judicial Power in Australia' (2017) 36 *University of Queensland Law Journal* 221, 222-223.

⁷¹ Richard Ekins, 'The Dynamics of Judicial Power in the New British Constitution', *Judicial Power Project* (1 February 2017) 1.

⁷² *Evans v Attorney General* [2015] UKSC 21.

⁷³ See Danny Nicol, 'Legitimacy of the Commons Debate on Prisoner Voting' [2011] *Public Law* 681.

⁷⁴ *Hansard*, House of Commons WS168 (10 October 2016). This was a key recommendation in *Clearing the Fog of Law*, above n 66.

about the structure and practice of the domestic human rights legal regime have reached such levels within the Conservative Party that questions remain about both the future of the HRA and the UK's status as a signatory to the ECHR. A final example is Parliament's affirmation in section 18 of the *European Union Act 2011* that the status of EU law in the UK's domestic legal arrangements depended on the continuing statutory basis in the ECA,⁷⁵ which represented in turn an unmistakable rejection of the CJEU's self-understanding of the nature and status of EU law.⁷⁶

In one important sense, the national political authorities in the UK are now acting decisively to limit judicial power and to restore the historic constitution. Withdrawal from the EU Treaties will bring the CJEU's jurisdiction over the UK to an end. The Government appears resolute in not being prepared to accept its jurisdiction after exit and UK courts will in due course not be free to treat post-exit CJEU jurisprudence as authoritative. The Government has proposed, and Parliament seems likely to enact, legislation retaining the content of much EU law after exit day, with the important exceptions of the EU Charter of Fundamental Rights and state liability for breach of general principles. Thus, the implementation by Government and Parliament of the referendum vote to leave the EU is unwinding the CJEU's role in our constitutional order. This is a welcome development, although it also bears noting that a decisive majority of the political class favoured continued EU membership, notwithstanding the concerns outlined above about how this unbalances the constitution and empowers courts in ways at odds with the UK's constitutional tradition.

Overall, however, despite welcome remarks in a handful of discrete policy spheres, and notwithstanding political action to honour the referendum and withdraw from the EU, political elites have mostly failed to push back against the expansion of judicial power. The political focus has almost always been incomplete. Political concern has focused on European courts, with domestic courts relatively sheltered from rebuke. This is understandable in one sense: rule by foreign courts is especially objectionable. However, it is problematic in another: national political authorities are in fact much more able to respond to actions of domestic courts than foreign courts. To the extent that the political spotlight has fallen on domestic courts, the focus has largely been on human rights litigation, with judicial overreach more widely often overlooked. Also, while some politicians have from time to time responded critically to cases to which they have taken especially strong objection, they have tended to do so without evaluating the cumulative consequences of the whole gamut of changes that have been made to the powers of domestic and European courts. Only seldom, in other words, have individual instances of improperly exercised judicial power been seen by politicians as a good reason to consider whether the expansion of judicial power over many years has unbalanced the constitution.

Restoring constitutional principle requires political responsibility. The political classes should resist the caricature of politics shared by many lawyers and judges that we mentioned above, where the Government dominates a supine Parliament and amoral MPs neglect minority rights. This is an impoverished understanding of the nature, history and practice of the executive-legislative relationship at Westminster,⁷⁷ placing insufficient weight on the multiple ways in which Parliament exerts influence on policy-

⁷⁵ *European Union Act 2011*, s18.

⁷⁶ Cf. the majority's discussion of the status of EU law in UK domestic law in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁷⁷ On how the history of executive-legislative relations at Westminster are misunderstood, see Matthew Flinders, 'Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis' (2011) 13 *British Journal of Politics & International Relations* 249.

making in Whitehall.⁷⁸ It also underestimates the place of and reasons for a strong government in the UK's constitutional tradition. Parliamentarians and others in public life must contest this caricature, demonstrating to the public and other influential elites that the political process is directed towards the pursuit of constitutional goods. None of this implies that either politicians or political processes are perfect. Rather, it is merely to acknowledge that parliamentary democracy in the common law constitutional tradition in the UK has an enviable record in comparative terms, with this due in large measure to the seriousness with which a wide range of political actors (ministers, MPs, peers, officials and so forth) have approached their constitutional functions, including where necessary by seeking to remedy defects in prevailing political processes.

Parliamentarians are ultimately responsible for the balance of the constitution. Earlier political choices to enter into the ECHR or to enact the HRA should be reviewed routinely, especially with an eye on how the domestic courts and the ECtHR are discharging their responsibilities. The same is true for the ways in which some judges now understand their constitutional role — extending and intensifying judicial review, misinterpreting statutes, and voicing scepticism about parliamentary sovereignty itself. Parliamentarians need to 'keep abreast of these changes, and develop the intellectual self-confidence needed to respond'.⁷⁹ Successive Governments have failed to lead on this. Likewise, it is telling that although select committees at Westminster are more assertive and energetic than ever before, there has been no inquiry dedicated to examining the consequences of the expansion of judicial power.⁸⁰ Political responsibility requires an overarching (and, by now, long overdue) examination of how the judicial role has changed, how it may develop in the future if left unchecked, and whether the excesses of the new judicial role should be unwound. It also requires Government and Parliament to understand and to be willing to make use of the powers they have to intervene to correct the constitution if or when it seems out of kilter. These options include: legislating to reverse particular judgments that misinterpret or undercut statute; legislating to repeal or amend major legislation such as the HRA; derogating from the ECHR under Article 15; legislating to prohibit judicial review of derogation or otherwise to oust judicial review in particular domains;⁸¹ legislating to restore greater ministerial involvement in judicial appointments;⁸² exercising existing statutory powers to respond

⁷⁸ See Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: "The Parliamentary State" and the Empirical Evidence' (2015) 29 *Governance* 121; Meg Russell, Daniel Gover and Kristina Wollter, 'Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt' (2016) 69 *Parliamentary Affairs* 286; and Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017) 260-285.

⁷⁹ Jeffrey Goldsworthy, *Losing Faith in Democracy: Why Judicial Supremacy Is Rising and What To Do About It* (Policy Exchange, 2015) 26.

⁸⁰ The nearest approximations are: the inquiry into relationships between judges and ministers following changes to the office of Lord Chancellor (House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament*, 6th Report of 2006-07, HL 151; and the inquiry into possible changes to the judicial role in the event that the constitution was codified (House of Commons Political and Constitutional Reform Committee, *Constitutional Role of the Judiciary If There Were a Codified Constitution*, 14th Report of 2013-14, HC 802).

⁸¹ See *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 for an example of the Court of Appeal accepting that an ouster clause successfully precluded judicial review of the Investigatory Powers Tribunal.

⁸² This point is developed in Graham Gee, 'Rethinking the Lord Chancellor's Role in Judicial Appointments' (2017) 20 *Legal Ethics* 4. For critiques of the high levels of judicial influence on the new judicial appointment processes in the UK, see Graham Gee, 'Judging the JAC: How Much Judicial Influence Over Judicial Appointments Is Too Much?' in Graham Gee and Erika

to problematic judgments; measured criticism of unsound judgments; defiance of unprincipled or extravagant declarations of incompatibility; standing ready to refuse to conform to dubious judgments of international courts, including the ECtHR; and withdrawal from the ECHR, and so forth. The Government must in any event be quick to oppose constitutional novelty in litigation and to apply to the court to strike out hopeless cases.⁸³

One difficulty is that many politicians seem to lack the confidence to discuss even in fairly general terms questions about the appropriate scope of judicial power. Many MPs and peers who are keen to articulate their concerns about a raft of policy questions are much more reticent on constitutional questions. A familiar pattern is that politicians expressing concern about rising judicial power are quickly criticised by some lawyers and legal academics for failing to grasp the finer details of the law or judicial processes, with little obvious effort made to understand why those politicians might have been moved to voice their concerns. One consequence of this may be that some lawyer-MPs (in the Commons) and notable lawyers and retired judges (in the Lords) will enjoy disproportionate influence whenever questions about the judicial role pierce the parliamentary agenda, which they then use to defend the growing reach and intensity of the judicial function.⁸⁴ Over the long haul this may result in many in the political class suffering ‘learned helplessness’, where they assume that policy debates about the constitutional role of the courts are too complicated or too specialist for them to contribute.

Some aspects of the rise of judicial power require political action to reverse, but not all. It is open to judges to return to a more disciplined understanding of their constitutional function, to interpret statutes consistently with the intention of the enacting legislature, to refrain from extending and intensifying judicial review. Some judges also need to re-examine their understanding of executive-legislation relations, and how this in turn shapes their vision of the judicial role. Even in relation to their novel responsibilities under the HRA, much turns on how judges approach their task, on the presuppositions they bring to bear about the political process and the nature of rights. In these respects, as we noted above, judges in the UK are divided. To simplify for the purpose of exposition, some are more enthusiastic for an expanded judicial role, eager to extend the reach of judicial power and to oversee and discipline the political authorities, and willing at times to stretch legal technique and depart from settled law to this end. Others remain wedded to the common law tradition, having reservations about their competence and legitimacy to second-guess the political process, and refusing to depart from the will of Parliament or to subvert the executive’s constitutional role. Of course, these are overly broad and impressionistic categories, with many judges not

Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017) 152; and James Allan, ‘Is Talk of the Quality of Judging Sometimes Strained, Feigned or Not Sustained?’ in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence: Contemporary Challenges and Future Directions* (Federation Press, 2016) 64, 72.

⁸³ An encouraging recent example is the UK Government’s muscular response to litigation about the revocability of Article 50 that (at the time of writing) is currently before the Court of Session in Edinburgh. Likewise, it is good to see the Divisional Court’s categorical dismissal of a hopeless challenge to the confidence and supply agreement between the Conservative Party and the Democratic Unionist Party, with costs awarded to the Government: *R (McLean) v First Secretary of State* [2017] EWHC 3174 (Admin).

⁸⁴ That said, some of the politicians most concerned about rising judicial power have been lawyers (e.g. Tony Blair and Jack Straw): D Howarth, ‘Lawyers in the House of Commons’ in David Feldman (ed), *Law in Politics and Politics in Law* (Hart, 2013) 41, 62.

fitting neatly into either, and some moving between the two.⁸⁵ Still, the future of judicial power in the UK turns in part on which of these rival understandings prevails amongst judges. The task of restoring constitutional principle thus requires persuading judges and lawyers that the common law tradition is a coherent and intelligible scheme for government that should be maintained, and that the case for departing from it, especially by judicial action alone, is unfounded. It is a useful discipline on judicial power for judges to anticipate that judicial innovation will invite a negative political response, but it is no substitute for a robust, shared commitment to the limited judicial role envisaged by the common law tradition.

VII PUTTING THE JUDICIAL POWER PROJECT IN ITS PLACE?

The limits of judicial action are framed in part by how judges, lawyers and academic-lawyers understand the idea of judicial power and its place in the constitution, an understanding which the political classes of course take seriously in turn. The common law constitutional tradition continues to anchor much thinking about judicial power and the merits of that tradition are at times articulated by senior judges and others. Nonetheless, it is clear that in recent years many prominent members of the legal community have become sceptical of that tradition for some of the reasons traced above. Many of the most vocal lawyers, legal academics and judges in public life have expressed enthusiasm for an expanded judicial role. It seems to us there has been an imbalance of arms in the public conversation about judicial power, with the good arguments for limits on judicial power not being articulated as often or as well as they could be. In 2015, we set up the *Judicial Power Project*, with the think-tank Policy Exchange, to put this right, aiming to engage judges, lawyers, academics, politicians and others in public life in conversation. With this in mind we have convened lectures and seminars, published papers, books and blog-posts, contributed articles and letters to newspapers, given evidence to select committees, and so forth. At times we have presented ideas in different ways and in different registers than conventional academic discourse. Many colleagues have helped with their time and expertise for which we are most grateful, including several who do not share our concerns about the growth of judicial power, but the choice about what to solicit or publish has been and is our responsibility.

Our hope is that over time this body of work will help to equip the political classes to exercise their responsibilities, and judges and lawyers to recognise the proper limits on judicial action. It will of course be for others to assess the extent to which the Project succeeds in this. Our understanding of constitutional law and principle is no longer shared as widely as it once was and thus our enterprise cuts across what one might term respectable academic opinion. Paul Craig gives voice to that opinion in his critique of the Project.⁸⁶ We thank him for his engagement with our work, although regret that he takes it to be mistaken about the law, wrong about principle, intemperate in tone, reckless about political consequences, overstated and unfair to judges, and at times simply to fall below academic standards. We have a different view of course. It seems to us that Craig is too comfortable with the status quo and not inclined to look carefully enough at what courts have been doing and too insouciant about the effects on democracy. As we see it,

⁸⁵ Lord Sumption enthusiastically embraces the common law constitutional tradition, yet it is possible to point to cases where his reasoning is less restrained: e.g., *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

⁸⁶ Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 *University of Queensland Law Journal* 355.

Craig's critique neither outlines an alternative account of the proper limits of judicial power nor engages with the powerful reasons in principle why those limits ought to be tightly drawn. He asserts that we overstate the extent to which judicial power is rising in the UK. This is a difficult matter to quantify and certainly we make no claim that UK courts enjoy the remarkable powers of some of their counterparts, for example in Canada. Parliamentary sovereignty remains good law, and long may it do so. But we do maintain that the powers of over-mighty courts increasingly threaten the balance of the UK's historic constitution and cannot be squared with principle. This has been true for the CJEU, it remains true for the ECtHR, and — alas — it is increasingly true for domestic courts as well.

We turn to some of the details of Craig's critique. The Project's first major study considered recent judgments of the ECtHR and the Supreme Court that chose to extend European human rights law and the common law of negligence to military action abroad.⁸⁷ The study met with a furious response from many human rights lawyers, whose critique Craig adopts. His reliance is misplaced. The study's main concern was with the ECtHR judgment in *Al-Skeini*,⁸⁸ which radically reinterpreted the idea of 'jurisdiction' and thus extended the reach of the ECHR beyond its earlier bounds. The Project's proposal was that the UK should exercise its power under Article 15 to derogate from the ECHR in time of war, which would partly limit the application of the ECHR and thus restore the primacy of the law of armed conflict. This would help to reinstate, more or less, the law as it was in *Al-Skeini*,⁸⁹ where the House of Lords had taken the extension of the ECHR to military action abroad to be unworkable and undesirable. It is extraordinary, but revealing, that a proposal to work within the ECHR itself to help restore the law as at 2011, and relatedly to use statutory powers to return to the law of tort as understood by three dissenting judges in 2013,⁹⁰ should be met with such vehemence.

Alternatives to Article 15 include withdrawal from the ECHR altogether or principled defiance of the ECtHR. In evidence to Parliament the Project has recommended amending the HRA.⁹¹ However, we are certainly willing to argue for its outright repeal. Craig's argument that one cannot laud the democratic process and also object to the HRA is fallacious. Parliament ought to have authority to choose what the law should be, but not every choice it makes is sound. Almost every choice it makes will be subject to rational, and often reasonable, disagreement: this is part of the reason why the choices should be made by an elected, representative body. It is perfectly coherent to defend Parliament's law-making authority and democratic legitimacy *and* also to argue that it made a mistake in enacting the HRA and/or should in any case now amend or repeal that legislation.

In any case, Craig's analysis of the HRA is problematic. The HRA has not yet been a main focus of the Project's work — indeed, we have been at pains to stress that the problem of judicial power is not simply attributable to human rights litigation.⁹² However, human rights law is obviously of concern to us. Professor Craig's account of the section 3 case law is wrong. Lord Nicholls in *Ghaidan*, still the leading case, states clearly that section 3 licenses departures from the intent of the enacting legislature and from the statutory text. His gloss that this is somehow limited to interpretation not

⁸⁷ Ekins, Morgan and Tugendhat, above n 66.

⁸⁸ *Al-Skeini v UK* (2011) 53 EHRR 18.

⁸⁹ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

⁹⁰ *Smith v Ministry of Defence* [2013] UKSC 41.

⁹¹ See House of Commons Defence Committee, *Who Guards the Guardians? MoD Support for Former and Serving Personnel*, HC 109 (7 February 2017) [111].

⁹² Richard Ekins and Graham Gee, 'Debating Judicial Power', *Judicial Power Project* (20 October 2015).

amendment is incoherent and does not limit the judgment. It is true, as we note above, that the courts have not always taken *Ghaidan* to its logical conclusion, which is a mercy. But it remains an option and tacit judicial discretion about how or when to choose to amend statutes is a problem, not least of all for legal certainty and the rule of law. Besides, the wider impact of section 3 is easily overlooked. In cases like *Purdy*, it is simply taken for granted that the Director of Public Prosecution's statutory discretion is read down to forbid breach of convention rights.⁹³ In *Tigere*, section 3 is the silent premise for the conclusion that courts may invalidate regulations that they think flout convention rights.⁹⁴ Likewise, in *Harvey*, the Supreme Court does not mention section 3 and yet relies on it to foist a meaning on the *Proceeds of Crime Act 2002* that is simply not available on any sound theory of statutory interpretation.⁹⁵

The Project has commented on human rights law more generally in the context of Brexit, as part of an inquiry by the Joint Committee on Human Rights,⁹⁶ and in relation to arguments about possible law reform.⁹⁷ The aftermath of Brexit has seen much panic about a bonfire of rights. We have sought to remind parliamentarians, lawyers and others that the UK, like its common law counterparts, has a very good record of decent parliamentary government. The removal of the strictures of the EU Treaties, and judicial oversight by the CJEU, is not an abandonment of justice or rights. Likewise, it is wrong to think that the main protection of human rights in the UK is the HRA (or the EU Charter). Our ordinary law has long protected rights, and our constitutional law and practice makes provision for a constitutional order in which rights are the object of intelligent, reasonable attention. The apparent assumption that rights began in 1998, or perhaps in 1952,⁹⁸ runs hand-in-hand with widespread misunderstandings of politics and of the political consequences of judicial innovation and intervention. With the help of two former parliamentary counsel, the Project has tried to unravel some of these misunderstandings;⁹⁹ so too in the paper by Jason Varuhas to which Craig takes exception, which traces with care how one extension of judicial review has displaced, and distorted, parliamentary accountability.¹⁰⁰ The harmful ways in which judicial intervention can displace the proper exercise of political accountability is a theme also of two papers that Craig does not consider, one of which critiques *Evans* in some detail,¹⁰¹ the other reflecting on the nature of the executive.¹⁰²

Craig mentions *Evans* in a footnote, perhaps implying that he agrees it was wrongly decided. However, the judgment was not just a mistake. It was the conjunction of two damaging trends in legal and judicial practice: deliberate misinterpretation of statutes by way of the principle of 'legality' and overly intrusive judicial review that does not make

⁹³ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

⁹⁴ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

⁹⁵ *R v Harvey* [2015] UKSC 73.

⁹⁶ Gunnar Beck, Dominic Burbidge, Richard Ekins, John Finnis, Christopher Forsyth, Graham Gee, John Tasioulas and Guglielmo Verdirame, 'Evidence to the Joint Committee on Human Rights: *Rights after Brexit: What are the Human Rights Implications of Brexit?*' (10 October 2016).

⁹⁷ Richard Ekins and Graham Gee, 'How Not to Dismiss Human Rights Reform: A Reply to the House of Lords EU Justice Sub-Committee', *Judicial Power Project* (12 May 2016).

⁹⁸ Lord Neuberger, *The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience* (8 August 2014).

⁹⁹ Sir Stephen Laws, 'Policies for Change — The Role of the Courts', *Judicial Power Project* (16 February 2016); Daniel Greenberg, 'Judicial Ignorance of the Parliamentary Process: Implications for Statutory Interpretation', *Judicial Power Project* (27 March 2017).

¹⁰⁰ Jason Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

¹⁰¹ Ekins and Forsyth, above n 61.

¹⁰² Timothy Endicott, *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, 2017).

space for the political accountability for which the statute provides. As we note above, the misuse of ‘legality’ is seen again in *Miller*, another case that the Project has considered in detail and to which we return below. Craig discusses our treatment of *Miller* in the course of his extended critique of a list of ‘50 Problematic Cases’ that we published in May 2016.¹⁰³ His focus on the list is disproportionate in view of his article’s stated aim to evaluate the Project as a whole. The point of the ‘50 Problematic Cases’ was to identify and discuss a diverse set of cases that arguably exceed proper limits on judicial power. We took care to present the list as the start (not the end) of a larger and ongoing conversation about cases that might have exceeded those proper limits. With the help of around two dozen or more colleagues from the worlds of law and politics, we selected a wide range of cases. Once the list was published, we invited colleagues to comment, which was the spur for an interesting conversation.¹⁰⁴ But Craig treats the list as if it was the preamble to an Act of Attainder and finds the charges underwhelming. Yet, as spelled out expressly, and understood by most who engaged with it,¹⁰⁵ the list was only the beginning of a discussion. It was not presented as an authoritative critique of each judgment, of the kind undertaken in our other published work. Craig’s complaint echoes Joshua Rozenberg’s suggestion that the list involved judge-shaming, which discourages judges from boldly doing justice.¹⁰⁶ We rather doubt it.¹⁰⁷ No judges were harmed — or even named — in the making of the list and, happily, our judges are made of sterner stuff.

We return to *Miller*. The aftermath of the referendum vote to leave the EU gave rise to a frenzy of lawyerly activity, much of it clearly intended to prevent withdrawal. The *Miller* case was the most plausible, and least direct, of various schemes concocted to prevent the Government from triggering Article 50, whereby notice would be given to the EU of the UK’s decision to withdraw.¹⁰⁸ The Judicial Power Project commented on the litigation and the judgments of first the High Court and then the Supreme Court because this was a very important, high-profile and politically salient exercise of judicial power. That commentary repays attention. It includes Timothy Endicott’s lecture on executive power, relied on before the Supreme Court and a lasting contribution to constitutional understanding,¹⁰⁹ as well as John Finnis’s papers on terminating treaty-based rights and lecture on the constitutional dimensions of the UK’s entry into and withdrawal from the EU, also relied on during the oral argument.¹¹⁰ The Supreme Court’s *Miller* judgment was a misuse of judicial power. It departed from settled law by

¹⁰³ Richard Ekins and Graham Gee, ‘Judicial Power: 50 Problematic Cases’, *Judicial Power Project* (9 May 2016).

¹⁰⁴ See, e.g., Simon Lee, ‘A Problematic Manifesto?’, *Judicial Power Project* (10 May 2016); Aileen McHarg, ‘50 Problematic Cases: A Comment’, *Judicial Power Project* (11 May 2016); and Jon Holbrook, ‘Immigration Policy is for the People, Not the Courts’, *Judicial Power Project* (12 May 2016).

¹⁰⁵ See Dame Elisabeth Laing, ‘Two Cheers for Judicial Activism’, *Judicial Power Project* (24 November 2016). While offering a partial defence of fairly bold exercises of judicial power, Laing writes that ‘[d]espite Professor Craig’s polemic about it, Policy Exchange’s Judicial Power Project has drawn ... useful attention to the disquiet which judicial activism causes: see its list of “50 Problematic Cases”’.

¹⁰⁶ Joshua Rozenberg, ‘A Judge-Shaming List Is Bad For Justice’, *The Guardian* (12 May 2016).

¹⁰⁷ Graham Gee, ‘There Is No Shame In Debating Judicial Power: A Reply to Joshua Rozenberg’, *Judicial Power Project* (19 May 2016).

¹⁰⁸ We criticised the more outlandish attempts too: e.g. Richard Ekins, *Brexit and Judicial Power* (Policy Exchange, 2016).

¹⁰⁹ Endicott, above n 102.

¹¹⁰ John Finnis, ‘Terminating Treaty-Based UK Rights’, *Judicial Power Project* (26 October 2016); and John Finnis, ‘Terminating Treaty-Based UK Rights’, *Judicial Power Project* (2 November 2016).

requiring legislation to trigger Article 50, rationalising this on the novel ground of constitutional importance and adopting an incoherent account of EU law as a direct, independent and overriding source of UK law.¹¹¹ The Court's judgment warranted strong criticism for conflating the majority's contestable account of sound constitutional practice with conclusions about justiciable constitutional law and for turning the principle of legality on its head in their reading of the ECA 1972.

The success of *Miller*, such as it was, has encouraged further attempts to use, or to threaten to use, courts to scupper withdrawal from the EU. These various arguments should fail but that they are voiced at all tells us something important, and not very attractive, about our legal culture. More likely, and more worrying, is the spectre of judges being invited to reason that after Brexit the executive will be dangerously dominant, requiring courts to be ever more assertive. This is a temptation that the judiciary ought to resist. It misunderstands the historic constitution, the relationship between Parliament and Government, and the capacities of the courts themselves. Would Professor Craig welcome or oppose domestic courts endeavouring to compensate for withdrawal from the EU and for the Government's apparent domination of Parliament? We are not sure. The Judicial Power Project, for its part, would aim to explain why this would be a bad judicial error, a departure from settled law and a dangerous rejection of basic constitutional principle that would warrant a robust political response.

VIII CONCLUSION

The place of judicial power in the constitution is a question of high public importance. Adjudication by independent courts is indispensable to the rule of law, and courts should be committed to, and limited by, the discipline of positive law. The UK remains strongly committed to parliamentary sovereignty and the rule of law, yet for many years now has been subject to two European courts who do not observe these strictures, with domestic courts at times exceeding lawful limits. The rise of judicial power compromises constitutional principle. It has been driven in part by decisions of Parliament and Government. It has also been propelled by the judicial reception of those political decisions and sometimes by the courts assuming for themselves new powers. Parliamentarians are responsible for the balance of the constitution and should not let courts put it in doubt. The changing scope of judicial power warrants careful political attention, which alas has been mostly absent of late. The political authorities ought to have more confidence in the constitutional tradition and should stand ready to restore it when need be by using the various tools at their disposal. Judges and lawyers should in any case reflect on their practice, recalling the virtues of a more disciplined idea of judicial power, the weakness of the case for its expansion and the wisdom expressed in the common law constitutional tradition. In these ways, judicial power can be put in its proper place.

¹¹¹ We elaborate on this in Richard Ekins and Graham Gee, 'Miller, Constitutional Realism and the Politics of Brexit' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart, forthcoming).